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NEW ENGLAND REPORTER.

July 16

VOLUME IV.

ALL CASES DETERMINED

IN THE

COURTS OF LAST RESORT,

As Follows:

MAINE, SUPREME JUDICIAL COURT.

NEW HAMPSHIRE, SUPREME COURT.

VERMONT, SUPREME COURT.

MASSACHUSETTS, SUPREME JUDICIAL COURT.

RHODE ISLAND, SUPREME COURT.

CONNECTICUT, SUPREME COURT OF ERRORS

WITH NOTES, REFERENCE AND CITATION TABLES, ETC.

0

JAMES E. BRIGGS,

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J. E. B.

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* Resigned September 7, 1887.

‡ Resigned March 1, 1887.

† Appointed September 14, 1887.

‡ Elected by Legislature March 2, 1887.

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NEW ENGLAND REPORTER.

(Each case shows its date of decision.)

RHODE ISLAND.
SUPREME COURT.

Michael GAFFNEY

v.

NEW YORK & NEW ENGLAND R. R.
CO.

1. When a person enters upon a **dangerous employment**, he not only assumes the risk ordinarily incident thereto, but also the risk he may incur from manifest perils; he **cannot recover** for the **voluntary assumption of known risks**.
2. Where plaintiff, a brakeman on defendant's train, knowing of a lumber pile near the track, voluntarily jumped upon a train moving by the lumber pile, and was injured,—*Held*, that, under the circumstances, he **could not recover**.
3. *Held also*, that he could not recover, because the piling of the lumber there was an **act of plaintiff's fellow servant**.

(Providence—Decided February, 1887.)

ON defendant's petition for a new trial.
Granted.

Trespass on the case to recover for injuries alleged to have been caused by the defendant's negligence. After verdict for the plaintiff the defendant filed this petition.

Messrs. Frank S. Arnold and H. Eugene Bolles, for defendant:

The plaintiff, in order to maintain this action, must show: (1) that the injuries he received were occasioned solely by the negligence of the defendant; (2) that he himself did not contribute to them by a want of due care on his own part, or, in other words, that they were not in any wise the result of his own carelessness or risky conduct. Failing to maintain either of these propositions he cannot recover. When there is some evidence in support of both, it is properly submitted to the consideration of the jury as a question of fact. But when all the testimony favorable to the plaintiff has no legal tendency to show negligence on the part of the defendant, or due care on his own part, or does show that he was careless, the defendant is entitled to a verdict as a matter of law.

Gahagan v. Boston & L. R. R. Co. 1 Allen, 187; *Callahan v. Bean*, 9 Allen, 401-403; *Gard v. Manchester & L. R. R. Co.* 18 Gray, 501-506; *Todd v. Old Colony & F. River R. R. Co.* 3 Allen, 18-21; *Kelley v. Silver Spring Bleaching Co.* 12 R. I. 112-118.

The obligations of the defendant to the plaintiff are those merely which grow out of the legal relation of master and servant, and the defendant has not violated any duty which as master it owed to the plaintiff as servant.

Sullivan v. India Mfg. Co. 113 Mass. 396.

And the law is clearly settled that the master, having furnished suitable things, is not liable for an injury to one servant occasioned by the use of, disuse of, or failure to use the same by another servant (see *Brown v. Minneapolis & St. L. R. Co.* 15 Am. & Eng. R. R. Cas. 333-335); for example: servants run two trains into collision (*Gillshannon v. Stony Brook R. R. Co.* 10 Cush. 228; *Hayes v. Western R. R. Co.* 3 Cush. 270); servants make up a train of cars with platforms not adapted to each other (*Hodgkins v. Eastern R. R. Co.* 119 Mass. 419); a servant leaves a switch open, and thereby destroys the track on which another servant is riding or working (*Farwell v. Boston & W. R. R. Co.* 4 Met. 49; *Gilman v. Eastern R. R. Co.* 10 Allen, 233).

Nor is the master liable if machinery is defective or out of repair, if he has supplied suitable articles to repair it. The omission to use these is the omission of the servant.

Johnson v. Boston Tow Boat Co. 135 Mass. 209; *McGee v. Boston Cordage Co.* 139 Mass. 445; *Kelley v. Norcross*, 121 Mass. 508.

In *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204, "No new chain being supplied," the old one had been mended.

One who voluntarily enters the employment of another takes upon himself all the ordinary risks and dangers incident to the business.

Farwell v. Boston & W. R. R. Co. 4 Met. 49; *Coombs v. New Bedford Cordage Co.* 103 Mass. 572-583; *Kelley v. Silver Springs Bleaching Co.* 12 R. I. 112; *Priestley v. Fowler*, 3 Mees. & W. 1; *McGrath v. New York & N. E. R. R. Co.* 14 R. I. 356; *De Forest v. Jewett*, 88 N. Y. 264; *Gibson v. Erie R. R. Co.* 63 N. Y. 449; *Whart. Neg.* §§ 206, 214.

And the danger, while riding upon the side of a car in a freight yard, of coming in contact with freight unloaded near the freight track, is one incident to the employment of a freight brakeman, and the plaintiff cannot recover from injuries resulting therefrom.

Ladd v. New Bedford R. R. Co. 119 Mass. 412-414.

"Every corporation has the right to carry on a business which is dangerous either in itself or in the manner of conducting it, * * * and is not liable to one of its servants, who is capable of contracting for himself and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom."

Id. 413.

And this would be true although he did not know of the existence of the particular object which hit him; for example: striking head against water crane (*Gould v. Chicago, B. & Q. R. R. Co.* 22 Am. & Eng. R. R. Cas. 289); striking head against signal post (*Lovejoy v. Boston & L. R. R. Co.* 125 Mass. 79).

The plaintiff does not bring himself within any of the exceptions to this rule as to young persons; inexperienced persons; hidden defects and dangers not apparent; acting in an emergency outside of one's usual employment, as in *Mann v. Oriental Print Works*, 11 R. I. 152; or acting suddenly under immediate orders which he was bound to obey.

There was no failure to give any notice which the plaintiff was entitled to receive.

Lovejoy v. Boston & L. R. R. Co. supra; *Gould v. Chicago, B. & Q. R. R. Co.* 22 Am. & Eng. R. R. Cas. 289; *Sullivan v. India Mfg. Co.* 118 Mass. 896.

The plaintiff "knew it was there, but did not know it was so close." "I knew it came there. I knew it was unloaded there." He even saw them "piling up small piles."

But the plaintiff did not notify the defendant of the danger. He remained exposed to it for weeks without protest or complaint. He must therefore be held to have consented to the exposure.

Kelley v. Silver Spring Bleaching Co. 12 R. I. 116; *Sullivan v. India Mfg. Co.* 118 Mass. 896; *Ladd v. New Bedford R. R. Co.* 119 Mass. 412; *Yeaton v. Boston & L. R. R. Co.* 185 Mass. 418-420; *McGrath v. New York & N. E. R. R. Co.* 14 R. I. 857.

It is the knowledge, and not its source, which affects the plaintiff.

Sullivan v. India Mfg. Co. supra.

If the danger complained of was as obvious to the employee using due care as to his employer, the workman cannot recover from an injury resulting therefrom.

Williams v. Churchill, 137 Mass. 243; *Moulton v. Gage*, 138 Mass. 390-393; *Russell v. Tillotson*, 140 Mass. 201.

The lumber pile and its nearness to the track were certainly as obvious to the plaintiff as to the defendant, and he cannot recover for this reason. Even when the danger is not obvious, if the plaintiff knows of its existence, but miscalculates in regard to it, he cannot recover, for he should have informed himself in regard to it.

Taylor v. Carey Mfg. Co. 140 Mass. 150, 1 New Eng. Rep. 210; *Ladd v. New Bedford R. R. Co.* 119 Mass. 412-414; *Yeaton v. Boston & L. R. R. Co.* 185 Mass. 418; *Lovejoy v. Boston & L. R. R. Co.* 125 Mass. 79; *Gould v. Chicago, B. & Q. R. R. Co.* 22 Am. & Eng. R. R. Cas. 289.

The plaintiff's injuries were occasioned by the act of a fellow servant, and therefore he cannot recover.

3 Wood, R. L. 1501; *Kelley v. Norcross*, 121 Mass. 508.

It has been decided that the following are fellow servants: a station agent and a brakeman (*Hodgkins v. Eastern R. R. Co.* 119 Mass. 419; *Brown v. Minneapolis & St. L. R. Co.* 15 Am. & Eng. R. R. Cas. 533); superintendent and workmen (*Albro v. Agawam Canal Co.* 6 Cush. 75-77; *Zeigler v. Day*, 123 Mass. 152); foreman and laborer in digging sewer (*O'Connor v. Roberts*, 120 Mass. 227); fireman and engineer (*Leary v. Boston & A. R. R.* 139 Mass. 584); an engineer, section boss, and section man (*Clifford v. Old Colony R. R. Co.* 141 Mass. 564); carpenter, mason, and a mortar-mixer (*Kelley v. Norcross*, 121 Mass. 508); engineer and switchman (*Farwell v. Boston & W. R.*

R. Co. 4 Met. 49); two brakemen on different trains (*Hayes v. Western R. R. Co.* 8 Cush. 370); laborer on the roadbed and train hands (*Gill-shannon v. Stony Brook R. R. Co.* 10 Cush. 228); carpenter, engineer, and car inspector (*Seaver v. Boston & Me. R. R. Co.* 14 Gray, 466); switchman and car repairer (*Gilman v. Eastern R. R. Co.* 10 Allen, 233).

There is no evidence legally tending to show that the plaintiff at the time of receiving the injuries was in the exercise of due care, but upon all the evidence in behalf of the plaintiff it appears that the accident was the result of his own gross carelessness.

Martensen v. Chicago, R. I. & P. R. R. Co. 11 Am. & Eng. R. R. Cas. 233.

And he cannot recover, "whatever may have been the defendant's omissions."

Ormsbee v. Boston & P. R. R. Co. 14 R. I. 102-108.

Messrs. Charles E. Gorman and F. L. O'Reilly, for plaintiff:

The extraordinary risk created by the defendant was not in placing the lumber by the side of the track, but by placing it nearer than usual, or so near that it unnecessarily endangered the plaintiff.

When such a risk is added to the ordinary risks, the master is liable, except the servant has absolute knowledge of the extent of the actual increased risk.

Lalor v. Chicago, B. & Q. R. R. Co. 52 Ill. 401; *Greenleaf v. Ill. Cent. R. R. Co.* 29 Iowa, 14; *Snow v. Housatonic R. R. Co.* 8 Allen, 39; *Ill. Cent. R. R. Co. v. Welch*, 52 Ill. 183; *Chicago & I. R. R. Co. v. Russell*, 91 Ill. 298.

In order to authorize a new trial upon the ground that the verdict is contrary to the evidence, it is essential that it should not only be against the weight of evidence, but that it should be so much so as on the "first blush of it to shock our sense of justice and right."

Hazen v. Henry, 1 Eng. (Ark.) 86; *Clark v. Whitaker*, 19 Conn. 319.

The question of negligence, as well as that of contributory negligence, is one of fact for the jury. "Cases present such variety of circumstances that courts have comparatively little opportunity of defining the duties of the parties, and for the same reason it is eminently proper that the degree of care demanded of persons in various situations should be determined by triers of fact."

1 Thomp. Neg. 1285.

"It is this class of cases," said Justice Hunt, "and those akin to it, that the law commits to the decision of a jury,—twelve men of the average of the community, comprising the mechanic, the farmer, and the laborer. These sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain."

Railroad Co. v. Stout, 17 Wall. 657 (84 U. S. bk. 21, L. ed. 745).

When the circumstances under which the parties act are complicated, and the general knowledge and experience of mankind do not at once condemn the conduct as careless, the question should be submitted to the jury as being the sole judges. Thus, cases of persons run over in the highway (112 Mass. 79; 99 Mass.

164; 58 N. Y. 411; 20 N. Y. 65); of teams colliding upon the highway (40 Barb. 193; 66 Me. 376; 3 L. 208; 23 Conn. 547; 14 Minn. 81); injuries to travelers from defects in highways; injuries resulting to employees from the use of dangerous machinery (56 Mo. 351; 45 Md. 229; 37 Md. 156; 29 Conn. 548; 42 Wis. 583).

Stiness, J., delivered the opinion of the court:

The plaintiff was employed as brakeman on a freight train by the defendant in November, 1883. While in that employment his train stopped at Caryville, on the defendant's road, to take a box car from a side track, near which were a storehouse and two piles of lumber. He coupled a box car to the engine, which then took that and two flat cars down the track to the other box car. On the return of the train thus made up, and while it was going, as the plaintiff says, "a pretty good gait," he claimed that he jumped upon the last car to climb a side ladder to get to his post, and in doing so struck against one of the piles of lumber, by which he was knocked off, receiving serious injuries. The plaintiff knew about the lumber piles, for one had been there a long time, and the other two days, according to the plaintiff, or two months according to other witnesses. The plaintiff said he "knew it was there, but didn't know it was so close." He claims that the negligence of the defendant consisted in allowing the lumber pile to be placed and to remain so near the track that there was not room enough between the car and the pile for him to ascend the car in safety; thus adding a new and extraordinary risk to his employment.

The defendant introduced testimony to show that the box car had no side ladder, and that the plaintiff was riding back to the switch on the truck of one of the flat cars, and thus was not in the line of his duty. Upon this petition, however, we must assume that the jury found the facts to be in accordance with the plaintiff's claim; and upon such a state of facts we think a new trial should be granted. The plaintiff had been a brakeman for several years, on this and other roads, and was familiar with the premises and surroundings where this accident occurred. Standing near the stone house, where the train came up, he jumped upon the car from the side of the track where the lumber was, in daylight, when it could be plainly seen. He not only knew the lumber was there but knew about how far it was from the place where he stepped on the moving train. There was a difference in the testimony about the distance of the pile from the track, the defendant claiming that it was placed at the usual and proper distance, and that the plaintiff was thrown off the car by some part of his clothing catching on the boards; the plaintiff denying this.

When a person enters upon a dangerous employment, he not only assumes the risk ordinarily incident thereto, but also the risk he may incur from manifest perils. The former are the risks which enter into his contract of employment; the latter are those which he voluntarily accepts when he knows of their existence. If, therefore, the lumber was at its proper and usual distance from the track, there was no negligence on the part of the defendant;

there was room for the plaintiff between the car and the lumber, and his injury must have been an accident liable to happen to those whose business requires them to climb the sides of cars. But if the lumber was placed improperly near the track, no one could know better than the plaintiff the certainty of injury if he should be on the side of the car when the pile was reached. It had been unloaded from his own train, and the next pile had been hit by cars, when he had assisted to hold it down. His remark "I knew it was there, but didn't know it was so close," may mean that he did not know it was so close to the place where he got on the car, or that he did not know it was so close to the track. But in either case he had seen it with an experienced eye, and took his chance. In one case he must have supposed he had time to get to the top of the car, and in the other that he had room to pass on its side. He misjudged. There was no hidden defect and no sudden call to act in an emergency outside of his ordinary duty. We do not see upon what ground the plaintiff's claim that the location of the lumber was "misleading" and confusing can be maintained. If it was in dangerous proximity to the track, he could not have supposed it was located "so as not to add to the usual risks of his employment," for he knew where it actually was. That a plaintiff cannot recover for the voluntary assumption of known risks, is a proposition established as well by principle as by authorities numerous and decisive. See *Kelley v. Silver Spring Bleaching Co.* 12 R. I. 112; *McGrath v. New York & N. E. R. R. Co.* 14 R. I. 357; *Moulton v. Gage*, 138 Mass. 390; *Williams v. Churchill*, 137 Mass. 843; *Lovejoy v. Boston & L. R. R.* 125 Mass. 79.

Indeed, the plaintiff does not controvert this proposition, but claims simply that the piling of the lumber near the track made an unusual risk, which was misleading and confusing and so presented a complication of circumstances which warranted the verdict of the jury in determining the question of the plaintiff's negligence. We do not see any such complication. The plaintiff, knowing the lumber pile was near the track, jumped upon a moving train supposing he could escape it, and failed. As much as this could be said in almost every case of pure accident. We do not see that the company did anything to mislead or confuse him, or that he could have been misled or confused; except, possibly, that he may have thought that the train was not going as fast as it really was going, and that he had time to climb its side before reaching the pile. He was not ordered to get upon the train, and his place as head brakeman was on the car next to the engine, and not on the rear car. His getting upon the car, therefore, under the circumstances, was an act of his own choosing. In this and in other respects before suggested the case differs from the recent case of *Ferren v. Old Colony R. R. Co.* 3 New Eng. Rep. 380.

Another ground upon which the petition is founded is that the negligence complained of, in piling the lumber too near the track, was an act of the plaintiff's fellow servant. The station agent had charge and direction of the premises and the unloading of freight. The lumber was piled beside the track under his direction and authority. But he was not a

vice-principal. He had no authority over the plaintiff. He could neither hire nor discharge him; nor was the plaintiff, so far as appears, subject to his orders. Both were engaged in a common employment, serving a common principal, and both were under the same general control. Their duties and authority were different, but they were still fellow servants. As this very question has been decided upon grounds satisfactory to us, it would be profitless to discuss it further, or to multiply authorities in its support. See *Brown v. Minneapolis & St. L. R. Co.* 81 Minn. 553, 15 Am. & Eng. R. R. Cas. 333; *Hodgkins v. Eastern R. R.* 119 Mass. 419.

We think the verdict should be set aside and a new trial granted.

Petition granted.

Francis M. ANDREWS *et al.*

v.

George F. BEANE.*

1. A bond on appeal from a justice's court, executed in the name of the appealing party by his attorney of record, subscribing as his attorney without any authority under seal to do so,—is invalid.
2. The Act of April 30, 1886 (Pub. Laws, chap. 582), does not validate such a bond executed previously.
3. The Legislature cannot enforce upon another a contract which he has neither entered into nor adopted, either personally or by attorney.

(Providence—Decided February 5, 1887.)

ON exceptions to the Court of Common Pleas denying defendant's motion to dismiss an appeal for want of a valid appeal bond. *Sustained.*

The case is stated in the opinion.

Mr. Marquis D. L. Mowry, for defendant:

This appeal bond is null and void. "An attorney of record, as such, cannot execute a valid appeal bond for his clients, the appellants."

Murray v. Peckham, Index Y, p. 3, 2 New Eng. Rep. 509.

In regard to sections 2 and 3 of Pub. Laws, chap. 582, being unconstitutional, null, and void as an exercise of judicial power, see opinion of Supreme Court of Rhode Island upon the Act passed by the General Assembly at its January Session, 1854, reversing and annulling the judgment against Thomas W. Dorr, supplement to 3 R. I.; *Taylor v. Place*, 4 R. I. 324.

Sections 2 and 3 of chap. 582 are unconstitutional, as retrospective and in contravention to the provisions that no person shall be deprived of life, liberty, or property but by the judgment of his peers or by the law of the land, and that private property shall not be taken for public use without full compensation; and, as destructive of vested rights, are null and void.

Burke v. Mechanics Sav. Bank, 12 R. I. 513; *Reynolds v. Randall*, 12 R. I. 522.

Sections 2 and 3 of chap. 582 are unconstitutional and void, because they impair the obligation of contracts.

Pearce's Heirs v. Patton, 7 B. Mon. 162; *Good's Lessee v. Zercher*, 12 Ohio, 364.

The General Assembly cannot make a deed and impose it upon the defendant.

Burke v. Mechanics Sav. Bank, Index L, p. 53, 12 R. I. 513; *Pearce's Heirs v. Patton*, 7 B. Mon. 162; *Good's Lessee v. Zercher*, 12 Ohio, 364; *Stanford v. Barry*, 1 Aik. 314; *Bradford v. Brooks*, 2 Aik. 284; *Bates v. Kimball*, 2 Chipman, 77; *McCracken v. San Francisco*, 16 Cal. 591; *Sedg. Const. p.* 144, notes; *Young v. State Bank*, 4 Ind. 301; *Lewis v. Webb*, 3 Greenl. 326; *Durham v. Lewiston*, 4 Greenl. 140; *Davis v. Menasha*, 21 Wis. 497; *Merrill v. Sherburne*, 1 N. H. 199.

Mr. George T. Brown, for plaintiffs:

The Act, (Pub. Laws, 1886, chap. 582) merely cures an irregularity in the procedure of the appeal. It grants no new rights to the plaintiffs which they did not have prior to the passage of the Act, for they had the right to appeal before its passage; and it deprives the defendant of no substantial right or equity and impairs no vested rights.

"A retrospective statute curing defects in legal proceedings, where they are in their nature irregularities only and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden; * * * of this class are statutes to cure * * * irregular proceedings in courts," etc.

Cooley, Const. Lim. p. 371.

A party has no vested right in a defense based upon an informality not affecting his substantial equities.

Cooley, Const. Lim. 370.

Doubtless the Legislature could have passed a valid Act before the commencement of this action, doing away entirely with the provision requiring a bond as a condition of appeal. "If the thing wanting, or which failed to be done and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute."

Cooley, Const. Lim. 371.

This act is retroactive in its terms. There is no law in our State prohibiting the passage of retroactive statutes.

Fiske v. Briggs, 6 R. I. 557.

In *Kimbray v. Draper*, L. R. 3 Q. B. 160, pending a suit, an Act was passed requiring parties in such cases to give security for costs. The court held that the Act was one of procedure and applied to pending cases. Where an Act "deals with procedure only, *prima facie* it applies to all actions, pending as well as future."

In *Grinder v. Nelson*, 9 Gill (Md.), 299, an action to recover on a usurious contract made in 1840, defendant pleaded an Act of 1704, by provisions of which plaintiff could not recover on such a contract. Plaintiff replied that by an Act passed in 1846 he was enabled to recover on such a contract.

See *Hepburn v. Curtis*, 7 Watts, 300; *Ex parte*

*See *Murray v. Peckham*, 2 New Eng. Rep. 509.

McCardle, 7 Wall. 506 (74 U. S. bk. 19, L. ed. 264).

Durfee, *Ch. J.*, delivered the opinion of the court:

This action was begun in the Justice Court of the City of Providence, where the defendant recovered judgment for his costs, March 4, 1886. On the last of the five days allowed for an appeal, to wit, on March 9, 1886, the plaintiffs, for the purpose of taking an appeal to the next June Term of the court of common pleas, paid the defendant's costs and filed a paper purporting to be an appeal bond executed in their names by their attorney of record, subscribing as their attorney without any authority under seal to do so. The appeal was entered May 15, 1886, and the case coming on for trial on the 20th day of said June Term, the defendant moved to dismiss it for want of a valid appeal bond. The court denied the motion and the defendant excepted.

In *Murray v. Peckham*, 2 New Eng. Rep. 509, decided March 30, 1886, Index Y, 8, this court held that an appeal bond so executed was void, and sustained a dismissal of the action. On April 30, 1886, the General Assembly passed an Act (R. I. Pub. Laws, chap. 582), the first section of which makes an appeal bond signed by the appellant "or some person in his behalf or his attorney of record," sufficient for the purposes of appeal; and the second section of which provides that "all appeals from the judgment of any justice court which have heretofore been signed by the attorney or agent of any party appellant for said appellant, are hereby validated." It was by reason of this latter section that the motion to dismiss was denied.

The meaning of the section is not entirely clear. "Appeals" are never signed, but only the bonds given in case of appeal as part of the procedure. We must assume that it is the appeal bonds, executed as described, which are intended to be validated. But, again, is an appeal bond signed in the name of the appellant by his attorney or agent intended to be validated, or only an appeal bond signed by the agent or attorney in his own name for or in behalf of the appellant? The first section evidently contemplates that whoever signs the bond shall sign it in his own name. If the second section also contemplates that whoever signs shall sign his own name, then it does not validate the bond here, by its terms. But, construing the section broadly, and holding that the bond here is within its terms, is the section effectual to validate the bond; or is it as applied to such a bond unconstitutional, as the defendant contends?

It will be observed that the section, if it applies, validates the bonds absolutely, without regard to whether the persons whose names are signed consent to the validation or not. The bond here was a nullity when given; can it become the obligation of the plaintiffs independently of their sanction by force of such a mere legislative fiat?

There are cases which hold that the Legislature has power to validate invalid deeds or contracts, where they are invalid only because by some inadvertence or misapprehension they have been defectively executed by the persons who would be bound if they had been duly

executed. But the ground of decision in these cases is that the deeds or contracts become, by validation, what they were originally intended to be by the persons defectively executing them. The section in question, if it applies, goes far beyond this limit. It undertakes to bind parties by contracts which they have never entered into, in person or by attorney, whether they consent or not. Suppose the plaintiffs had never entered the appeal, or after entering had discontinued before trial, and to an action against them on the bond by the defendant, were to plead *non est factum*,—could the defendant joining issue with them in the plea, prove that the bond was their deed by simply proving the attorney's signature and reading the section in question? We think not. To hold that he could, would be to hold that it is competent for the Legislature to enforce upon a person a contract which he has neither entered into nor adopted, nor intended to enter into or adopt, either personally or by attorney; and all the cases concede that this is something which the Legislature cannot do. *Cooley*, Const. Lim. 370-383; *Medford v. Learned*, 16 Mass. 215.

The section is not, as is contended for the plaintiffs, simply an exercise of the power which the authorities cited for the plaintiffs show the Legislature has, within certain limits, to cure irregularities and defects in judicial proceedings. But, even regarding the matter in that light, it is questionable if the section does not transgress the permissible limits; since, if the appeal was fatally defective for want of a proper bond when taken, it is difficult to see why a confirmation of the bond, after the time for taking has expired, does not amount to an extension of the time after its expiration, which, according to the authorities, the Legislature has no power to grant as against the appellee. *Staniford v. Barry*, 1 Aik. (Vt.) 314-316; *Bradford v. Brooks*, 2 Aik. (Vt.) 284; *Hill v. Sunderland*, 8 Vt. 507; *Burch v. Newburg*, 10 N. Y. 374; *Yeatman v. Day*, 79 Ky. 186; *Cooley*, Const. Lim. 96, note; *Sedg. Stat. & Const. L.* 2d ed. 145, note.

Exceptions sustained and appeal dismissed, without costs.

Joseph P. KNOWLES

v.

John T. BLODGETT.

1. The deed given by an executor or administrator in pursuance of a sale under the statute of the real estate of the decedent, to pay his debts, is as effectual to convey the real estate sold as if it were executed by the decedent immediately before his death.
2. An administrator, as such, does not have the estate in lands; he has no seisin, and therefore cannot be disseised. He has only a power given him by statute to be exercised for certain purposes, in a certain manner, and, if the decedent die seised, such power can not be defeated by any subsequent disseisin.
3. A disseisin by a sale of the interest of the heir upon execution against him, and an entry in pursuance of such sale

by the purchaser, does not defeat or impair the administrator's power to sell and convey title under the statute.

(Providence—Decided February 19, 1887.)

TRESPASS and ejectment. Heard by the court, jury trial being waived. *Judgment for plaintiff.*

The case is stated in the opinion.

Messrs. Edwin Metcalf and Walter F. Angell, for plaintiff.

Messrs. Louis L. Angell and John T. Blodgett, for defendant.

Durfee, Ch. J., delivered the opinion of the court:

This is trespass and ejectment for a lot of land. The case is tried to the court, jury trial being waived. The plaintiff submits evidence, documentary and other, to show that the land formerly belonged in fee simple to the late Edward P. Knowles, who died in possession of it, and that the plaintiff became a purchaser of it at an administrator's sale, receiving from the administrator *cum testamento annexo* a deed purporting to convey to him and his heirs all the right, title, and interest which the said Edward P. Knowles had at the time of his decease.

One of the defenses is that, after the decease of Edward P. Knowles, and before the administrator's sale, the defendant became the purchaser, under an execution against one Edward R. Knowles, a son of Edward P., levied on the lot, of all the right, title, and interest of Edward R. in and to the lot, and entered into possession of it under the sheriff's deed, and has remained in possession ever since, claiming it as his own in fee simple, his contention being that Edward R. became the owner after the death of Edward P., the latter being entitled at most only to a life estate. He cites the cases of *Campbell v. Point Street Iron Works*, 12 R. I. 452, and *Burdick v. Burdick*, 14 R. I. 574, and on the authority of them contends that, even if Edward P. was the owner in fee simple when he died, the administrator's deed was ineffectual to convey any legal estate to the plaintiff. The doctrine of the cases cited is the familiar common-law doctrine that a disseisee cannot convey the estate of which he is disseised to a stranger to the title, so as to enable him to sue for and recover it in his own name at law. The conveyance by the administrator, however, was not a conveyance at common law, but under the statutes, and we must look to the statutes for its effect. Under our statutes the estate of every person deceased is chargeable with his debts and funeral expenses, to be paid by his executor or administrator out of his personal estate, if sufficient, and if not, so far as deficient, out of his real estate, the executor or administrator being required to supply the deficiency in pursuance of certain prescribed

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proceedings by selling the real estate or some portion of or interest in it; and the statute provides that the deed given by the executor or administrator, in pursuance of such sale, "shall make as good a title to the purchaser, his heirs and assigns, as the testator or intestate, being of full age and of sane mind and memory, in his lifetime might or could have made." Pub. Stat. chap. 179, § 18.

As we understand this provision, it makes the deed of the administrator on the estate of Edward P. Knowles as effectual to convey the real estate sold, the manner of the sale being unimpeached, as if it were the deed of Edward P. Knowles himself, given immediately before his decease, he being then of sane mind and memory; and of course his deed so given would have passed the title, so as to enable the grantee to sue for and recover the estate of a subsequent disseisor. The reason why a disseisee cannot make an effectual conveyance is because, being dispossessed of the estate by the disseisor, he is deemed to have only a right of entry or of action to recover it, which is not assignable. An administrator, as such, does not have the estate. He has no seisin, and therefore cannot be disseised. He has only a power given him by statute to be exercised for certain purposes in a certain manner, and, if the decedent die seised, to hold that the power can be defeated by any subsequent disseisin would be to hold that the statute itself could be so defeated, which, it seems to us, would be not only against public policy, but absurd; and see Pub. Stat. chap. 189, § 13, as follows: "No heir or devisee of any deceased person shall have power within three years [and six months after the probate of the will, or grant of administration on the estate of such person, to incumber or aliene the real estate of the deceased so as to prevent or affect the sale thereof by the executor or administrator, if necessary, as prescribed by law: Provided, that after the expiration of three years and six months, the heir or devisee may aliene or incumber the same, and the same shall not be liable for the debts of the deceased in the hands of the purchaser thereof, or of any other person."

Whether the power would override a disseisin suffered by the decedent in his lifetime is rather a different question, which we express no opinion upon, but leave it to be decided when it arises.

The defendant raises several objections to the title of Edward P. Knowles, and contends that at his decease, he had either no title or only a life estate. We think the objections are untenable, and that they do not raise questions of law which are of enough importance to merit an extended discussion. We are of opinion, on the evidence before us, that Edward P. Knowles died seised of an estate in fee simple.

Judgment for plaintiff, for possession and costs.

MASSACHUSETTS.
SUPREME JUDICIAL COURT.

Robert W. MORVILLE, Jr.,

v.

George W. FOWLE *et al.*

1. A conveyance of certain lands "in trust for the use of a Sabbath school, and for the diffusion of Christian principles as taught and practiced by Christian evangelical denominations, with power to erect, repair," etc., constitutes a **public charity**.

2. Where such a deed contained a clause by which the **trustees** were invested "with full power to sell or exchange said land and improvements whenever, in the judgment of said trustees or their successors, another location would better subserve the object and purposes of said trust;" and the donor had provided how a vacancy of the three trustees, to whom he had conveyed the property, should be filled, and directed that the trust should be administered by them and their successors as thus selected,—the discretionary powers with which the trustees were invested were to be exercised only after the consideration and discretion which would be given by the trustees composing the board, and as the result of their judgment; and they were **not empowered** to make a conveyance to and to **confide all these large discretionary powers to a single corporation**, acting as a unit, and to reserve to themselves only a right of entry in case they were not properly exercised.

3. Where **two of the trustees, without the consent of the third, convey the trust property** with the buildings thereon necessary for the execution of the trust, discharged from all trusts, to a corporation, and receive in exchange a lot of land without buildings, which would be comparatively valueless for the purposes of the trust; and five months later, without the knowledge of the other trustee, reconvey to the same corporation the parcel of land which had been conveyed to themselves and the other trustee, without consideration, other than the conditions stated therein, which bound the defendant corporation to erect upon the premises buildings suitable for Sabbath-school work, and, in substance, to perform and execute all the trusts imposed upon the trustees by the original trust deed,—these **conveyances must be treated as one transaction**, and their intended purpose held to be to exchange the original trust property for other premises; to substitute a new trustee for those named in the trust deed and their successors, who should execute the trust upon such other premises, so far as the trust was to be locally executed; and to release the trustees from all duties as trustees, or control over the trust prop-

erty in its ordinary administration; and the transaction cannot be separated into distinct parts and the two first deeds sustained, but the **whole transaction is a violation of the duties of the trustees**.

4. The power to sell or exchange the **trust property, given by the deed, is not one that could be exercised by two of the trustees without the consent of the third**. Although a distinction has been drawn between the powers of a majority of the trustees where a private and where a public trust has been created, there are no cases which permit the majority to exercise the power conferred on trustees, where the character of the instrument or the nature of the trust fairly shows that all should join. The power to sell or exchange, created by this trust, was a special and peculiar one, to be used whenever, in the judgment of the trustees, another location would better serve the purpose of the trust; and the land originally granted as the location of the charity was not to be changed but upon the concurrent and collected judgment of the trustees, unless authorized by a court of competent jurisdiction.

5. The only question presented by an **appeal from a final decree of a justice of the supreme court**, where there has been no report or request for a report of the facts, is whether the decree is warranted by the allegations and prayer of the bill.

(Suffolk—Filed February 25, 1887.)

A PPEAL by defendants from a decree of a justice of the Supreme Judicial Court in favor of complainant in a bill in equity for a reconveyance of a certain trust estate. *Affirmed*.

The bill was filed against George W. Fowle, Nicholson Broughton, Jr., and the Boylston Congregational Church, and the case was heard in the supreme court on bill, answer, demurrer and proofs, and a decree entered thereon for complainant.

The facts and questions raised appear from the opinion.

Mr. L. M. Child, for defendants:

The language of the trust creates a public charity.

Old South Society v. Crocker, 119 Mass. 1; *Tucker v. Seaman's Aid Society*, 7 Met. 188; *Bartlett v. King*, 12 Mass. 537; *Earle v. Wood*, 8 Cush. 430.

If it was a public trust or charity, a majority of the trustees have the power to control the management of the trust; and, in this instance, a change of locality being left to the decision of the trustees, and they, in good faith, having decided that a change was necessary to the benefit of the trust, a majority had a right to make that change; and the deeds,—the first and second deeds in the bill of exceptions,—are valid and binding.

Perry, Tr. § 413; Wilkinson v. Malin, 2 Tyr. 544.

Mr. C. J. Keyes, for plaintiff:

The only question now before the court on

this appeal is whether the decree is warranted by the allegations of the bill; and that depends upon the true construction of the trust deed.

O'Hare v. Downing, 130 Mass. 16; *Cheney v. Gleason*, 125 Mass. 166; *Ross v. Harper*, 99 Mass. 175; *Smith v. Townsend*, 109 Mass. 500.

It is submitted that the two defendant trustees, Fowle and Broughton, could not lawfully make the conveyances set forth in the bill, under the circumstances alleged. It cannot be presumed from the language, or from the general purpose or object of the trust as disclosed by the trust deed, that it was intended that a majority of the trustees could sell or exchange the trust estate at their pleasure; especially, when it does not appear that the other trustee is incompetent, or refuses improperly or corruptly to join in a proposed sale or exchange.

Perry, Tr. §§ 411-732; *Chapin v. Universalist Society*, 8 Gray, 580; *Austin v. Shaw*, 10 Allen, 552; *Atty-Gen. v. Federal Street Meeting House*, 3 Gray, 1; *Sloo v. Law*, 3 Blatchf. 459, 472, 473; *Winthrop v. Atty-Gen.* 128 Mass. 258; *Ridgeley v. Johnson*, 11 Barb. 527; *Ward v. Hipwell*, 3 Giff. 547; *Luke v. South Kensington Hotel Co.* 11 Ch. Div. *121; *Re South Cong. Church of Southwick*, 1 W. N. C. 196; *Jones v. Blake*, 29 Ch. Div. 913; *Thatcher v. Candee*, 3 Keyes, 157; *Learned v. Wellton*, 40 Cal. 849; *Perry v. Shipway*, 4 De G. & J. 353.

The power to sell or exchange the entire real estate given in the deed is such a special power that all the trustees must join in its execution; and it is submitted that no case can be found where a deed of real estate made by a part of the trustees, under a special power of sale like the one in this case, has been sustained.

Devens, J., delivered the opinion of the court:

If a final decree of a justice of this court is appealed from, without any report or request for a report of the evidence or facts, the only question presented is whether the decree is warranted by the allegations and prayer of the bill. *O'Hara v. Downing*, 130 Mass. 16.

The plaintiff and the two individual defendants were trustees under a deed by which certain lands were conveyed "in trust for the use of a Sabbath school, and for the diffusion of Christian principles as taught and practised by Christian evangelical denominations, with power to erect, repair," etc. This constituted a public charity. There was no definite body, for whose use the gift was intended, capable of receiving, holding, and using it in the manner provided; and there was a duty to be performed towards such part of the public as should desire instruction in Christian principles as taught and practiced by what are known as the evangelical denominations. *Old South Society v. Crocker*, 119 Mass. 1.

The deed to the trustees contained a clause by which they were invested "with full power to sell or exchange said land and improvements whenever, in the judgment of said trustees or of their successors, another location would better subserve the objects and purposes of said trust." A building having been erected on the premises by the trustees, and having been occupied and used beneficially for a Sabbath school and for the uses and purposes named in

the trust deed, the defendant trustees, without the consent and against the wishes of the plaintiff trustee, conveyed the premises to the defendant corporation, on March 21, 1884, discharged from all trusts named in the trust deed. On the same day, without the knowledge or consent of the plaintiff, they received from the defendant corporation a deed purporting to convey to themselves and the plaintiff, as trustees, to be held upon the trusts stated in the original trust, a certain other parcel of land, it being recited to have been given as an exchange for the premises conveyed to the defendant corporation. On the 25th of August, 1884, without the knowledge or consent of the plaintiff trustee, the defendant trustees reconveyed to the defendant corporation the parcel of land which had been conveyed to themselves and the plaintiff trustee by it, as above stated. This deed was without consideration, other than the conditions stated therein; which bound the defendant corporation to erect upon the premises a building suitable for Sabbath school work, and, in substance, to perform and execute all the trusts imposed upon the trustees by the original trust deed. These conveyances must be treated as one transaction; and their intended purpose was to exchange the original trust property for other premises; to substitute a new trustee for those named in the trust deed and their successors, who should execute the trust upon such other premises, so far as the trust was to be locally executed; and to release the trustees from all duties as trustees, or control over the trust property in its ordinary administration. This latter deed was made "upon the condition that when these premises or some other which may be substituted for them shall cease to be used in accordance with the foregoing conditions, the same shall revert to the grantors or their successors, to be held under the original trust," etc. All, therefore, that was left to the trustees was a right of entry upon the premises for condition broken.

Regarding these deeds as constituting but a single transaction, even if the plaintiff had concurred in it, we do not see how it could be sustained. The donor had selected the trustees for his gift; had provided how vacancies in the board of three trustees should be filled; and directed that the trust should be administered by them and their successors as thus selected. He had given no authority to transfer this property, or the administration of the trust, to an individual, or to a corporation, which acts as a unit. The large discretionary powers with which the trustees were invested were to be exercised only after the consideration and discussion which would be given by the trustees composing the board, and as the result of their judgment. To confide all these to a single corporation, acting as a unit, and to reserve to themselves only a right of entry in case they were not properly exercised, was to attempt to impose upon another duties they were bound themselves to perform, and to violate the trust they had accepted. However honorable their motives may have been, even if all the trustees had concurred, they had no authority to make such a conveyance.

It is the contention of the defendant that this transaction may be separated into distinct parts; and that, even if the deed to the defendant cor-

poration must be pronounced invalid, the other two deeds may be sustained. We do not think the transaction is susceptible of this division. To convey the trust property, with the buildings thereon necessary for the execution of the trust, discharged from all trusts; to receive in exchange a lot of land without buildings, which would be comparatively valueless for the purposes of the trust,—but for the agreement and conditions contained in the subsequent deed to the defendant corporation by which it bound itself to erect suitable buildings thereon,—would appear plainly a violation of the duties of the trustees. But assuming that the transaction could be divided, we are not of opinion that the power to sell or exchange the trust property given by the deed is one that could be exercised by two of the trustees without the consent of the third. A distinction has certainly been drawn between the powers of a majority of the trustees where a private and where a public trust has been created, it having been held that in the latter, many powers of the trustees may be exercised by a majority. *Ward v. Hipwell*, 3 Giff. 547.

It will be seen upon examination that in most if not all of them the powers there exercised are those of administration only, as in the selection of an agent, a schoolmaster or clergyman, or in the performance of purely incidental matters such as provision for buildings or the care of them. *Wilkinson v. Malin*, 2 Tyr. 544; *King v. Beeston*, 8 T. R. 592; *Withmell v. Gartham*, 6 T. R. 388.

Even if some of them may go further than this, there are none which permit to the majority the exercise of the power conferred on trustees where the character of the instrument or the nature of the trust fairly shows that all should join. The power to sell or exchange quoted above, was a special and peculiar one to be used whenever, in the judgment of the trustees, another location would better subserve the purposes of the trust. The land originally granted was designed as the location of the charity by the donor; nor was it intended to be changed but upon the concurrent and collective judgment of the trustees, unless authorized by a court of common jurisdiction. *Chapin v. Universalist Society*, 8 Gray, 580; *Austin v. Shaw*, 10 Allen, 552; *Atty-Gen. v. Federal St. Meeting House*, 8 Gray, 1; *Sloo v. Law*, 3 Blatchf. 459; *Re South Cong. Church of Southwick*, 1 W. N. C. 196.

Decree affirmed.

George DWELLEY

v.

Julia DWELLEY et al.

1. Where the defendant and her brother conveyed several tracts of land to the plaintiff, taking back a mortgage to secure the performance of the conditions of a bond, in which the plaintiff agreed to provide for them, "**both in sickness and in health, good and proper food, medicine, and clothing, with proper and kind care during their natural lives, together with fuel for each of them, prepared and housed for their fires, suitable board and care for a horse**

for their own use," **together with certain stipulations, which, in effect, provide that the sister is to occupy the front room during her natural life, that she is to reside there as long as she lives, that she is to have and occupy it for her own and separate use during her life,—it follows from these stipulations, that the provisions made for her in sickness and in health are to be furnished to her in the house in which she is to occupy a room, and not elsewhere.**

2. Where the house conveyed to the plaintiff was that in which the mortgagees resided when the mortgage was executed; and the bond indicates that the plaintiff was intending to build additions for the convenience of the mortgagees, and he expended between \$2,000 and \$3,000 in the necessary alterations in accordance with a plan adopted by the parties; and he was restrained by the terms of the bond from disposing of the real estate, including the dwelling-house, without the consent of the mortgagees during their natural lives; and the accommodations which the brother and sister should have in respect to rooms in the plaintiff's house, and the other privileges granted to them about the house and premises, were explicitly stated; and the parties, until the death of the brother, treated the obligation as contingent upon the residence of the defendants upon the premises,—**the survivor is not entitled to demand that the supplies and service shall be furnished to her elsewhere.**

(Plymouth—Filed February 23, 1887.)

APPEAL by complainant from a decree of a justice of the Supreme Judicial Court dismissing a bill in equity for an injunction. *Injunction made perpetual.*

Bill in equity filed by George Dwelley against Julia Dwelley and William Nutt, for an injunction to restrain said Julia Dwelley, as mortgagee, and said William Nutt, as auctioneer, from holding a sale and foreclosing a certain mortgage given by complainant on the transfer to him of the premises mortgaged for the consideration of the maintenance and support of the grantors (of whom defendant Julia Dwelley is survivor) during their natural lives, and of certain privileges. A preliminary injunction was ordered by consent of the parties.

On the hearing before C. Allen, J., on bill, answer, and report of master, the bill was dismissed and complainant appealed to the full court.

Further facts appear from the opinion.

Messrs. J. White and William H. Osborne, for complainant:

Whether the complainant is bound by his contract to furnish fuel, support, etc., to the said Julia Dwelley, at a place other than upon the mortgaged premises, is a question put in issue by the pleadings in the case. In determining the question, not simply the express terms of the contract are to be considered, but all the circumstances of the case. The collateral facts indicated in the bond itself, as well as those proved by parol and found by the master,—

the nature of the contract, the relation and position of the parties and of the property,—all are relevant and are to be weighed in the construction to be put upon the condition of the mortgage.

Fiske v. Fiske, 20 Pick. 499, 503; *Currier v. Currier*, 2 N. H. 75.

Messrs. P. H. Cooney and William Nutt, for defendants:

Defendant is entitled to a liberal construction in her favor, and to the benefit of all reasonable doubts as to the meaning of the terms used; and such has been the general current of authority in this as well as other courts in cases like the present.

Wilder v. Whittemore, 15 Mass. 262; *Thayer v. Richards*, 19 Pick. 398; *Fiske v. Fiske*, 20 Pick. 500; *Conkey v. Everett* 11 Gray, 95; *Hubbard v. Hubbard*, 12 Allen, 586; *Flanders v. Lamphear*, 9 N. H. 201; *Craven v. Bleakney* 9 Watts, 19; *Wusthoff v. Dracourt*, 3 Watts, 245; *Steele's App.* 47 Pa. 437; *Tope v. Tope*, 18 Ohio, 520.

The complainant's offer to support the defendant was coupled with the condition that she would "come back and live with him," and this condition he had no right to impose upon her (*Hubbard v. Hubbard*, 12 Allen, 586); and his declaring to Dr. Phillips, in whose family she was living, that he would not support her while she remained in his family, superseded the necessity of any demand being made by her for her support, even if a demand had been necessary before then, which it was not (*Pettee v. Case*, 2 Allen, 546).

Gardner, J., delivered the opinion of the court:

The defendant and her brother conveyed several tracts of land to the plaintiff, taking back a mortgage to support and maintain them during their natural lives, as was provided in a certain bond. The bond does not specifically require that the support and maintenance shall be furnished only at the dwelling-house mentioned in the same. The defendant contends that the contract is entitled to a liberal construction in her favor, and that she is entitled to the benefit of all reasonable doubts as to the meaning of the terms used, and that such has been the general current of authority in this as well as in other courts, in cases like the present.

There is no well-established rule by which each case shall be governed, but each case must be decided on its own facts, depending upon the language of the contract or instrument, and the surrounding circumstances. The only rule to be extracted from all the cases, perhaps, is this: "That a court will look at all the circumstances of the case, the nature of the property, the occupation and relations of the parties, the usages of the place and of the business to which the contract relates, and ascertain by reasonable inference what the parties must have understood and mutually expected at the time of the making of the contract, and then adopt that construction which will best and most nearly carry the contract into effect as they intended and understood it." *Chief Justice Shaw* in *Fiske v. Fiske*, 20 Pick. 500.

In this case the condition of the mortgage was to provide a horse for said Margery to ride to meeting and elsewhere, when necessary; find

her firewood for one fire, to be drawn and cut at the door fit for use; give her a good cow and keep said cow for her during her natural life. The court was of opinion that there was nothing to warrant the construction that the wood was to be furnished the mortgagee only at the house on the farm on which she then lived, even if the mortgagee had a privilege under her deceased husband's will to live in the house; it was a privilege which she might exercise or not at her choice.

Conkey v. Everett, 11 Gray, 95, was upon the following clause of the will of Jason Everett: "I give and bequeath to my wife, Lucy Everett, her support and maintenance in sickness and in health, and meaning all that shall or may be necessary for her comfort for and during her natural life fully to be completed and ended, out of my estate," etc. It was held that although it was highly probable that it was the expectation of the testator that the support would be furnished at the place of his last residence, yet there was nothing in the terms of the will to give it such a locality. Had there been a devise to the widow, of a part of the house for her occupation, this would have strongly indicated a purpose of the testator that she should there receive her support. We have been referred by the defendant to *Wilder v. Whittemore*, 15 Mass. 252; *Hubbard v. Hubbard*, 12 Allen, 586; *Flanders v. Lamphear*, 9 N. H. 201; *Craven v. Bleakney*, 9 Watts, 19; *Wusthoff v. Dracourt*, 3 Watts, 245; *Tope v. Tope*, 18 Ohio, 520.

In all these cases, excepting the last, there is either a bald agreement to maintain, or the right to occupy without the accompanying obligation to support in the house occupied. In *Tope v. Tope*, *supra*, the wife was to have her maintenance "off of the farm" while she lived. "The said Joseph Tope is to let my wife have the house in which I now live, while she lives; he is also to furnish her with everything that is necessary while she lives." The court held that although the testator contemplated that upon his death, his wife would continue to reside in the house, and there receive her support, yet if she refused to reside there, but preferred to reside elsewhere, the duty of the son charged with her maintenance was to pay her whatever sum of money it may be considered worth to support her on the farm, and no more.

In examining the various cases cited by counsel, but little aid can be derived. Each case must be decided on its own facts, considering the language of the instrument and surrounding circumstances.

In the case at bar, it is evident that by the condition of the bond a personal trust was confided in the plaintiff by the obligees, to perform such trust in behalf of the defendant Julia and her brother. The plaintiff agreed to provide for them, "both in sickness and in health, good and proper food, medicines, and clothing, with proper and kind care and nursing during their natural lives, together with fuel for each of them prepared and housed for their fires, and suitable board, and care for a horse for their own use." This personal trust could not well be discharged except upon the premises where all the parties resided. Considering the entire contract, this becomes more evident, "and the said Charles is to have, use, and occupy the westerly front

room of the house below, and the southeasterly chamber for his own and separate use, during his natural life; and the said Julia is to have, use, and occupy the southwesterly front room of the house (when built) for her own and separate use during her natural life." Then follow descriptions of other rights and privileges granted the obligees. This, in substance, provides that Julia is to occupy the front room during her natural life; that she is to reside there as long as she lives; that she is to have and occupy it for her own and separate use during her life. This being the fair meaning of this portion of the condition of the bond, it follows that the provisions made for her in sickness and in health are to be furnished to her in this house and not elsewhere.

The surrounding facts tend to confirm this construction of the bond, and to show what was the real intent of the parties. The house conveyed to the plaintiff was that in which the mortgagees were residing when the mortgage was executed. The mortgagor, by the terms of the bond, was intending to build additions to the dwelling-house for the convenience of the mortgagees, and he expended between \$2,000 and \$3,000 in the necessary alteration and improvements of the premises, in pursuance of a plan adopted by the parties.

The bond contained a stipulation that the plaintiff should not dispose of the real estate, including the dwelling-house, without the consent of the mortgagees, during their natural lives. The bond was explicit in statement as to the accommodations which Julia and her brother should have in respect to rooms in the plaintiff's house, and the other privileges granted to them about the house and premises. It appears that part of the contract was necessarily to be executed in the house, and that a change of residence by the mortgagees would impose a greater burden upon the plaintiff in supporting them, and that the contract makes no reference to such contingency. Until the death of the brother Charles, all the parties acted upon the construction here given to the bond without doubt or question. Considering all the surrounding circumstances in connection with the language of the bond, a majority of the court are of opinion that the bond points out the house of the plaintiff as the place where the care and support of Julia shall be furnished by the plaintiff, and that the defendant Julia is not entitled to demand that they shall be furnished to her elsewhere. It is not contended by the defendant that, if the entire contract is to be carried out upon the premises and dwelling-house of the plaintiff, there has been any breach of its terms; nor that Julia has not at all times been treated kindly and considerately by the plaintiff and his family.

Injunction made perpetual.

William H. SWASEY, Exr.,

τ.

Richard T. JAKUES *et al.*

Where the testatrix gave pecuniary legacies to certain persons, and provided that, if "any of them shall die before my decease, I give the sums I

2 MASS.

have given to them respectively, respectively to those persons living at the time of my decease who shall then be next of kin, respectively, of those of them whom I may survive;" and one of the legatees died in the lifetime of the testatrix leaving as her next relations a brother and three nephews, sons of another brother, all of whom survived the testatrix,—the legacy was payable under the words "next of kin" to the brother.

(Essex—Filed February 26, 1887.)

CASE reserved. Decree of Probate Court reversed.

Appeal by Richard T. Jaques from a decree of the Probate Court for the County of Essex, upon the petition of William H. Swasey, executor of the last will of Anna Jaques, to said court, to determine to what person or persons said petitioner should pay a certain legacy given in said will to Matilda Jaques, deceased; which decree directed said executor to distribute and pay over the same to the persons who would be her heirs at law under the Statute of Distribution in this Commonwealth, and in the proportion therein provided. Hearing in the supreme court before Devens, J., who reserved the case for the determination of the full court.

The facts appear from the opinion.

Mr. Horace I. Bartlett, for Richard T. Jaques, appellant:

The appellant being a brother of Matilda Jaques is entitled to the legacy to the exclusion of the appellees, the children of her deceased brother. The appellant only is included in "next of kin." That in common parlance the words "next of kin" and "nearest of blood" are synonymous, needs no authority. The legal meaning of the word *simpliciter* is the same.

Rapalje & Law, L. Dict.; Bouv. L. Dict.; Burr. L. Dict.; Abb. L. Dict.

And when used *simpliciter* in a will the phrase will not include those who take by representation under the statute. This is the well-settled law.

2 Jarm. Wills, 8d Am. ed. p. 28; 2 Redf. p. 75; 1 Perry, Tr. § 257; Wig. Wills, 2d Am. ed. 819; Hawk. Wills, 2d Am. ed. p. 97; *Garrick v. Camden*, 14 Vesey, 373; *Smith v. Campbell*, Cooper, 275; *Brandon v. Brandon*, 8 Swanst. 812; *Elmsley v. Young*, 2 Myl. & K. 780; *Withy v. Mangles*, 10 Clark & F. 215; *Halton v. Foster*, L. R. 3 Ch. App. 505; *Harris v. Newton*, 25 W. R. 228; *Redmond v. Burroughs*, 63 N. C. 242; *Jones v. Oliver*, 3 Ired. Eq. 369; *Simons v. Gooding*, 5 Ired. Eq. 382; *Davenport v. Hassell*, Bush. Eq. 29; *Wright v. Methodist E. Church*, 1 Hoff. Ch. 213; *Wimbles v. Pitcher*, 12 Ves. 438.

Elmsley v. Young, *supra*, the leading case decided before the Lords Commissioners, and approved in *Withy v. Mangles*, *supra*, before the House of Lords, has never been overruled,—a contingency not to be thought of; legislative interposition ought never to be invoked to alter a rule so fortified.

Wig. 2d Am. ed. p. 819.

There is an important difference between next of kin and next of kin according to the Statute of Distributions. The former points

only to law of consanguinity,—the latter to the law of succession *ab intestato*. Administration is granted to the next of kin as follows: first, to children; second, to parents; third, to brothers and sisters; fourth, to grandparents; fifth, to nephews and nieces.

Wms. Exrs. 6th Am. ed. p. 491; 2 Bl. Com. 496.

This is the practice in the probate court.

And see Smith's Probate Law, ed. 1884, p. 84.

Messrs. David L. Withington and Nathaniel N. Jones, for nephews of Matilda Jaques, deceased, appellees:

In this Commonwealth the words "next of kin" used in a will, uncontrolled by other words, mean next of kin according to the Statute of Distributions. The Legislature has so used the words:

Pub. Stat. chap. 136, §§ 20, 26-28; Pub. Stat. chap. 143, §§ 12, 13, 20, 23. See also "Kindred," Pub. Stat. chap. 135, § 3; "Next of kin in equal degree," chap. 25, § 2.

This court has habitually used the expression in the sense contended for.

Parker v. Kuckens, 7 Allen, 509.

It is well settled that the word "heirs," whenever it denotes succession or substitution, "should be construed to mean the persons who would legally take property according to its nature or quality; and that the heirs-at-law would take the real estate, and the next of kin, or persons entitled to inherit personally, would take the personal estate."

Fabens v. Fabens, 141 Mass. 399, 2 New Eng. Rep. 380.

And where it denotes a substantive gift, whether it is held to mean heirs-at-law, strictly, or next of kin, it means those who are heirs or next of kin under the statute.

Minot v. Harris, 132 Mass. 528; *Merrill v. Preston*, 135 Mass. 451.

And such is the law in England.

Wingfield v. Wingfield, L. R. 9 Ch. Div. 658. 2 Jarm. Wills, p. 78, note 13, and cases cited.

"Relations" is construed to mean statutory next of kin.

Esty v. Clark, 101 Mass. 38; *Rayner v. Mowbray*, 3 Bro. Ch. 234.

Harraden v. Larrabee, 113 Mass. 490, only decides that next of kin is limited to blood relations whether qualified by reference to the statute or not.

There is no express decision in this court, but *Wilde, J.*, in *Tillinghast v. Cook*, 9 Met. 148, says: "We think that where a legacy is given to the legal heirs or next of kin * * * it is a reasonable inference that the legatees should turn *quasi* heirs or next of kin according to the Statute of Distributions," citing *Daggett v. Stack*, 8 Met. 453, where *Shaw, Ch. J.*, says that in a devise to heirs "the presumption is that the testator referred to the familiar law of descendants and distributors to regulate the distribution of his bequest."

See also *Rand v. Singer*, 115 Mass. 128; *Childs v. Russell*, 11 Met. 25.

It is true that in the English cases the law is settled the other way, since *Withy v. Mangles*, 10 Clark & F. 215, which *Hoar, J.*, discusses very sharply and unfavorably in *Houghton v. Kendall*, 7 Allen, 75. We would add nothing to this discussion save to say that in England to-day, legal heir is construed to mean statutory

next of kin; legal heirs or next of kin to mean next of kin (*Sir G. Jessell, M. R.*, in *Re Thompson's Trusts*, 9 Ch. Div. 607); while next of kin *simpliciter* is understood to mean nearest of kin. Indeed, as *Lord Campbell* says: "It is impossible to deny that the law has by some bad luck got into a strange state."

Withy v. Mangles, supra.

The North Carolina cases have no force of argument nor are they decided on weight of authority.

A distinction which should not be overlooked is that the English scrivener is paid by the yard, while with us he is paid by the job.

Field, J., delivered the opinion of the court:

This is a petition by an executor for the construction of a will. It was filed in the probate court and a decree there entered, from which an appeal has been taken to this court, where the cause has been heard by a single justice and reported to the full court. In proceedings in the probate court, upon the allowance of an account of an executor, the court is necessarily confined to the determination of only those questions which are involved in the allowance or disallowance of the account, and cannot give directions for the future action of the executor. *Lincoln v. Aldrich*, 141 Mass. 342, 1 New Eng. Rep. 728; *New Eng. Trust Co. v. Eaton*, 140 Mass. 534, 1 New Eng. Rep. 372.

A bill in equity was the proper proceeding for obtaining the instructions of the court upon the construction to be given to a will. Jurisdiction in equity to hear and determine all matters relating to trusts created by will, was long ago conferred upon the probate court. Rev. Stat. chap. 69, § 12. See Report Comrs. on Rev. Stat. chap. 69, notes, § 12; Gen. Stat. chap. 100, § 22; Pub. Stat. chap. 141, § 27.

By Stat. 1873, chap. 224, § 3, "probate courts in the several counties may, concurrently with the supreme judicial court, hear and determine all matters arising under wills, in the same manner as is now provided by law in relation to trusts created by wills;" and by Stat. 1879, chap. 183, § 1, "the supreme judicial court and the probate courts in the several counties may, on petition, hear and determine all matters and questions arising under wills; provided, however, that any party aggrieved by the decision of the probate court thereon, may appeal therefrom to the supreme judicial court as now provided by law." See Pub. Stat. chap. 127, § 84; chap. 156, §§ 5, 6, 11. The proceedings in the present case were authorized by and are in accordance with Stat. 1879, chap. 83, § 1, and the Public Statutes. *Huntress v. Place*, 137 Mass. 409; *Wright v. White*, 136 Mass. 471.

By the tenth article of the will, the testatrix gave pecuniary legacies to certain persons, and provided that, if "any of them shall die before my decease, I give the sums which I have given to them respectively, respectively to those persons living at the time of my decease who shall then be next of kin, respectively, of those of them whom I may survive."

Matilda Jaques, one of these legatees, died in the lifetime of the testatrix, leaving as her nearest relations, a brother, Richard T. Jaques, and three nephews sons of another brother,

all of whom survived the testatrix and are now living. The question is whether the words "next of kin," in the will, mean nearest blood relations, or include all those relations who would take under the Statute of Distribution.

In England this question was settled by *Withy v. Mangles*, 10 Clark & F. 215; *Harris v. Newton*, 25 W. R. 228; *Hatton v. Foster*, L. R. 3 Ch. App. 505. The case of *Withy v. Mangles* has been cited by this court in *Houghton v. Kendall*, 7 Allen, 72; *Haraden v. Larabee*, 118 Mass. 430. There are comments upon the case in *Houghton v. Kendall*, but the decision in *Houghton v. Kendall* is in accordance with late English decisions by courts inferior to the House of Lords, and these decisions must be held not to be in conflict with *Withy v. Mangles*. In *Houghton v. Kendall* a testator bequeathed to his daughter, Sally, the income of \$2,000, which was to remain in the hands of his executors; and provided that at her decease the sum remaining in their hands should be paid "over to the children who may be the surviving heirs of said Sally's body, to be divided in equal shares between them. Sally survived the testator, and died leaving at her death one son and four grandchildren, children of a deceased son. The court says "that when the word 'heirs' is used in a gift of personality, it should primarily be held to refer to those who would be entitled to take under the Statute of Distributions, and to indicate that they should take in the same manner and in the same proportions as if it had come to them as intestate estate of the persons whose heirs they are called." It is unnecessary in the present case to consider under what circumstances the word "heirs" is to be construed to mean distributees of personality. In *Fabens v. Fabens*, 141 Mass. 395, 399, 2 New Eng. Rep. 380; *Merrill v. Preston*, 135 Mass. 451; *Minot v. Harris*, 132 Mass. 528; *Sweet v. Dutton*, 109 Mass. 589.

Wingfield v. Wingfield, 9 Ch. Div. 658; *Re Thompson's Trusts*, Id. 607, and *Keay v. Boulton*, 25 Ch. Div. 212, are decisions to the same effect as *Houghton v. Kendall*. The distinction taken between these cases and *Withy v. Mangles* is that the word "heirs" in itself imports succession to property by death; and as the persons who are the heirs of any one deceased are designated by law, which now is statutory law, the heirs must be either those persons who by law would succeed to the real estate or those who would succeed to the personal estate of the person whose heirs they are called, if that person had died intestate; and it is said that if the property is personal, the inference is that those persons are meant who would succeed to personal estate if the owner had died intestate, and who have been sometimes styled the statutory next of kin, or heirs of the personality. But it is said that the words "next of kin" do not of themselves import "succession *ab intestato*," and taken alone, mean nothing more than nearest blood relations; and that, unless there is something more in the will, indicating that the testator intended statutory next of kin or that the property should be distributed as intestate property, these words must have their customary meaning. Our Statute of Distributions includes among those who take, the husband or wife of the deceased, and permits representation. The words "next of kin" are not used

in the chapter of the Public Statutes concerning the distribution of the personal estate of intestates, but are used once in the chapter concerning the descent of real estate, which, with certain exceptions, regulates the distribution of personal estate, and then the words are "next of kin, in equal degree." But the words "next of kin" are used in other provisions of the statutes relating to the administration of estates, and apparently sometimes include all persons who take personal property as distributees of an intestate estate, and, sometimes, all such persons except the husband or wife. Pub. Stat. chap. 135; chap. 125; chap. 136, §§ 20, 26-28; chap. 143, §§ 12, 13, 20, 23; chap. 180, § 1. The context and the subject-matter must, in each case, determine the meaning of the words. There is no general provision that the personal estate of an intestate shall be distributed among the next of kin.

It is certainly difficult to distinguish between the expressions "next of kin," "nearest of kin," "nearest kindred" and "nearest blood relations;" and, primarily, the words indicate the nearest degree of consanguinity, and they are, perhaps, more frequently used in this sense than in any other.

What little recent authority there is, beyond that of the English courts, supports the English view; and, on the whole, we are inclined to adopt it. *Redmond v. Burroughs*, 63 N. C. 242; *Davenport v. Harsell*, Bush. Eq. 27; *Wright v. Methodist E. Church*, 1 Hoff. Ch. 202, 218. There is nothing in the will which controls or modifies the meaning of the words "next of kin."

The decree must be reversed, and a decree entered that the legacy of \$500 given to Matilda Jacques be paid to Richard T. Jacques. The details of the decree may be settled by a single justice before whom counsel may be heard upon their application to be allowed counsel fees out of the fund. *So ordered*.

Joseph S. BRADLEY *et al.*
v.

Rufus H. BRIGHAM, Exr., *etc.*

On a bill in equity brought against the executor of the estate of a deceased partner, to recover the value of certain bonds, the property of the copartnership, sold by the executor as part of the estate and the proceeds of the sale entered among the assets,—the surviving partners can only recover their share of the amount which has gone into the hands of the executor as assets of the estate. The legal title of the bonds was in the surviving partners in trust for the copartnership, and the executor of one of the copartners had no legal right to sell them and convert them into money. In so doing he acted tortiously, and not as executor of the estate; and the estate can only be compelled to account for that portion which does not belong to it.

(Middlesex—Filed February 8, 1887.)

A PPEAL by defendant from an order of a justice the Supreme Judicial Court overruling defendant's exceptions and ordering judgment for the plaintiffs on a master's report in a bill in equity to recover the value of certain property.

The facts and questions raised appear from the opinion.

Messrs. J. G. Abbott and J. T. Joslin, for defendant:

The plaintiffs had a full and adequate remedy at law. An action of trover would have been the proper remedy for the conversion of the bonds. But granting, for the sake of argument, that the bill as framed can be maintained upon the facts found, very clearly judgment cannot be rendered in favor of the plaintiffs against the defendant, for one third to each, of the par value of the bonds and interest, for this reason,—the master finds the whole property in the bonds, after the death of Francis Brigham, was in the plaintiffs; that the defendant had no property in them; and that his selling them was tortious and without right.

Now this entitled the plaintiffs to sue for the tort, the conversion, and recover the value of the property converted; or, they could waive the tortious conversion and bring an action of contract for the proceeds actually received by the defendant from the wrongful conversion of the bonds. If the latter course is taken, nothing but the money received by the defendant can be recovered, whatever may have been the value of the property wrongfully converted. By bringing this bill the plaintiffs have substantially elected the last remedy; they have waived the tort, and only asked judgment for the proceeds of the wrongful conversion of the bonds and not for their value. Whatever judgment is rendered, it can only be for the share of the plaintiffs of the proceeds of the sale of the bonds actually received by the defendant; for the best of all reasons, viz., that is all they have asked judgment for.

The ground on which the complainants seek to maintain their action is that they were formerly partners in business with Francis Brigham; and that, under a partnership which was long ago dissolved, these Mexican bonds were received in payment of a partnership debt and had never been divided. This action involves the determination of the following propositions: 1. Who was the legal owner of these bonds at the date of Francis Brigham's death? 2. If they belonged to a partnership concern, what partnership? 3. When was the debt contracted?

Mr. S. W. Trowbridge, for complainants:

Defendant is liable for the value of the bonds as found by the master, viz., "par flat," and not merely what he received of them.

See *Washburn v. Pond*, 2 Allen, 474, 476, 478.

He sold them at private sale and without notice to complainants.

Fletcher v. Dickinson, 7 Allen, 25, 26.

He had no right to sell them at all.

Freeman v. Freeman, 136 Mass. 263.

The value at the time of demand should govern.

Gray v. Portland Bank, 3 Mass. 364-390; *Bell v. Bell*, 20 Ga 250; *Sargent v. Franklin Ins. Co.* 8 Pick. 100, 101.

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Par value of bonds to be taken if defendant does not prove them of less value.

Thomas v. Waterman, 7 Met. 227.

When the value of property converted is fluctuating, the highest value between the time of conversion and time of trial may be taken.

Linman v. Reeves, 68 Ala. 69; *Street v. Nelson*, 67 Ala. 504; *Bank v. Hubbard*, 69 Ala. 379; *American Express Co. v. Parsons*, 44 Ill. 312; *Romaine v. Van Allen*, 26 N. Y. 309; *Musgrave v. Beckendorf*, 53 Pa. 310.

There was no evidence in the case that the bonds were ever worth less than their face value.

The attorney for the defendant argued before the single justice that plaintiffs were guilty of laches; but that exception is not open to him. No such issue was raised by the pleadings and no evidence was introduced with reference to any such issue.

Story, Eq. Pl. 503-751.

Nothing appears in the report touching laches, and exceptions can only be taken to matter appearing on the face of the report.

Rennell v. Kimball, 5 Allen, 356.

The findings of the master were correct, and the court will not revise the findings of a master except for gross error.

Dean v. Emerson, 102 Mass. 480-482.

Gardner, J., delivered the opinion of the court:

The plaintiffs were formerly copartners with one Francis Brigham, deceased. This bill in equity is brought against the executor of the estate of Francis Brigham to recover the value of certain bonds, the property of the copartnership, sold by the executor as part of the estate, and the proceeds of the sale entered among the assets of the deceased's estate. Two questions are raised by the pleadings and the master's report: 1. Whether the bonds sold were taken in settlement of a debt contracted prior to November 1, 1860, when the shares of the complainants were one third each, or after that date, when their shares were one quarter each. 2. Whether the plaintiffs are entitled to recover the value as found by the master, or their share of the amount which the executor received for the bonds at private sale.

I. The two firms of F. Brigham & Co. and Kimball, Robinson & Co. entered into an agreement in writing to do business together on joint account, under the name of the "Feltonville Factory," the same to continue from November 1, 1858, to November 1, 1860, each firm to have an equal share in the business. The master found and reported "that there was no evidence that the arrangement continued beyond its written limitation." It is conceded that the master erred in coming to the conclusion which he did, that the arrangement between the two firms did not continue beyond its written limitation, as, in fact, it did continue many years after November 1, 1860. This becomes material, as the bonds were received by the Feltonville Factory for a debt due that company. When that debt was contracted, before or after November 1, 1860, was in dispute between the parties. The master found and reported as follows: "I am also of the opinion, in the absence of any evidence

showing the continuance of the Feltonville Factory partnership later than November 1, 1860, * * * that said debt * * * was contracted prior to said last named date."

The presumption which generally arises from the finding of the master, upon a matter of fact, does not exist in the present case, because of the conceded mistake made by the master. It becomes our duty, therefore, to determine whether, upon all the evidence before us, the indebtedness for which the bonds were given in settlement was created before or after November 1, 1860. Upon carefully reading all the evidence, we are unable to say that the master was wrong in the conclusion which he arrived at. We think that the evidence warrants the conclusion that the indebtedness of Otis, Lewis & Brown to the Feltonville Factory was contracted prior to November 1, 1860. The finding of the master that the Mexican bonds given in payment of the debt of Otis, Lewis & Brown, were assets of the copartnership existing prior to November 1, 1860, and at the death of the defendant's testator were owned one third by him, and one third by each of the complainants, was correct.

II. The executor found the Mexican bonds among the other property of the deceased testator and disposed of them at private sale, placing the amount received for them among the assets of the estate. When this bill was brought, the sum of \$2,487.50, the amount received by the executor for the bonds, was in his hands among the assets. The complainants, in their bill, allege that the defendant, as executor, came into possession of the bonds; that he has disposed of them, and received the proceeds thereof to the amount of \$6,000, and the plaintiffs are entitled to receive their share of said proceeds, viz., one third to each and interest thereon. The plaintiffs also allege that they have demanded of the executor to pay to them their share of the proceeds, etc.; that the defendant's testator and the defendant have received other property, which the defendant ought to account for as part of the assets of the partnership. The plaintiffs pray that an account may be taken, etc., and that the defendant be directed to pay to the plaintiffs whatever sum shall be found due to them in respect to said partnership matters, with interest. The bill goes upon the ground that the complainants are only entitled to their share of the proceeds of the sale of the bonds; no complaint is made of wrongful or negligent action on the part of the executor, as to the bonds; nor that they were sold at private sale for less than their fair market value. The question as to what the value of the bonds was at the time of the sale is not raised by the plaintiffs' bill. But independent of the question of pleading, we think that the plaintiffs cannot recover more than their share of the amount which has become assets of the estate. This is a bill, in fact, against the estate of Francis Brigham. Whatever the rights of the plaintiffs may be against the executor personally, their only remedy against the estate is to recover their share of the amount which has gone into the hands of the executor, as assets of the estate. The negligent and tortious acts of the executor in dealing with the property, if any such acts exist, cannot be imputed to the estate. The

executor must personally respond to such charges. The legal title to the Mexican bonds was in the surviving partners in trust for the copartnership. The executor of Francis Brigham, one of the copartners, had no legal right to sell them and convert them into money. In so doing he acted tortiously, and not as executor of the estate. If, however, the estate has received any benefit from the wrongful acts of the executor, the estate should be compelled to make restitution of that portion which does not belong to it. The plaintiffs are each entitled to one third of \$2,487.50, the sum for which the bonds were sold, and which went into the hands of the executor as assets of the estate, with interest from the date of the filing of this bill.

Decree accordingly.

McLauren F. PICKERING

v.

City of CAMBRIDGE.

1. Evidence that the plaintiff declined to accept a nomination for the common council of the city of Cambridge, or to serve if elected, "on the ground that he had no connection with or interest in the affairs of Cambridge," is too indefinite and remote to be admitted as evidence to show that he afterwards actually abandoned his domicile in Cambridge and acquired another.
2. So far as the right or liability to be taxed depends upon domicile, it is an incident of domicile. A change of domicile to avoid taxation in the place where a man is domiciled must be accomplished by an actual change of his home. Whether the residence is continuous or occasional, whether it is intended to be temporary or permanent, and the purposes for which the residence is established or continued, are facts which are relevant in determining whether the residence is of such a character as to constitute a domicile. A mere intention in the mind to make the change is not sufficient.
3. Declarations of the plaintiff in his own favor, made to persons who in no respect represented either the city of his past or the place of his future domicile, are inadmissible so far as they are statements of a past fact, namely, that he had changed his residence; so far as they relate to work done upon the farm where he claims to have acquired a present domicile, they are not competent, where it does not appear that they were made in connection with living upon or personally occupying the farm as a place of residence.
4. The admission of declarations of the party, favorable to himself, as part of the *res gestæ*, should be confined to very narrow limits, in order to exclude hearsay and to prevent parties from making evidence for themselves; and the rule should be more rigidly enforced

since parties have been permitted to testify.

(Middlesex—Filed March 23, 1887.)

ON plaintiff's exceptions. *Overruled.*

Action of contract to recover back taxes assessed by the City of Cambridge upon the plaintiff for the year 1883, paid under protest in writing. Tried before Rockwell, J., without a jury, who found for defendant, and plaintiff alleged exceptions, the substance of which appears from the opinion.

Mr. Frank Goodwin, for plaintiff:

No one element or class of elements can, as matter of law, conclusively determine what is the domicile. Of the various elements, "the choice of the taxpayer as between two places of residence, is an element to be considered in determining which is the real domicile; but a choice in favor of one place will not be permitted to control a preponderance of evidence in favor of another. The place of domicile * * * is not left by the law to the choice of the citizen, except only as such choice may give character to existing relations and accompanying acts of residence, which are not in conflict with it. As between different places, it may depend on a mass of evidence which will generally include, as one of its items, the declared intention and choice of the party himself. * * * If the evidence be equivocal and uncertain, then the choice may be sufficient to turn the scale; if the weight of it be one way, then an opposite intention or wish will be of little or no avail."

Thayer v. Boston, 124 Mass. 146; *Opinions of the Justices*, 5 Met. 588, 589.

In *Weld v. Boston*, 126 Mass. 166, 167, 169, it is shown that it is competent for the taxpayer to prove any acts of habitancy; such as residence in the given town or city, paying taxes, voting, attending town meetings, and taking part in the discussions.

Proof of a change of domicile is composed of an aggregation of facts more or less isolated; and exists to the exclusion of other facts, which popularly would be regarded as implying much in evidence of a change of residence, but which the technical rules of law shut out from consideration.

Weld v. Boston, 126 Mass. 166; *Wright v. Boston*, 126 Mass. 161.

In *Kilburn v. Bennett*, 3 Met. 199, the court regarded declarations accompanied by an act itself, admissible, and as *res gestæ*; that the giving notice to the owner of the house in which the party was then living, and the declarations explanatory thereof, were admissible.

See also *Bulkley v. Williamstown*, 3 Gray, 498.

In *Cole v. Cheshire*, 1 Gray, 441, which was an action to recover back taxes, evidence of the plaintiff's declarations, made in February to a party in the town to which he thereafter removed, during negotiations about coming to board with him in that town, that he intended to come to that town and live with him in April, and not to return to Cheshire,—were held admissible. The tax was assessed as of the ensuing May 1.

See also *Thorndike v. Boston*, 1 Met. 242; *Reeder v. Holcomb*, 105 Mass. 94.

Native domicile more easily reverts than acquired domicile.

Hallet v. Bassett, 100 Mass. 167, 170; *Otis v. Boston*, 12 Cush. 50. See also *Greene v. Greene*, 11 Pick. 414.

When the *animus* is in question, evidence of transactions with other persons than the party to the record is admissible.

Butler v. Watkins, 13 Wall. 456 (80 U. S. bk. 20, L. ed. 516); *Castle v. Bullard*, 23 How. 172 (64 U. S. bk. 16, L. ed. 419); *Friend v. Hamill*, 34 Md. 298; Best, Ev. Chamberlayne's ed. § 506, and note; § 495, and note; Best, Ev. § 255; *Scott v. Berkshire County San. Bank*, 140 Mass. 161, 162, 165, 166, 1 New Eng. Rep. 221; *Commonwealth v. Greene*, 111 Mass. 393, 394.

Mr. Charles J. McIntire, for defendant:

The instructions and directions which plaintiff gave to his superintendent, offered in evidence, are private conversations with a third party, in the absence of the defendant, and inadmissible.

Baxter v. Knowles, 12 Allen, 114; *Lucas v. Trumbull*, 15 Gray, 306; *Carrigg v. Oakes*, 110 Mass. 144.

Therefore the declarations which plaintiff made at the time, not being made while doing any act in connection with his alleged removal from Cambridge, were properly excluded.

Wright v. Boston, 126 Mass. 161.

It was, moreover, a recital of past transactions and past purposes, and not competent.

Salem v. Lynn, 18 Met. 544; *Haynes v. Butler*, 24 Pick. 242.

The conversation with Packer took place about the time when plaintiff had his controversy with the assessors of Cambridge, and probably before he paid his tax for 1881. The statements therein made are declarations in his own favor.

Thorndike v. Boston, 1 Met. 242; *Cole v. Cheshire*, 1 Gray, 441; *Kilburn v. Bennett*, 3 Met. 199; *Reeder v. Holcomb*, 105 Mass. 98.

Field, J., delivered the opinion of the court:

It is the policy of the law that no person shall escape civil responsibility for want of a domicile; and therefore it is held that every person retains his domicile of origin until he has acquired another, and that he cannot abandon his domicile, whether original or acquired, unless and until he acquires another. The fact of domicile is shown by acts of residence with the intention of making the place of residence a home. A man cannot elect to make one place his home for the general purposes of his life, and another place his home for the purpose of taxation. So far as the right or liability to be taxed depends upon domicile, it is an incident of domicile. The controlling reason why a man changes his domicile may be in order to avoid taxation in the place where he was domiciled, but to accomplish this he must actually change the place of his home. He cannot elect to be taxed in one place rather than another, except by living in the place and making it the place of his principal residence. Whether the residence is continuous or occasional, whether it is intended to be temporary or permanent, and the purposes for which the residence is established or continued, are facts which are relevant in determining whether the residence is of such a character as to constitute

a domicile. But a change in the domicile of a person cannot be effected by an intention in the mind to make the change, unless it is accompanied by an actual change in the place of abode.

The plaintiff had acquired a domicile in Cambridge, and the issue of fact was whether he had abandoned this domicile and acquired another in Greenland, New Hampshire. The plaintiff contended that he had changed his domicile from Cambridge to Greenland "on or about the month of October of the year 1881."

The court rightly excluded the evidence that the plaintiff in the autumn of 1880 declined to accept a nomination for the common council of the city of Cambridge, or to serve if elected, "on the ground that he had no connection with or interest in the affairs of Cambridge." Such evidence, if admissible under any circumstances, could only be admissible upon the question whether at that time he was domiciled in Cambridge, and this was not in dispute. As evidence that the plaintiff's interest in Cambridge was slight, and therefore that it was probable that he would some time break the connection, it is too indefinite and remote to be admitted as evidence to show that he afterward actually abandoned his domicile in Cambridge and acquired another in Greenland.

The second exception is to the exclusion of the statement made by the plaintiff upon the farm at Greenland, in November, 1881, to the superintendent, when giving him instructions in regard to work to be done upon the farm. The statement was "that he had now made Greenland his residence and domicile; and that he wished to be taxed there and to vote there, and to become a citizen of the town; and that he had left Cambridge as a resident."

The third exception is to the exclusion of what the plaintiff said at Cambridge, in the autumn of 1881, to one Packer, a witness, at the time the plaintiff requested Packer to go to Greenland and "make and report to him an estimate of the expense of making certain repairs and improvements in the house in Greenland." The plaintiff then "stated to the witness that he, the plaintiff, had changed his residence from Cambridge to Greenland, and that he was no longer an inhabitant or citizen of Cambridge."

The ground on which the declarations of a person in his own favor have been admitted as evidence of domicile or a change of domicile, is that they accompany acts done, and tend to explain and qualify the meaning of the acts, or, in other words, that the declarations are a part of the *res gestæ*. The declarations in the present case are in the plaintiff's favor, and were made to persons who in no respect represented either the city of Cambridge or the town of Greenland, and they are inadmissible as evidence unless they are to be admitted as a part of the *res gestæ*. *Weld v. Boston*, 126 Mass. 168; *Wright v. Boston*, 126 Mass. 161; *Borland v. Boston*, 132 Mass. 89.

This court has felt the necessity of confining this exception to the general law of evidence to very narrow limits, in order to exclude hearsay and to prevent parties from making evidence for themselves; and since parties have been permitted to testify there is perhaps an additional reason why great strictness should

be used in admitting as evidence the declarations of a party in his own favor, when made in the absence of the other party. If the declarations are narrative of a past occurrence, they cannot be admitted. The acts done must be admissible in evidence, and the declarations must accompany the acts and be so connected with them as to characterize them, or indicate the purpose and intention with which the acts were done.

It appears by the exceptions that the farm in Greenland was the homestead where the plaintiff was born, and where he had resided for most of the time up to 1867; that he then took up his residence in Cambridge; that by the death of his mother in May, 1881, the plaintiff and his brother became, under her will, owners of the homestead as tenants in common; that his brother "vacated the Greenland homestead, and went west," in November, 1881, and that since that time the plaintiff has had exclusive control of the estate, "and put an elderly female relative into the Greenland homestead;" and "that one Dearborn was the superintendent of said farm, and had been such for many years."

The plaintiff's wife died in February, 1881, leaving the plaintiff with one child, a son, who was an undergraduate in Harvard College from 1878 to 1882, and who has continued since his mother's death to live in the house at Cambridge, which the plaintiff bought and had conveyed to his wife in 1869, and which they both occupied until she died. It does not appear where the plaintiff has lived since the death of his wife. For aught that appears he may have lived with his son in Cambridge until after the tax he now sues to recover was assessed upon him. Since 1881 he has been in Greenland on the 1st day of April of each year, and in New York city on the 1st day of May of each year, and he has paid taxes in Greenland and has voted there once; but it does not appear that he has in any way made the house or the farm in Greenland his home, by occupying it or by having any furniture or personal effects in it. It does not appear that he has repaired or fitted up this house with any intention of permanently occupying it himself. The plaintiff, for aught we know, may have acted upon the theory that a determination in his own mind to consider himself an inhabitant of Greenland, and an election to be taxed there and to vote there, established his domicile there, although he may have lived and continued to have his home somewhere else.

So far as the declarations excluded were statements of a past fact,—namely, that he had changed his residence from Cambridge to Greenland,—they may be considered as narrative; so far as they relate to the directions given for the work to be done upon the farm, if they do relate to this work, it does not appear that they were made in connection with any acts of living upon or of personally occupying the farm as a place of residence, or with any intention of so occupying it. So far as they relate to an estimate to be made of the expense of repairing and improving the house, it does not appear that these repairs and improvements were ever made, or that the estimate was requested for the purpose of repairing and improving the house for the plaintiff's residence. The court

trying the case without a jury had all the evidence before it, and we have but a part. It may have appeared that there was no evidence that the plaintiff, after his wife died, ever actually resided in any sense upon the farm, or intended to reside upon it. We cannot say that the declarations were not rightly excluded. The last exception was waived at the argument.
Exceptions overruled.

James DOOLING

v.

BUDGET PUBLISHING CO.

Words relating merely to the quality of articles made, produced, furnished, or sold by a person, though false and malicious, are not actionable without special damage caused thereby, unless they go further and attach to the individual; hence, where defendant charged, in effect, that plaintiff, being a caterer, on a single occasion provided a very poor dinner, vile cigars, and bad wine, however strong the denunciatory language, it is not actionable without proof of special damage.

(Suffolk.—Filed March 23, 1887.)

ON report. *Judgment on the verdict.*
Action of tort to recover for an alleged libel, the publication of which by the defendant was admitted at the trial, contained in the words following, to wit:—

“Probably never in the history of the Ancient and Honorable Artillery Company was a more unsatisfactory dinner served than that of Monday last. One would suppose, from the elaborate bill of fare, that a sumptuous dinner would be furnished by the caterer, Dooling; but instead, a wretched dinner was served, and in such a way that even hungry barbarians might justly object. The cigars were simply vile, and the wines not much better.”

The case was tried in the superior court before Pitman, J. [The plaintiff's counsel, in opening the case to the jury, stated that the plaintiff was a caterer in the city of Boston, with a very large business, and acted as caterer upon the occasion referred to. Upon the statement of the plaintiff's counsel that he should offer no evidence of special damage, the court ruled, without reference to any question of privilege that might be involved in the case, that the words set forth were not actionable *per se*, and that the plaintiff could not maintain his action without proof of special damage; and the plaintiff's counsel still stating that he should offer no evidence of special damage, the court thereupon ruled that the jury, as matter of law, should render their verdict for the defendant, which was done, and the court reported said ruling for the consideration and decision of the supreme judicial court.

Messrs. C. B. Southard and Russell Bradford, for plaintiff:

I. The words complained of are actionable *per se* as affecting the plaintiff in his office, profession, or business.

“To enumerate the different decisions upon

this subject would be tedious, and to reconcile them impossible; yet they seem to yield to a general rule sufficiently simple and unembarrassed; namely, that words are actionable which directly tend to the prejudice of anyone in his office, profession, trade, or business.”

1 Starkie, Sland. 117.

As to the degree of certainty and precision requisite to make the words actionable.

“The only question arising upon this point seems to be this, Do the words in any degree prejudice the plaintiff in his office, profession, or employment? If they do, they are actionable. * * * Words in general belonging to this class relate either to the plaintiff's integrity, his knowledge, skill, or diligence, his credit, or to the subject-matter in which he deals.” Id. 180.

Harman v. Delany, 2 Strange, 898; *Jenner v. A'Beckett*, L. R. 7 Q. B. 11; *Gottbehuet v. Hubachek*, 36 Wis. 515; *Burnett v. Gould*, 27 Hun (N. Y.), 386; *Botterill v. Whythead*, 41 L. T. (N. S.) 588.

The rule, as stated in Townshend on Slander and Libel, § 182, is:

“Language which concerns the person in such his employment will be actionable, if it affects him therein in a manner that may, as a necessary consequence, or does as a natural or proximate consequence, prevent him deriving therefrom that pecuniary reward which probably he might otherwise have obtained.”

Foulger v. Newcomb, L. R. 2 Exch. 327.

De Grey, Ch. J., in *Onslow v. Horne*, 8 Wils. K. B. 186, states the rule thus: “Words are actionable when spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage.”

“The test in every case by which to decide if the language be actionable, meaning actionable *per se*, is, Does it necessarily occasion damage?”

Townsh. Sland. & Lib. § 188.

Words charging want of integrity, ignorance, incompetency, unskillfulness, or want of care and diligence in a particular case or transaction, are actionable if they impute such want of integrity, ignorance, etc., as men in the same calling ordinarily do not, or should not, exhibit.

Townsh. Sland. & Lib. 3d ed. § 194, and cases cited; *Gauvreau v. Superior Publishing Co.* 62 Wis. 403; *De Pew v. Robinson*, 95 Ind. 109; *Purdy v. Rochester Printing Co.* 26 Hun (N. Y.), 206.

Words may constitute a libel on the plaintiff in his trade or calling, for which he may recover without proof of malice or special damage, even though the words are more directly an imputation upon something connected with such trade or calling. For example, to charge—

That a bookseller published an absurd poem.

Tabart v. Tipper, 1 Camp. N. P. 350.

That the place of business of a trader (a coach-builder) was not respectable.

Barrett v. Long, 3 H. L. Cas. 395.

That a ship of which the plaintiff was owner and master, and which he had advertised for a voyage to the East Indies, was not seaworthy, and that Jews had bought her to take out convicts.

Ingram v. Lawson, 6 Bing. (N. C.) 212.

That a hotel-keeper kept no accommodation, and a person would not get a decent meal or decent bed, if he tried.

Burnett v. Gould, 27 Hun (N. Y.), 366.

That the name of an article manufactured by the plaintiffs ("The Bag of Bags") was "very silly, very slangy, and very vulgar," and that "it has been forced upon the notice of the public *ad nauseam*."

Jenner v. A'Beckett, 25 L. T. (N.S.), 464.

"The evident intention being to injure him (the plaintiff) in his business."

1 Starkie, Sland. * 142.

II. The words complained of are actionable *per se* as tending to bring the plaintiff into ridicule, contempt, or disrepute, or to induce an ill opinion of him; the nature of the imputation being such that the court was not justified in withdrawing the case from the jury on the ground that the language clearly did not have a necessary tendency to lower the plaintiff in the estimation of his acquaintances, or of the public, or to cause him some other loss, either in his property, character, or business.

Tacey v. McKenna, 4 Ir. R. Com. L. 874; Townsh. Sland. & Lib. § 176; *Tuam (Archbishop) v. Robeson*, 5 Bing. 17.

E.g. To state, in effect, that a coroner, who was also a physician, held an inquest on a man who was discovered by another physician to be alive.

Purdy v. Rochester Printing Co. 26 Hun (N. Y.), 206.

In *Steele v. Southwick*, 9 Johns. 214, the definition of libel given by Mr. Hamilton in *People v. Croswell*, 3 Johns. Cas. 354, was referred to as drawn with precision,—"a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrate, or individuals."

Words are not to be construed *mitiori sensu*, but the court will see if there is anything in the language which by a reasonable intentment is actionable.

Mave v. Pigott, 4 Ir. Com. L. 54.

It is for the court to define what constitutes a libel; it is for the jury to say whether the particular publication comes within the definition.

2 Greenl. Ev. § 411; *Parmiter v. Coupland*, 6 Mees. & W. 105; *Baylis v. Lawrence*, 11 Adol. & El. 920.

This rule admits of no modification unless it clearly appears that the words complained of are not actionable.

Shattuck v. Allen, 4 Gray, 540.

Messrs. W. E. L. Dillaway and H. E. Bolles, for defendant:

The ruling of the court was clearly in accordance with law.

Gott v. Pulsifer, 122 Mass. 235, 238, and cases cited; *Swan v. Tappan*, 5 Cush. 104, 108-110; *Fitzgerald v. Robinson*, 112 Mass. 371.

C. Allen, J., delivered the opinion of the court:

The question is, whether the language used imports any personal reflection upon the plaintiff in the conduct of his business, or whether it is merely in disparagement of the dinner which he provided. Words relating merely to the quality of articles made, produced, fur-

nished, or sold by a person, though false and malicious, are not actionable without special damage. For example, the condemnation of books, paintings, and other works of art, music, architecture, and, generally, of the product of one's labor, skill, or genius, may be unsparing, but it is not actionable without the averment and proof of special damage, unless it goes further and attacks the individual. *Gott v. Pulsifer*, 122 Mass. 238; *Swan v. Tappan*, 5 Cush. 104; *Tobias v. Harland*, 4 Wend. 537; *Western Counties Manure Co. v. Sawes Chemical Manure Co.* L. R. 9 Exch. 218; *Young v. Macrae*, 3 Best & S. 264; *Ingram v. Lawson*, 6 Bing. (N. C.) 212.

Disparagement of property may involve an imputation on personal character or conduct; and the question may be nice, in a particular case, whether or not the words extend so far as to be libelous; as in *Bignell v. Buzzard*, 8 Hurl. & N. 217.

The old case of *Fenn v. Dixie*, 11 Jones, 444, is much in point. The plaintiff there was a brewer, and the defendant spoke of his beer in terms of quite as strong disparagement as those used by the present defendant in respect to the plaintiff's dinner, wine, and cigars; but the action failed for want of proof of special damage. In *Evans v. Harlow*, 5 Q. B. 631, Lord Denman, Ch. J., said "a tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be false, scandalous, malicious, and defamatory, that the plaintiff can found a charge of libel upon them."

In the present case there was no libel on the plaintiff in the way of his business. Though the language used was somewhat strong, it amounts only to a condemnation of the dinner and its accompaniments. No lack of good faith, no violation of agreement, no promise that the dinner should be of a particular quality, no habit of providing dinners which the plaintiff knew to be bad, is charged, nor even an excess of price beyond what the dinner was worth; but the charge was, in effect, simply that the plaintiff, being a caterer, on a single occasion provided a very poor dinner, vile cigars, and bad wine. Such a charge is not actionable without proof of special damage.

Judgment on the verdict.

John K. SARTWELL *et al.*, Assignees,
v.

Charles H. NORTH *et al.*

By Pub. Stat. chap. 157, § 96, making **fraudulent preferences by an insolvent debtor void, the entry of a voluntary appearance, by the attorney of such a debtor, for him, in an action pending, curing the insufficient service of the writ, was an act done by the debtor, although he was ignorant of it and did not intend that it should be done; and amounts in law to procuring his property to be seized on execution, within the meaning of the statute.**

ON report. *New trial granted.*

Action brought by the plaintiffs, as assignees in insolvency of the firm of Fitz & Martin, to recover \$610, alleged to have been obtained of said firm by the defendants as a fraudulent preference.

At the trial in the superior court, before Knowlton, J., it appeared that on the 14th day of October, 1884, the defendants caused a writ to be made in their favor against said Fitz & Martin, returnable in the Municipal Court of the city of Boston on the 25th of said month, to recover a debt of more than \$600; which debt had been due and unpaid for several months. Fitz & Martin resided in Lynn, in the county of Essex, and had their usual place of business in Boston, in the county of Suffolk; but the residences of said Fitz & Martin were not stated in said writ. An attachment was made upon the writ, and a keeper placed in their store in Boston. Said Fitz & Martin thereupon paid \$100 of the debt and obtained time to pay or arrange the balance, and said attachment was released. Afterwards, on the 18th day of said month, said writ was served by another attachment of a stock of goods in Lynn; and said Fitz & Martin were there served with process the same day for their appearance at court.

The writ was returned into court October 25, and a memorandum was made by the clerk that the service was insufficient, inasmuch as the defendants therein did not reside in the county of Suffolk, and the writ had been served only seven days before the return day.

Fitz & Martin were insolvent, and they proposed to their creditors to compromise their debts by the payment of 25 per cent in discharge thereof.

Charles H. North & Co. agreed to accept said compromise; and, with their consent, Fitz & Martin employed to represent them in the business of arranging this compromise with their other creditors, the same attorney who brought the suit for the defendants in this action.

At the time said attorney agreed to act for Fitz & Martin, they knew that he was acting for his original clients, the defendants in this action, in the collection of their claim; and said attorney did not intend to do anything which should prejudice the interests of said clients, and did not then contemplate the probability of further adverse action on their part, as they had already accepted Fitz & Martin's proposition of compromise, which was made contingent upon said firm's procuring all their other creditors to join therein.

Said firm were not able to obtain the signatures of all their creditors to the agreement of compromise, and the composition failed. Meanwhile said attorney informed Fitz & Martin that said suit had been entered in court; that he could not act for them in that suit, but would employ some one to do so if they desired, and was requested to do so. He thereupon requested another attorney, who was his friend, to enter an appearance for Fitz & Martin in said suit. Thereupon said last-named attorney, without being paid, and supposing that it was a matter of accommodation to his friend, entered an appearance and filed an answer for Fitz & Martin in said suit on the 30th day of said October. On the first day of the following Novem-

ber the case was placed on the trial list by the attorney who commenced it. The attorney who appeared for the defendants, having received notice thereof from the clerk of the court, left word with the son and clerk of the first-named attorney to notify him if he was expected to do anything more in the case. No further notice was given him; a default followed; judgment was entered for the plaintiffs on the 7th day of November, and an execution was issued in their favor on the 8th day of the same month. November 10 the execution was levied upon one hundred and twenty barrels of flour belonging to Fitz & Martin; the flour was sold for \$510, and the proceeds applied to the said execution. The levy was made in the forenoon, under the direction of the attorney who brought the suit and who conducted all the proceedings in it; and in the afternoon of the same day proceedings in insolvency were commenced for Fitz & Martin, through the same attorney, by filing a petition and the accompanying schedules prepared by him; and it appeared that he had in his pocket the blanks therefor at the time he ordered the levy to be made. Under these proceedings the plaintiffs were duly appointed assignees. Said attorney was not paid for said insolvency proceedings until after said levy was made.

It was found as a fact, by way of inference from the other facts in the case, stated herein, that said attorney was acting generally for Fitz & Martin, in the business of arranging and adjusting their affairs with their creditors; that one of the purposes of the attorney, in causing an appearance to be entered in said suit, was to facilitate such proceedings as might be necessary in the further prosecution thereof, and to save the necessity of taking out an order of notice and making further service upon the defendants therein; and that his subsequent action in that suit was with a view of collecting in full the debt of his clients, the defendants in this action, and thereby obtaining an advantage over the other creditors of Fitz & Martin.

It did not appear that at the time of the payment of the \$100 the defendants had any reason to believe that Fitz & Martin were insolvent (otherwise than by their inability to pay the debt due the defendants, in the regular course of business, when it became due, and the facts hereinbefore stated), and that the payment was made as a fraudulent preference. But they and their attorney had full knowledge of the insolvency before their writ was entered in the municipal court. It was also found, as a fact, that Fitz & Martin did not either of them, at any time, personally intend to do or cause to be done anything which should give the defendants a fraudulent preference; and had no knowledge of the entry of an appearance for them in said suit, or of any of the proceedings therein after the entry thereof, except as hereinbefore stated, until after the levy of the execution had been made, and the petition in insolvency was filed.

Upon these facts, the plaintiffs asked the court to rule that the payment of the \$100 was a fraudulent preference of the defendants, and also that the proceeds of the sale of the flour levied upon were obtained by the defendants through a fraudulent preference, and

that the plaintiffs could recover therefor in this action. The court declined so to rule, and found for the defendants, and at the request of the plaintiffs reported the case to the supreme judicial court for its opinion upon the questions of law involved.

Messrs. John Lowell and P. J. Doherty, for plaintiffs:

Mass. Pub. Stat. chap. 154, § 47, requires 14 days' service, and there were only 7. The plaintiffs therefore would have been obliged to begin anew, or to get leave for a new process, under Pub. Stat. chap. 161, § 84.

The debtors were insolvent and knew it, and the creditors knew it; the levy operated as a preference. It has been held that where the debtor assists the creditor in any way, as by notifying him to bring his action, by giving a warrant of attorney, by confession on the first day of the term, by virtue of which a judgment may be obtained and an execution be issued and levied on his property earlier than it otherwise would be, or in a mode more advantageous to the creditor, the debtor has committed an act of "procuring" his property to be taken under statutes like Pub. Stat. chap. 157, § 96, or even under what may be called the common law of preference.

Sage v. Wyncoop, 104 U. S. 819 (Bk. 26, L. ed. 740); *Lane v. Haynes*, 8 L. Rep. 499; *Hall v. Wallace*, 7 Mees. & W. 358; *Stingleton v. Butler*, 2 Bos. & Pul. 283; *Campbell v. Traders Nat. Bank*, 2 Biss. 423; 14 Wall. 87 (U. S. bk. 20, L. ed. 832); *Clarion Bank v. Jones*, 21 Wall. 825 (U. S. bk. 22, L. ed. 575); *Little v. Alexander*, 21 Wall. 500 (U. S. bk. 22, L. ed. 625); *London v. First Nat. Bank*, 15 Nat. Bankr. Reg. 476; *Beattie v. Gardner*, 4 Ben. 479; *Samson v. Burton*, 5 Ben. 325; *Webb v. Sachs*, 15 Nat. Bankr. Reg. 168.

The act of attorney No. 2, in entering an appearance, facilitated the entry of judgment, as in cases cited. Even in a criminal case, one who acts through an ignorant instrument is guilty as principal.

1 Russ. Crimes, 28.

The only reason which we can conjecture, from the report, for exonerating the defendants is that both parties acted through attorneys. But the very purpose of appointing an attorney is that he may act for the principal, without informing him of every act and asking his advice before taking every step. That the knowledge and intent of the attorney should be imputed to the principal, has been decided in many cases of preference as fully as in other civil cases. The maxim is somewhat musty, but not yet obsolete,—*Qui facit per alium, etc.*

Rogers v. Palmer, 102 U. S. 263 (Bk. 26, L. ed. 164); *Bush v. Moore*, 133 Mass. 198; *Sage v. Wyncoop*, 104 U. S. 819 (Bk. 26, L. ed. 740); *Graham v. Stark*, 3 Ben. 520.

The fact of insolvency is undoubted, and the debtors are presumed to have known it. The inference from the circumstances is that preference was intended and that the creditors had reasonable cause to believe it.

Denny v. Dana, 2 Cush. 160; *Beals v. Clark*, 13 Gray, 18; *Forbes v. Howe*, 102 Mass. 437.

There is a lack of one or two important dates in the report, but it may be reasonably inferred that the time of payment of the \$100 was very close to the date of composition.

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Mr. William H. H. Emmons, for defendants:

Only questions of law raised at the trial and specified in the report are open.

Churchill v. Palmer, 115 Mass. 810; *Hodgkins v. Price*, 137 Mass. 18; *Rea v. Simmons*, 141 Mass. 563, 2 New Eng. Rep. 361.

The weight of evidence and of conflicting facts is for the court below, and if there is any evidence to sustain the finding it must be affirmed.

Heywood v. Stiles, 124 Mass. 275; *Kane v. Learned*, 117 Mass. 194.

The payment of \$100 was not a preference. *Grant v. National Bank*, 97 U. S. 80 (Bk. 24, L. ed. 971).

The judgment was not a preference.

Clark v. Iselin, 21 Wall. 360 (U. S. bk. 22, L. ed. 563); *Wilson v. City Bank of St. P.* 17 Wall. 473 (84 U. S. bk. 21, L. ed. 723).

The debtors are not bound by act of creditor's attorney unless his employment by them (the debtors) extended to the suit in which the judgment was obtained.

The facts reported leave this entirely disproved, or in very strong doubt; hence the weight of the conflicting facts is for the court below.

The debtors lived in Lynn and had their usual place of business in Boston; hence the service was good.

Pub. Stat. chap. 161, § 27; chap. 154, § 47.

Amending the writ was all that was necessary to get default and judgment.

No one is bound by the intent of another unless he assents.

Commonwealth v. Putnam, 4 Gray, 17; *Beattie v. Gardner*, 4 N. B. R. 323, 332, 337, 338.

A ruling that the existence of particular facts conclusively prove fraud is rightly refused; and the finding is conclusive.

Banfield v. Whipple, 14 Allen, 14.

C. Allen, J., delivered the opinion of the court:

The questions of law which the report in the present case seems intended to present, relate only to the alleged preference which was obtained by the levy of the execution, and are as follows:

1. Whether, according to the true meaning of Pub. Stat. chap. 157, § 96, making fraudulent preferences by an insolvent debtor void, the act relied on should be considered to have been done with the view, on the part of Fitz & Martin, the insolvent debtors, to give a preference to their creditors, North & Co.; that is to say, whether, upon the facts stated, such a view or intention should be imputed to them from the intention entertained by the attorneys, although Fitz and Martin themselves did not, either of them, at any time, personally intend to do or cause to be done anything which should give a fraudulent preference to North & Co.

2. Whether the act which was done amounts in law to procuring their property to be seized on execution, within the meaning of the statute.

It has heretofore been clearly established that, although an intent to give a preference may be inferred from the fact of doing so, with its attendant circumstances, yet there must be proof of an actual intent to prefer. The infer-

ence which a jury may properly draw, that a person intends the natural and probable consequences of his act, is only one element of proof to establish the fact of an actual intent. This intent is essential, and must be found as a fact. *Rice v. Grafton Mills*, 117 Mass. 228; *Parsons v. Topliff*, 119 Mass. 245; *Forbes v. Howe*, 102 Mass. 427, 437; *Beals v. Clark*, 13 Gray, 18; *Denny v. Dana*, 2 Cush. 160, 172. So far as the payment of \$100 is concerned, which was made by Fitz & Martin personally, an intent to prefer on their part is expressly negatived; and it necessarily follows that the plaintiffs cannot recover this item from the debts. But, as already intimated, the more important and difficult questions arise in respect to the other item of claim.

On a fair construction of the report, it seems reasonable to assume that an intention to prefer, on the part of both of the attorneys, was sufficiently proved. It is expressly found that one of the purposes of the first attorney, who communicated directly with Fitz & Martin, was to facilitate such proceedings as might be necessary in the further prosecution of the suit; and his conduct leaves no room to doubt that he intended to secure a preference to North & Co. The second attorney, though employed on behalf of Fitz & Martin, acted without pay, supposing it was a matter of accommodation to his friend, the first attorney; he sought no instructions directly from Fitz & Martin, whom he assumed to act for under this employment; he entered an appearance and filed an answer; and thereafter took no steps to prevent the entry of a default and of judgment. While the report does not state in express terms that these attorneys intended by their course of proceedings to secure a preference to North & Co., and while it is within possibility that the decision of the court may have been placed on the ground that the proof of such fraudulent intention on their part was not satisfactory, yet it seems much more reasonable to suppose that such was not the view taken at the trial.

The inquiry, therefore, is whether in law, under the circumstances stated, the intent to prefer is to be imputed to Fitz & Martin. The latter were insolvent. They had been sued by North & Co., and their property attached. They had made a proposal to their creditors to compromise their debts by the payment of 25 per cent in discharge thereof. They had employed to represent them, in the business of arranging this compromise, the same attorney who brought the action of North & Co. against them. That attorney had informed them that the action had been entered in court; that he could not act for them in it, but would employ some one else to do so, if they desired; and he was requested to do so. They thus trusted wholly to his selection of an attorney to represent them, and apparently were content to do so. No further instructions were given, and no limitation was put upon the authority of the attorney to be employed. Moreover, so far as appears, they did not seek to have any personal communication with him; it is not stated that they even took the trouble to ascertain, or that they were ever informed, who he was; and they have never repudiated or taken any steps to avoid the effect of what he assumed to do in their behalf. Under these circumstances, it can-

not be said that they were deceived, or betrayed by the attorney thus employed. While it is possible that he acted in contravention of what they wished and expected him to do, he certainly did not act in violation of any directions which they gave, or which he received from the first attorney. There is nothing in the report to lead to the inference that they meant that he should have less authority than an attorney usually has, when entrusted with the management of litigation in court. It has been held that an attorney has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action. *Moulton v. Bowker*, 115 Mass. 36. See also *Shattuck v. Bill*, 142 Mass. 56, 2 New Eng. Rep. 159.

To enter an appearance for a defendant in court, in case of insufficient service, without requiring the further notice provided in Pub. Stat. chap. 161, § 27, is within this authority. What the attorney did, therefore, was within the scope of his employment; and any act so done by him, with a view to give a preference, was done by him as the representative of Fitz & Martin, although they were ignorant of it, and did not intend that it should be done; and his intention was, by construction of law, their intention. To hold otherwise would be to open a wide door for avoiding the beneficial purpose of the statute. The principle involved is substantially within the decision in *Rogers v. Palmer*, 102 U. S. 263 (Bk. 26, L. ed. 164), where it was held that knowledge of a creditor's attorney in receiving a preference is imputable to the creditor, and in *Bush v. Moore*, 133 Mass. 198. See also *Graham v. Stark*, 1 Beav. 520.

It is not necessary at present to go so far as to say that the same result would follow if it appeared that the attorney intentionally and fraudulently acted in violation of his instructions, or in contravention of what he knew or believed that his principal expected him to do. Whether such a fraud, committed by him upon those for whom he was assuming to act, would vary the rule, may be left to be determined when the question is directly presented.

The act relied on to support the charge that Fitz & Martin procured their property to be seized on execution, was the voluntary appearance of the attorney for them in the action, thus curing the insufficient service of the writ. It is now to be assumed that the service was in fact insufficient, since the trial proceeded on that ground. The writ is not before us, but the report shows that one of the purposes of the first attorney in causing an appearance to be entered was to save the necessity of taking out an order of notice and making further service upon Fitz & Martin, the defendants therein. The defendants now contend that the service was good; but we cannot assume this to have been so. Under these circumstances, the entry of an appearance for Fitz & Martin was a positive act which directly aided the creditors in obtaining an early judgment, upon which the creditors took out execution and seized the property. Mere passive nonresistance, on the part of a debtor, to legal proceedings brought without his request

or connivance, to enforce a claim which is due, and against which he has no just defense, will not bring him within the statute. But any positive act which is done by the debtor with the intention, and which has the effect, to aid the creditor in obtaining a preference by means of levying an execution upon his property, satisfies the requirements of the statute. The debtor procures his property to be seized on execution, if he contributes to such seizure. *Sage v. Wyncoop*, 104 U. S. 319, 321 [Bk. 26, L. ed. 740]; *Rogers v. Palmer*, 102 U. S. 263 [Bk. 26, L. ed. 164]; *Tenth Nat. Bank v. Warren*, 96 U. S. 539 [Bk. 24, L. ed. 640]; *Little v. Alexander*, 21 Wall. 501 [88 U. S. bk. 22, L. ed. 625]; *Wilson v. City Bank of St. P.* 17 Wall. 484 [U. S. bk. 21, L. ed. 728]; *Lake v. Haynes*, 8 L. Rep. 499, 503.

Construing the report as intended to present the questions above considered, we have come to the conclusion that, upon the facts stated and reasonably to be assumed, a preference within the meaning of the statute was shown in respect to the property seized on execution. *New trial granted.*

COMMONWEALTH of Massachusetts
v.

Patrick J. MURRAY.

1. The **Municipal Court of the City of Boston** has original criminal jurisdiction of all crimes under the degree of felony, except conspiracies and libels, and cases where a prosecution by indictment or information is required by law.
2. **Jurisdiction** given to a court to punish for a crime by fine or imprisonment, specially provides by law for the prosecution of the offense; and Pub. Stat. chap. 217, §§ 1, 2, do not even give a concurrent remedy to recover the fine by indictment or by action of tort.

(Suffolk—Filed February 26, 1887.)

On defendant's exceptions. *Overruled.*

Complaint under Pub. Stat. chap. 100, § 1, charging defendant with keeping and exposing intoxicating liquors for sale. Tried in the superior court, on appeal from the municipal court, before Pitman, J.

The facts appear from the opinion.

Mr. J. L. Eldridge, for defendant:

Pub. Stat. chap. 154, § 50, gave the Municipal Court of Boston original criminal jurisdiction of all crimes under the degree of felony, except cases where a prosecution by indictment or information is required by law.

Pub. Stat. chap. 217, §§ 1, 2.

These sections refer to the maximum punishment.

108 Mass. 139.

But the offense charged against the defendant is punishable, under chap. 100, § 18, with a fine of not less than \$50 or more than \$500, etc. (Pub. Stat. chap. 154, § 50), "in addition to the jurisdiction otherwise conferred." There is none.

The provisions of chap. 154 are not applicable to the municipal court. Chap. 154, § 50, defines the jurisdiction.

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See chap. 154, §§ 11, 18; also, chap. 155, §§ 45, 54.

It is clear that the Legislature did not intend to give trial justices and police and municipal courts jurisdiction to punish by a fine of \$500.

This offense, being punishable by a fine of \$500, can only be prosecuted by indictment.

Mr. Harvey N. Shepard, *Asst. Atty-Gen.* for the Commonwealth:

The Municipal Court of the City of Boston had jurisdiction of the defendant and of the offense.

Pub. Stat. chap. 154, § 50.

W. Allen, J., delivered the opinion of the court:

The defendant was convicted in the Municipal Court of the City of Boston, on a complaint for keeping intoxicating liquors with intent to sell the same unlawfully. On appeal, he was convicted in the superior court, and filed a motion in arrest of judgment for the reason that the municipal court had not final jurisdiction of the offense.

Pub. Stat. chap. 154, § 50, gives to the Municipal Court of the City of Boston, original criminal jurisdiction of all crimes under the degree of felony, except conspiracies and libels, and cases where a prosecution by indictment or information is required by law.

The offense of which the defendant was convicted is punishable with a fine not exceeding \$500, and imprisonment for not more than six months. As it is under the degree of felony, the Municipal Court of the City of Boston has jurisdiction of it, unless a prosecution by indictment or information is required by law. It is agreed in behalf of the defendant that Pub. Stat. chap. 217, §§ 1, 2, require a prosecution by indictment. Those sections contain provisions, in substance, that all fines or forfeitures recovered in criminal prosecutions, or exacted as a punishment for any offense or for a violation or neglect of any duty imposed by statute, or expressly appropriated to the use of the Commonwealth, or of a county, city, or town, may, unless otherwise especially provided by law, be prosecuted by indictment; or, if the amount does not exceed \$100, in a municipal court; or the same may be recovered in an action of tort. The argument is that the case is not specially provided for by the general jurisdiction given to the municipal court, and that, therefore, the fine may be recovered by indictment, or by an action of tort, and cannot be imposed as a punishment on complaint by the municipal court.

It is enough to say that jurisdiction given to a court to punish for a crime by fine or imprisonment, does specially provide by law for the prosecution of the offense; and the statute referred to does not even give a concurrent remedy to recover the fine by indictment or action of tort.

Exceptions overruled.

Jonathan M. SMITH *et al.*
v.

Town of DEDHAM *et al.*

1. Pub. Stat. chap. 27, § 27 *et seq.* contemplates supplying water to the inhabi-

tants of a town, an exercise of power beyond the general corporate power of cities and towns in the absence of a law to enable them to do so, and a contract for the supply of water for fire and other service, which a town at a legal meeting authorized its selectmen to make with a water company for a term of years, does not come within the purpose of these sections; and Pub. Stat. chap. 29, §§ 1-15, does not exempt the town from its liability to pay the debt contracted under such authority, and such a debt is an annual debt, payable out of the money each year granted by the town, raised by taxation.

2. The charter of the Dedham Water Company does not confer any power upon the town of Dedham, or upon its selectmen, similar to that conferred by Pub. Stat. chap. 110, relating to "aqueeduct corporations."

(Norfolk—Filed February 23, 1887.)

A PPEAL by plaintiffs from a decree of a justice of the Supreme Judicial Court dismissing a bill in equity to restrain the making of a contract and from carrying it into effect. *Affirmed.*

The case was heard before W. Allen, J., upon bill, answer, and replication. The court dismissed the bill and plaintiffs appealed.

The facts appear from the opinion.

Messrs. Thomas H. Talbot and Elisha Greenwood, for plaintiffs:

The vote of August is in violation of Pub. Stat. chap. 29, which provides as follows:

§ 1. "Towns shall not incur debts, except in the manner of voting * * * prescribed in this chapter."

§ 6. Towns may "incur debts for temporary loans in anticipation of the taxes of the year in which such debts are incurred, and of the year next ensuing, and expressly made payable therefrom by vote of the" town.

§ 7. "Other debts than those mentioned in the preceding section shall be incurred only by a vote of two thirds of the voters present and voting at a town meeting."

The vote in question authorized the selectmen to incur an indebtedness, and this indebtedness was not for a temporary loan to be repaid from the taxes of the current or following year, one or both. Further, it is not disputed that the authority required by the statute in the authorization of any other indebtedness was not obtained.

The vote authorized a debt to be incurred. The selectmen, having proceeded to execute this vote, and having made the contract which the vote authorizes, there then remains no further act to be performed by or on behalf of the town in order to the incurring of a "debt." Nothing further is necessary save action on the part of the Dedham Water Company, action which the contract contemplates and calls for; and the contract once entered into, the town cannot prevent that action on the part of the water company. The town has bound itself to accept it, and pay for it. There is nothing whatever further for the town to do or perform, in order to become indebted to the water company.

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Wallace v. San José, 29 Cal. 180; *Bladen v. Philadelphia*, 60 Pa. 464; *Newell v. People*, 7 N. Y. 9; *French v. Burlington*, 42 Iowa, 614; *Wright v. Fairfield*, 2 B. & Adol. 727; *Reg. v. Stepney Union*, L. R. 9 Q. B. 388; *Coz v. Gould*, 4 Blatchf. 341, 346; *Camp v. Grant*, 21 Conn. 54; *Rodman v. Munson*, 13 Barb. 68; *Newell v. People*, 7 N. Y. 9; *Baltimore v. Gill*, 31 Md. 375; *Davenport Gas Co. v. Davenport*, 13 Iowa, 220, 233; *Scott v. Davenport*, 84 Iowa, 208, 213, per Miller, J.; *Wilson v. Morgan*, 4 Robt. (N. Y.) 58, 68; *Lewis v. N. Y. Cent. R. Co.* 49 Barb. 330; *Mill Dam Foundry v. Hovey*, 21 Pick. 417, 456; *Perry v. Washburn*, 20 Cal. 318, 351; *Stanton v. Wilkeon*, 8 Ben. 365, per Blatchford, J.; *Dryden v. Kellogg*, 2 Mo. App. 87, 94; *Kimpton v. Bronson*, 45 Barb. 618, 625; *Jonas v. Cincinnati*, 18 Ohio, 318, 322; *Garrison v. Chicago*, 7 Biss. 488; *Career v. Braintree Mfg. Co.* 2 Story, 432.

There is no question of the jurisdiction of this court. If the action of the defendant town is in violation of Pub. Stat. chap. 29, that chapter has, undoubtedly, provided a remedy; and the remedy provided is the mode of proceeding now followed by the plaintiff.

Pub. Stat. chap. 29, § 17.

But this court has a jurisdiction in cases like the present beyond that conferred by chap. 29, § 17.

Pub. Stat. chap. 27, § 129; *Babbitt v. Savoy*, 3 Cush. 531.

The vote of August, taken in connection with that of April, being a vote to pay money under the contract which it authorized, this court undoubtedly has jurisdiction to inquire into the legality of that contract, to wit, the purpose declared in August.

It is a vote to raise money. The assessors are authorized to assess this sum without further action by the town. The law makes it their duty each year to "assess taxes to an amount not less than the aggregate of all sums appropriated, granted, or lawfully expended by their respective towns since the last preceding annual assessment, and not provided for therein."

Pub. Stat. chap. 11, § 94, p. 103.

The vote authorized the selectmen to contract to pay the sum of \$4,500 annually from the town treasury. An order authorizing the selectmen to make a contract to pay money is, by implication, an order authorizing them to draw a warrant upon the treasurer for the annual installments which the contract will call for, and is therefore, in effect, a vote to pay from the town treasury.

Babbitt v. Savoy, 3 Cush. 531.

Since the passage of Acts 1877, chap. 178, § 1 (now Pub. Stat. chap. 151, § 4), this court has "jurisdiction in equity of all cases and matters in equity, cognizable under the general principles of equity jurisprudence, and in respect of all such cases and matters shall be a court of general equity jurisdiction."

Crampton v. Zabriske, 101 U. S. 601, 603 (Bk. 25, L. ed. 1070).

The vote of August is in violation of Pub. Stat. chap. 27, § 27, as well as of chap. 29, as already shown.

The broad construction of the term "supplying its inhabitants with water," for which the plaintiffs contend, is necessary in one respect to make valid the contemplated contract in

this case. A contract to supply the inhabitants of Dedham with water is the only contract which the party with whom the defendant town is entering into contract is authorized to make. The Dedham Water Company is incorporated "for the purpose of furnishing the inhabitants with pure water," and for no other purpose whatever. This is the whole extent of the franchise conferred by the Commonwealth upon this corporation. If, then, a contract for a supply of water for fire purposes be not a contract for supplying or furnishing the inhabitants with water, then the contemplated contract would be beyond the power—*ultra vires*—of the Dedham Water Company to make. Thus, the town should be enjoined from entering into this contract, because it would be void for want of authority in the other party to make it, and in violation of the charter which brought it into being.

Haverhill v. Gale, 108 Mass. 104; *Macgregor v. Doer*, etc. R. Co. 7 R. Cas. 227; 18 Q. B. 618; *East Anglican R. Co. v. Eastern C. R. Co.* 7 R. Cas. 150; 16 Jur. 249; 11 C. B. 775.

The contract contemplated is void, as in excess of the powers of the town to appropriate money and make contracts binding it to pay money.

Per Bigelow, *Ch. J.*, in *Hood v. Lynn*, 1 Allen, 103, 104; *Bangs v. Snow*, 1 Mass. 190; *Allen v. Taunton*, 19 Pick. 486; *Spaulding v. Lowell*, 23 Pick. 76, 77; *Minot v. West Roxbury*, 112 Mass. 1, 6; per Spooner, *J.*, in *Stetson v. Kempton*, 18 Mass. 272, 281; per Shaw, *Ch. J.*, in *Willard v. Newburyport*, 12 Pick. 227; *Parsons v. Goshen*, 11 Pick. 396.

The contract contemplated would be void as against public policy.

A contract to pay a public corporation greater compensation for services rendered to the public than that expressly provided for by law is void as against public policy.

Tappan v. Brown, 9 Wend. 175; *Tilden v. Mayor*, 56 Barb. 340; *Plucket v. Gresham*, 3 Salk. 75; *Putnam v. Woodbury*, 68 Me. 58; *Carrol v. Tyler*, 2 Har. & G. 54, 57; *Commonwealth v. Cony*, 2 Mass. 523; *Brophy v. Marble*, 118 Mass. 548; *Andrews v. U. S.* 2 Story, 202; *Evans v. Trenton*, 24 N. J. L. 764; *Converse v. U. S.* 21 How. 463 (62 U. S. bk. 16, L. ed. 192); *Fawcett v. Woodbury*, 55 Iowa, 154; *Satterlee v. Jones*, 8 Duer (N. Y.), 102; *Smith v. Whildin*, 10 Pa. 39; *Firemen's Charitable, etc. v. Berghaus*, 18 La. Ann. 209; *Callagan v. Hallett*, 1 Caines (N. Y.), 104; *Kernion v. Hills*, 1 La. Ann. 419.

Mr. George Fred. Williams, for defendants:

The case presented does not show a cause within the jurisdiction of the court.

The town of Dedham has not voted "to raise by taxation or pledge of its credit, or to pay from its treasury, any money for a purpose other than those for which it has the legal right and power."

Nor has it voted to appropriate money or pledge its credit at all.

The case then falls short of the restraining power conferred by Pub. Stat. chap. 27, § 129. *Carlton v. Salem*, 108 Mass. 141; *Mead v. Acton*, 189 Mass. 341.

The town of Dedham does not, by the vote of August 30, 1886, incur a debt within the im-

port and fair construction of that term in Pub. Stat. chap. 29, § 7. It is an ordinary function of a town to maintain a fire department and furnish a supply of water to extinguish fires.

Allen v. Taunton, 19 Pick. 485; *Hardy v. Waltham*, 3 Met. 163; *Fisher v. Boston*, 104 Mass. 93.

The ordinary powers and duties of towns may be exercised by ordinary votes. The Legislature did not intend to cripple towns in the exercise of their powers. The statute under construction is a statute to limit extravagance. The town of Dedham is not extravagant or improvident. It has no debt, and pays no dollar of interest.

The contract proposed does not create a debt. *Laycock v. Baton Rouge*, 35 La. Ann. 475, 480; *Dively v. Cedar Falls*, 27 Iowa, 233; *Grant v. Davenport*, 36 Iowa, 396.

Pub. Stat. chap. 27, § 27, has no application in this case. The town does not propose to supply its inhabitants with water.

The power of towns to raise money and to enter into contracts obligatory on them has ever been held to include all subjects of general interest which could be reasonably embraced within their statutory powers.

Records of Colony of Mass. Bay in New England, p. 72; Stat. 1785, chap. 75, § 7; *Allen v. Taunton*, 19 Pick. 485, 487; *Hill v. Boston*, 122 Mass. 344, 349; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503.

The Act of 1875, chap. 209, should not be construed to take away this power as ordinarily exercised, unless "a debt" is thereby incurred. The vote of the town authorizing a contract is purely executory.

Copeland v. Huntington, 99 Mass. 525.

And unless no contract can be made which will not interfere with the limitations of the Act of 1875, chap. 209, this court should not interpose its prohibition. If a contract be made for ten years, at a rate of \$4,500 a year, if the water company shall furnish water each year for legitimate needs of the town, no debt will be created. No obligation imposed by a contract to pay money becomes a debt until money is payable.

Weston v. Syracuse, 17 N. Y. 110; *Garrison v. Howe*, 17 N. Y. 458.

Such a contract would consist of dependent promises, of which the performance would be several and divisible; and no debt would be created.

Wellington v. West Boylston, 4 Pick. 101; *Badger v. Titcomb*, 15 Pick. 409; *Knight v. N. E. Worsted Co.* 2 Cush. 271, 290; *Oviatt v. Hughes*, 41 Barb. 544.

Nothing would be payable except upon a contingency, and an obligation depending upon a contingency does not create a debt.

People v. Arguello, 37 Cal. 524; *Wood v. Partridge*, 11 Mass. 488, 493.

It has been so held in this State in cases arising under the trustee process.

Wentworth v. Whittemore, 1 Mass. 471, 473; *Thorndike v. De Wolf*, 6 Pick. 120; *Meacham v. McCorbit*, 2 Met. 352.

Also in cases involving liability of stockholders and officers for corporate debts.

Bordman v. Osborn, 23 Pick. 295.

So under insolvent laws where term "debt" is used in its broadest sense, and in other cases,

Wood v. Partridge, supra; Davis v. Ham, 3 Mass. 33; Child v. Boston & Fairhaven Iron Works, 137 Mass. 516, 520; Bent v. Hubbardston, 138 Mass. 99, 100; Deane v. Caldwell, 127 Mass. 242.

Mr. J. R. Bullard, for the Dedham Water Company, defendant:

Towns "may make contracts necessary and convenient for the exercise of their corporate powers."

Pub. Stat. chap. 27, § 9.

To provide water for the extinguishment of fires is a "corporate power." In *Allen v. Taunton*, the court says, "It is very apparent from these enactments that the prevention of damage by fire is one of those objects affecting the interest of the inhabitants generally, and clearly within the scope of municipal authority. With such an onerous liability imposed on them, it would be strange indeed if they had not the authority to take all necessary measures to secure themselves against losses by such means."

Allen v. Taunton, 19 Pick. 485; Hardy v. Waltham, 3 Met. 163.

Cases determining the rights of municipal corporations in other States are of little weight here; the power and the mode of contracting are purely matters of statute law. "The importance of a careful study of the charter or incorporating Act, and the general legislation of the State on the subject, cannot be too strongly emphasized."

Dill. Mun. Corp.

Gardner, J., delivered the opinion of the court:

At a town meeting of Dedham, held in 1888, the town authorized its selectmen to make a contract with the Dedham Water Company for three years at the rate of \$5,000 per year for the service of one hundred hydrants, the company agreeing to give free of charge the supply of water to public buildings, water troughs, and cemeteries. The selectmen made the contract. A town meeting was duly called August 30, 1886, to consider among other things an article in the warrant, to see what action the town would take with reference to a supply of water for fire and other service. Under this article it was voted "that the selectmen be authorized to renew the contract for 10 years with the Dedham Water Company, at the rate of \$4,500 per year." At the meeting at which the vote was passed the check-list was not used; nor did two thirds of the voters present and voting vote to authorize the contract to be made. The plaintiffs seek to enjoin the town and its officers from making the contract and from carrying it into effect.

I. The plaintiffs contend that the vote of the town is in violation of Pub. Stat. chap. 27, § 27, which provides that a town, with the consent of a majority of its selectmen, ratified by a majority of its voters present and voting thereon at a legal meeting at which the check-list shall be used, may, for the purpose of supplying water to its inhabitants, purchase of any municipal or other corporation the right to take water from any of its sources of supply or from pipes leading therefrom; or may purchase its water rights, estates, franchises, and privileges; or

may make a contract therewith for a supply of water. The following sections provide for issuing bonds in case of purchase. These sections relate to supplying the inhabitants of a town with water. This does not come within the corporate powers of towns, and must be exercised by authority of statute. Under it towns can supply water to their inhabitants for all purposes, mechanical, fire, and domestic, in the manner pointed out by the statute.

To supply water to the inhabitants of a town is meant water for all uses for which it may be legally supplied, and not necessarily for the purpose of extinguishing fires. This statute makes provisions for purchasing rights to supply pure water to its inhabitants, for which the town may issue bonds in payment redeemable in 20 years. The contract to which it refers is a contract for the supply of water for all uses, to the inhabitants of a town; and was not intended to interfere with the corporate power of cities and towns to procure water for fire purposes. It contemplated supplying water upon a much larger scale, and which was beyond the corporate power of cities and towns, and which required the enactment of laws to enable them to carry it out. The contract which the town of Dedham authorized its selectmen to make with the water company does not come within any of the provisions of the statute.

II. It is also argued that the vote of the town is in violation of Pub. Stat. chap. 29, §§ 1, 6, 7, which provide: § 1. That towns shall not incur debts except in the manner of voting prescribed in the chapter. § 6. That towns may incur debts for temporary loans in anticipation of the taxes of the year in which such debts are incurred, and of the year next ensuing, and expressly made payable therefrom by vote of the town. § 7. That other debts than those mentioned in the preceding section shall be incurred only by a vote of two thirds of the voters present and voting at a town meeting.

Pub. Stat., chap. 29 is entitled "Of Municipal Indebtedness." Its obvious purpose is to protect cities and towns from the creation of municipal debts without proper provision for payment, and to prevent improvident and reckless expenditures of public money as a natural consequence of debts so contracted. *Agawam Nat. Bank v. South Hadley, 128 Mass. 503.*

That it was not intended to apply to all debts contracted by a city or town is apparent from § 16, which provides that the restrictions of the preceding sections shall not exempt a city or town from its liability to pay debts contracted for purposes for which it may lawfully expend money. The statute deprived cities and towns of the power to contract debts for borrowed money, which it was generally supposed they had previously possessed, and gave them a limited power which could be exercised only in the way pointed out. But although the statute was prohibitory with reference to the borrowing of money and contracting debts, it was not intended to interfere with the limited corporate powers and duties of cities and towns. The statutes empower them to levy taxes and appropriate money for the corporate necessities of the town or city. They are authorized to make contracts necessary and convenient for the exercise of their corporate

powers, without bringing themselves within the limitation of this statute. Towns may at legal meetings grant and vote sums of money as they judge necessary for the several purposes enumerated, "and for all other necessary charges arising in such town." Pub. Stat. chap. 27, § 10. Whatever is necessary to enable them to exercise the power, enjoy the privileges and perform the duties established by law. *Willard v. Newburyport*, 12 Pick. 227. The proper necessary town charges must have a reasonable limitation. *Stetson v. Kempton* 18 Mass. 272. If the expenditures be in the furtherance of some duty enjoined by statute, or in exoneration of the citizens of the town from the liability to a common burden made in reference to it, it will be valid and binding on the town. The prevention of fire is one of those objects affecting the interests of the inhabitants generally, and clearly within the scope of municipal authority. *Allen v. Taunton*, 19 Pick. 485.

In *Hardy v. Waltham*, 3 Met. 163, it was held that towns, in their corporate capacity, having power to provide for the purchase and maintenance of fire engines for the extinguishment of fires, they must have the incidental power to make provision by reservoirs or other means for a supply of water without which the engines would be useless. It is clear that the town of Dedham could legally make provision for a supply of water to the town for fire purposes. Having this power, the first fifteen sections of Pub. Stat. chap. 29, would not exempt it from its liability to pay debts contracted for the supply of water to the town for fire purposes, as this was an object for which the town could lawfully expend money.

The contract which the selectmen are authorized to make is one which we assume is to be paid annually, among the other current expenses of the town. The payments are to be made out of the moneys annually granted by the town and raised by taxation. It is in effect a cash transaction, where the payments are made *pari passu* with the accumulation of the yearly service which determines the amount to be paid. *Grant v. Davenport*, 36 Iowa, 396. It is, like the other ordinary expenses of the town, within the limit of its annual current expenses. The town of Dedham by its vote did not incur a debt within the fair meaning of Pub. Stat. chap. 29, § 1.

A majority of the court is of the opinion that the statute was not intended to apply to contracts made for the current expenses of the town, and payable out of the current revenues of the several years in which the water company is to furnish water to the town. *Laycock v. Baton Rouge*, 35 La. Ann. 475.

III. Pub. Stat. chap. 110, relating to "aqueduct corporations," which authorizes a city or town in which such aqueduct is situated to put conductors into the pipes for the purpose of drawing water therefrom in case of fires, and which empowers the selectmen to make provisions for taking water for protection against fire, has no application to the Dedham Water Company. The charter of this company does not confer any similar power upon the town of Dedham, or upon its selectmen.

Decree affirmed.

2 MASS.

Mary RICE

v.

KING PHILIP MILLS.

1. In an action of tort to recover for injuries sustained by the plaintiff while in the employ of the defendant corporation, through defect in the machinery, the whole question is whether the master has exercised reasonable care in employing competent servants, in providing suitable machines and implements, and in doing that part of his business which he has undertaken to do himself, and has exercised a reasonable supervision over his servants in the performance of the duties which he has entrusted to them. This is usually a question for the jury.
2. The general question is, **What**, under the circumstances, **ought the master to have reasonably known and done?** and, in determining this, the nature of the defect, the length of time it has existed, and the means taken to remedy it, are important facts.
3. Where the plaintiff was employed on a slubber machine in a cotton-mill, and her duty was to see that the machine was kept running; to take off the full bobbins and put on others; to notify the overseer or his subordinates if she knew that there was anything wrong about the machine; and to see that it was kept clean; and she did not know and was not required to know that a weight which was attached by a lacing of rawhide, and which had been used upon the machine for about two years for the purpose of moving more rapidly the horizontal rack and the bobbins, so as to prevent the yarn from running off the bobbins, was attached in an unsafe manner; and, while the plaintiff was in the exercise of due care in discharging this duty, she was injured by the falling of this weight through a defect in the lacing,—the court properly instructed the jury that the person whose business it was to keep the machine in repair was a fellow servant with the plaintiff; and that "if the master provides suitable appliances and competent parties to attend to them, he has done his duty. If he provides proper persons to see that his machinery is kept in proper condition to use, and the injury is caused by the negligence of the persons employed, the master is not liable."
4. It was proper to instruct the jury "If you find that the weight as held up by the lacing was not a proper machine, and that the defendant knew or ought to have known it, the defendant is liable, if the accident happened while the plaintiff was in the exercise of due care."
5. The evidence of the manner in which the weight was attached to the machine, of the purposes for which it was attached, and of the effect produced by

it in the working of the machinery, being undisputed,—the court rightly ruled that it was a part of the machine within the meaning of the law that the defendant was bound to due care in furnishing suitable machines and in keeping them in proper repair.

(Bristol—Filed March 23, 1887.)

ON defendant's exceptions. *Overruled.*

Action of tort to recover for injuries sustained by the plaintiff while in the employ of the defendant corporation.

At the trial in the superior court, before Thompson, J., it appeared that the plaintiff was about fifty years old, of ordinary intelligence, and for the greater part of her life had worked in cotton mills; that the defendant corporation was engaged in the manufacture of cotton cloth, and owned and ran two large mills containing together about 100,000 spindles, and employing upwards of 1,000 hands; that the plaintiff had worked for it for upwards of seven years before the accident, and all the time on the same machine on which she was hurt.

This machine was called a slubber, and takes the ribbons of cotton as they come from the cards and railway heads and an intermediate machine, and twists them into a coarse yarn which is wound on bobbins set on the first of the machines. In order to wind this yarn on the bobbins in successive layers, and so as to make the full bobbins take from the middle towards each end, the machine is so constructed as to give the bobbins an upward and downward motion while the twisting and winding process is going on. A part of the machinery for securing this motion consists of a small grooved pulley, two or three inches in diameter, over which is a small gear which runs into a horizontal rack; and to the other end is hung a weight. This arrangement was intended to regulate the successive layers of yarn on the bobbin; and with each change in the upward and downward motion of the bobbin the rack moves about half an inch, and the weight drops about the same distance. This occurs several times a minute and continues until the bobbin is full, when the machine stops. This work is all done automatically.

The machine is about 20 feet in length and about 4 feet wide and 4½ feet high, with iron posts or stanchions on the sides, and solid iron at the ends. As the machine is constructed, the weight aforesaid hangs in sight on the back side of the machine, about 8 or 10 inches inside these posts or stanchions, and about a third of the length of the machine from the outer end, or end next the wall of the mills; at its highest point it is about a foot and a half, and at its lowest about 6 to 8 inches above the floor. Generally, standing on the floor behind the machine, there are three rows of tin cans, about 2½ feet high, which hold the ribbons of cotton, and from which the ribbons are taken by the slubber. While these stand there they would obstruct the view of the weight. These are empty more or less of the time, or are moved away to get at the machine to clean it. At the time of the accident, the plaintiff testified, the weight was at about its highest point.

There is ample room around the machine. The duty of the plaintiff was to see that the machine was kept running; to take off the full bobbins, and put on others; to notify the overseer or his subordinates if she knew there was anything wrong about the machine; and to see that it was kept clean. It appeared that on the day before the accident the plaintiff had called on the third hand to repair a belt, which he had done. The plaintiff testified that on the day of the accident she had cleaned a considerable portion of the machine at the noon-hour; that after the noon-hour she took off the bobbins, which were all full, started up the machine, and went around to the back side to finish cleaning; that she was down on the floor on her knees, near where the weight aforesaid hung, and brushing off inside the machine, which was in motion, with a brush in her left hand, and leaning on her right hand, which was on the floor, palm downward; that an extra weight, which had been hung by a rawhide lacing to a hook fastened into the chain to which the weight aforesaid hung, fell upon her right hand, in consequence of the breaking of the lacing, and injured the middle finger so that it had to be amputated, and caused the injury for which this action was brought. The hook was made of wire considerably larger than the chain to which it was fastened, and was bent up at the lower end about an inch, and remained undisturbed.

The extra weight did not come with the machine, and was not specially intended as a weight. There was testimony tending to show that this extra weight, which weighed about 15 pounds, had been used upon this machine for about two years for the purpose for which it was being used at the time of the accident; that is, of moving more rapidly the horizontal rack and the bobbins, so as to prevent the yarn from running off the bobbins. There was also testimony tending to show that the weight had been on and off during the two years, and that the machine operated successfully without it, although better with it; and on cross-examination the plaintiff testified that the weight was off for a short time some three or four months before the accident. A witness testified for the plaintiff that he saw the lacing hanging there, broken, after the weight fell, took it up and drew it through his fingers and hung it back, and that it looked rotten.

The defendant introduced testimony tending to show that the lacing was not broken; that the extra weight had hung from this hook for about two years off and on, suspended by the same rawhide lacing by which it was held when it fell; and that some four or five months before the accident the weight had been taken off by the second hand and laid on the floor, to make it easier for the plaintiff to manage the machine. It appeared that the third hand put it back a few weeks later, but it did not appear who put it on originally; there was no evidence that there had been any extra weight on this machine prior to about two years before the accident. The defendant offered to show that, as a matter of fact, the weight was not a part of the machine, but the court excluded the evidence and ruled, as matter of law, that the weight, being so used upon the machine, did constitute a part of the machine; and the de-

defendant excepted. It appeared that in the room where the plaintiff worked, and in an adjoining room, were 40 machines, or upward, similar to that on which the plaintiff worked; and that on these and other machines extra weights, similar to the one above described and for the same purpose, were used more or less, and when used were fastened in a manner similar to that adopted in this case; that the overseer of the room where plaintiff worked kept on hand, and had on hand at the time of this accident, rope and lacings, for the purpose of supplying the place of any rope or lacing that should become worn or broken. On cross-examination he stated that he had them on hand that day; and that no one had access to his desk—the place where they were kept—except the second hand; and that he was away that day and did not know that on that day and at that time there was one there. The second hand testified that he had taken none from the overseer's desk on that day; that under the overseer and second hand was a third hand, whose business it was to see that these machines were kept in repair, and who procured from the overseer or second hand rope or lacing as it was needed. The third hand had an assistant who likewise attended to repairs on these machines. If the condition of a machine or any of its parts was such that the third hand or his assistant could not make the repair, notice was given to the boss machinist, who attended to it.

The plaintiff testified that up to the time of the accident there was nothing wrong about the machine; that it was running all right up to the time of the accident; that she had no fault to find with it; that there was not anything that could be said against the machine; that it had run well all the time she had worked on it,—seven years,—with very little fixing; that she never spoke to any of the overseers about the machine needing any fixing; that she saw the weight hanging right there on the hook the whole two years; when it was put back she said nothing about its being dangerous, and was not aware that there was any danger in it, and it looked all right to run until it broke.

The plaintiff claimed that it was unsafe to suspend the extra weight by a rawhide lacing, but introduced no evidence of the strength of rawhide lacing like the one in question. The defendant claimed that the lacing was safe, and, in addition to the facts as to the length of time the extra weight had been sustained by the lacing in question, introduced evidence tending to show that such a lacing would sustain a weight of upwards of 200 pounds. The defendant's counsel, without the plaintiff's objection or exception, in the course of his argument made an experiment, by way of illustration, with a lacing similar to the one used to attach the weight, by suspending it and resting his weight upon it, under which it broke. The plaintiff claimed as a matter of right, and the court allowed it, to have the fact of this experiment made a part of these exceptions, and the defendant excepted.

The defendant asked the court to rule and instruct the jury that neither upon the plaintiff's case nor the whole case can this action be brought; that the weight formed no such part of the machine as to render the defendant liable for any injury caused by any imperfection in

the manner in which it was put on the machine; that, if the weight did form a part of the machine, and the manner in which it was put on was as obvious in all respects to the plaintiff as to the defendant, and there was nothing hidden or concealed about it, and the plaintiff worked upon and about the machine for two years and upwards without objection, she cannot now object that the weight could and should be more securely fastened; that the duty of seeing that the lacing by which the weight was put on the machine was properly secured, or was a suitable one, was a duty which the defendant could delegate to an employee, and, if it was delegated and the employee was provided with suitable means to repair or replace the lacing, then the neglect of such employee to see that the same was properly renewed or was a suitable one was the neglect of a fellow servant of the plaintiff, and the plaintiff cannot recover for any injury caused by such neglect.

The court declined so to rule, and instructed the jury substantially as follows:

The plaintiff has brought an action against the defendant, and claims that she has suffered an injury through the carelessness of the defendant, for which she is entitled to recover. In order to establish that fact, she must show that the defendant owes some duty to her which it has failed to perform, and that without any fault on her part, and through the fault of the defendant, she has suffered injury. In a case where both parties are negligent, no right of action exists. And when both parties perform their duty there is no right of action; when the plaintiff's neglect contributes to the injury, he cannot recover.

It is the duty of the master, when he undertakes to supply machinery, appliances, and instrumentalities, to use ordinary care in supplying them; and if the servant, while in the exercise of due care, is injured, the master is liable. Ordinary or due care is such care as prudent men would ordinarily take under the circumstances. The master does not warrant the strength or safety of his appliances, but that he will take ordinary precaution to make them reasonably fit or safe. If he uses ordinary care in providing them, such as prudent men ordinarily use in their business, that is all that is required of him; and that is a question for you. If the danger was unknown to the master and could not have been known by the exercise of ordinary care, he is not liable. He is not an insurer. The master is not liable for injury caused by dangerous machinery, when the servant has voluntarily assumed the risk and has as much knowledge of the danger as the master; and if he knows the condition of the machinery, he cannot recover if the accident happens from a condition of things which he knew and might have avoided. The master is bound to exercise ordinary care in the selection of his servants, and if he does not know or have reasonable cause to know that the servant is incompetent, he is not responsible even though an employee is injured by the carelessness of a fellow servant. They are fellow servants when they are engaged in a common employment, although they may be engaged on different parts of it, and the master is not liable for injury done by carelessness of another. The court here read from *Johnson v. Tow*

Boat Co. 185 Mass. 211, on what constitutes a fellow servant.

I instruct you that the weight as attached was a part of the machinery, and if the defendant knew, or might by the exercise of ordinary care have known, of the condition of the appliance, and the plaintiff did not know, and by the exercise of ordinary care could not have known, and the injury happened while the plaintiff was in the exercise of ordinary care,—the master is liable, otherwise not. If the master provides suitable appliances and competent parties to attend to it, he has done his duty. If he provides proper persons to see that the machinery is kept in proper condition to use, and the injury is caused by the negligence of the person so employed, the master is not so liable; and a person so employed to keep the machinery in repair is a fellow servant, within the rule. If you find that the machine as made and used shows no want of due care on the part of the defendant, then the defendant is not liable. If you find that the weight as tied up by the lacing was not a proper machine, and the defendant knew or ought to have known it, the defendant is liable, if the accident happened while the plaintiff was in the exercise of due care.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

Messrs. Morton & Jennings, for defendant:

The accident was due to a risk which was assumed by the plaintiff and which was within the scope of her employment. For about two years the extra weight had hung suspended inside the machine and in her sight by the same lacing. She has not the right now to object that some fastening other than a rawhide lacing would have been more secure. She chose to work with it as it was, with as full means of knowledge as to its danger or safety as the defendant.

Gibson v. Erie R. Co. 63 N. Y. 453; *Malone v. Hathaway*, 64 N. Y. 5; *De Forest v. Jewett*, 88 N. Y. 268; *Moulton v. Gage*, 138 Mass. 390; *Taylor v. Carew Mfg. Co.* 140 Mass. 150; *Russell v. Tillotson*, 140 Mass. 201; *Skipp v. Eastern Counties R. Co.* 9 Exch. 223; *Searle v. Lindsey*, 11 C. B. N. S. 429; *Ballney v. Oree*, 11 Ct. of Sess. (Sc.) 3d series, 626; *Richardson v. Cooper*, 88 Ill. 270; *Curran v. Merchants Mfg. Co.* 130 Mass. 374; *Memphis & C. R. R. Co. v. Thomas*, 51 Miss. 637; *Walsh v. St. Paul & D. R. R. Co.* 27 Minn. 367; *Sweeney v. Central Pacific R. R. Co.* 57 Cal. 15; *Michigan Cent. R. R. Co. v. Austin*, 40 Mich. 247; *Stone v. Oregon Mfg. Co.* 4 Oreg. 52; *Ogden v. Rummens*, 8 F. & F. 751.

The defendant, having furnished both materials with which to make repairs and men to attend to and make them, is not liable for their neglect, and especially in view of the fact that it is clear it was part of the defendant's own duty to assist in looking after the machines.

Johnson v. Boston Tow Boat Co. 135 Mass. 209; *McGee v. Boston Cordage Co.* 139 Mass. 445; *Floyd v. Sugden*, 134 Mass. 563; *Holden v. Fitchburg R. R. Co.* 129 Mass. 268.

Messrs. Cummings & McDonnough, for plaintiff:

It was not open to the defendant to show as

matter of fact that the weight was not a part of the machine. It was a question of law whether the weight, being used as admitted, was a part of the machine.

Pierce v. George, 103 Mass. 82; *Connolly v. Warren*, 106 Mass. 146.

Whether the place of ingress is a part of the house charged to have been broken into is a question of law for the court and not a question of fact proper to be submitted to the jury.

Conn v. Bruce, 79 Ky. 560.

The fact that the extra weight could be taken off and used elsewhere does not make it any the less a part of the machine.

Pierce v. George, 103 Mass. 82; *Cowley v. Mayor*, 6 H. & N. 565.

If the defendant had sold the machine while the weight was so attached and its use and purpose made to appear, it would be a question of law what passed by the sale, i. e. what was the construction of the contract.

Short v. Woodward, 18 Gray 86.

When the facts are found by uncontradicted testimony or by agreement, their legal effect is matter of law.

Todd v. Whitney, 27 Me. 484; *Short v. Woodward*, *supra*; *Corning v. Burden*, 15 How. 267 (56 U. S. bk. 14, L. ed. 683); 2 Bouv. L. Dict. 12th ed. *Machine*.

It is a question of law what is meant by the words "when the wall shall be completed."

Worcester Medical Inst. v. Harding, 11 Cush. 288.

Is it not also a question of law what is meant by the words, "when the machine shall be completed?"

Smith v. East Branch Co. 54 Cal. 165.

It was a question for the jury upon all the evidence whether the weight was properly suspended; whether the defendant exercised ordinary care in suspending it; whether the plaintiff was in the exercise of due care; and whether she was injured by the defendant's want of ordinary care.

Gilman v. Eastern R. R. 13 Allen, 433; *S. C.* 10 Allen, 233; *Snow v. Housatonic R. R.* 8 Allen, 441; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Ford v. Fitchburg R.* 110 Mass. 407; *Wheeler v. Wason Mfg. Co.* 135 Mass. 296; *Patrick v. Pote*, 114 Mass. 297.

Field, J., delivered the opinion of the court:

The evidence of the manner in which the weight was attached to the machine, of the purpose for which it was attached, and of the effect produced by it in the working of the machine, being undisputed, the court rightly ruled that it was a part of the machine within the meaning of the law; that the defendant was bound to exercise due care in furnishing suitable machines and in keeping them in proper repair.

There was evidence for the jury that the plaintiff was in the exercise of due care. There was evidence that she did not know, and that it was not her duty to know, that the weight was attached to the chain in an unsafe manner, or that the lacing was or had become too weak to support the weight. She knew that the weight was attached to the chain by a rawhide lacing; but it was not necessarily a part of her duty to decide whether this was a suitable

or safe means of hanging the weight, and she may have known nothing of the strength of rawhide lacing.

The difficulty in the case arises from the refusal of the court to give to the jury the last instruction requested by the defendant. It is the duty of the master to exercise due care in employing competent servants, in providing suitable machines, and in keeping them in proper repair; and the master cannot wholly escape responsibility by delegating these duties to a servant. If this could be done, a master might escape all responsibility by employing a competent superintendent to perform all these duties. But there are defects in machinery which are of such a character that the master has been held to have performed his duties if he furnished suitable materials and employed competent servants, and instructed them to keep the machinery in repair; although the servants neglect to make the repairs, or make them in an improper manner. The master must exercise a reasonable supervision over the manner in which his business is done; but the repairs which machines properly constructed require to keep them in running order may be entrusted to competent servants. They are regarded as incidental to the use of the machines, because they are such as machines in substantially good repair must, from time to time, need.

Perhaps the whole question is whether the master has exercised reasonable care in employing competent servants, in providing suitable machines and implements, and in doing that part of his business which he has undertaken to do himself, and has exercised a reasonable supervision over his servants in the performance of the duties which he has entrusted to them. This is often a question for the jury. Courts have therefore held that they could not say, as matter of law, that a master was not responsible for injuries occasioned by defective machinery, when the defect was substantial and rendered the machine unfit for use, although it was through the neglect of a competent servant that the machine had not been repaired; and they have also held that when the defect was one that must frequently arise from the use of the machine, and was such that the person employed to superintend the use of the machine should attend to in order to keep it in running order, the master performed his whole duty by furnishing suitable materials and employing competent servants to keep the machinery in repair. These decisions have been made in cases where it appeared that the defect in the machinery was unknown to the master. The general question is, What, under the circumstances, ought the master reasonably to have known and done? and in determining this, the nature of the defect, the length of time it has existed, and the means taken to remedy it, are important facts. In the present case the court instructed the jury that the person employed to keep the machine in repair was a fellow servant with the plaintiff, and that "if the master provides suitable appliances and competent parties to attend to them, he has done his duty. If he provides proper persons to see that his machinery is kept in proper condition to use, and the injury is caused by the negligence of the persons so employed, the master is not lia-

ble." These instructions comprise, substantially, all that is contained in the instruction requested, except that they require that the servants be competent and that the appliances furnished be suitable. If there was no evidence that the servants of the defendant were incompetent,—and we are not certain that all the evidence on this point is contained in the exceptions,—still, the defendant did not specifically call the attention of the court to this or ask any ruling upon it, and it was for the jury to say whether the rawhide lacings furnished were proper appliances, and whether the defendant had used due care in furnishing proper appliances. The court then instructed the jury: "If you find that the weight as held up by the lacing was not a proper machine, and that the defendant knew, or ought to have known it, the defendant is liable if the accident happened while the plaintiff was in the exercise of due care." This instruction required the jury to find whether the rawhide lacings furnished were proper appliances, or whether the particular lacing used was defective, and whether the defendant knew it, or ought to have known it. The defendant asked for no further instructions upon the nature of the facts, or the circumstances upon which the jury might find that the defendant ought to have known that the machine was defective. If the master knew, or under the circumstances ought to have known, that a machine in use was out of repair, and dangerous, it was his duty to see that it was put in proper repair, or to warn those using it of that danger if they were ignorant of it. *Holden v. Fitchburg R. R. Co.* 129 Mass. 268; *Johnson v. Boston Tow Boat Co.* 135 Mass. 209; *McGee v. Boston Cordage Co.* 189 Mass. 446; *Spicer v. South Boston Iron Co.* 188 Mass. 426; *Hough v. Texas & P. R. R. Co.* 100 U. S. 213 [Bk. 25, L. ed. 612]; *Ford v. Fitchburg R. R. Co.* 110 Mass. 240; *Snow v. Housatonic R. R. Co.* 8 Allen, 441; *Ellis v. New York, L. E. & W. R. R. Co.* 95 N. Y. 546; *Pantear v. Tilly Foster Iron Min. Co.* 99 N. Y. 368; *Benzing v. Steinway*, 101 N. Y. 547.

The exceptions must be overruled.

Mary J. EATON

v.

PACIFIC NATIONAL BANK.

1. A subscriber to a proposed increase of the capital stock of a national bank is compelled to pay the subscription before the final action of the comptroller of the currency approving or disapproving of the increase, in order to become entitled to any part of the new stock. Within the maximum of the increase of capital stock provided for by the articles of association, the comptroller cannot determine the amount of the increase, except by approving or refusing to approve the amount authorized to be paid, and actually paid, into the bank. A subscriber to the proposed increase of stock does not run the risk that if it is all paid in, the comptroller may, without any further action of the bank or of its direc-

tors, reduce the amount of the increase; because the comptroller has not the lawful power to do this.

2. Upon the failure to receive subscriptions to the full amount of the proposed increase, a vote of the directors, which in form is a reduction of the capital stock by the amount which the subscription falls short of the increase proposed, but which is in fact a vote authorizing the increase of the capital stock to the amount actually subscribed and paid in, will not render a subscriber who has paid her money under the original proposal, but has not accepted a certificate, a stockholder in the association; nor will the certificate of the comptroller of the amount of the increase in the capital stock of the bank, and that this amount has been actually paid in, make one a shareholder who is not one, or enable the bank to appropriate to a payment for the stock, a debt it owes on account of such payment upon the proposed increase which has failed, or to treat one who has thus become one of its creditors as a stockholder. Where the proposed increase was voted September, 1881, and the attempt to appropriate the subscriptions to a proposed increase of a less amount was made December 13, 1881, the subscriber to the original proposal who demanded the return of her money on January 10, 1882, will not be guilty of laches.

(Suffolk—Filed March 23, 1887.)

ON report. *Judgment for plaintiff.*

Action of contract to recover \$4,000. Heard in the supreme court, before W. Allen, J., who found the facts substantially as given below and reported the case for the consideration of the full court.

September 13, 1881, the capital stock of defendant bank was \$500,000, divided into 5,000 shares, of which plaintiff owned 40 shares, standing in her name on the books of the bank. On that day the directors of defendant voted "that the capital of this bank be increased to \$1,000,000, and that the stockholders of this date have the right to take the new stock at par, to an equal amount to that now held by them;" and a notice of that date was sent to and received by plaintiff. The notice, signed by the president and cashier, contained only a recital of the vote and the following: "Subscription to new stock payable October 1. Parties desiring to anticipate payment will be allowed interest to that date at 4 per cent per annum."

September 28 plaintiff paid to the bank the sum of \$4,000 "on account of subscription to new stock."

Only \$461,300 of the proposed increase of \$500,000 was taken or paid in, all of which was paid prior to November 18, and was used in the general business of the bank with its other funds. November 18 the bank failed, and the national bank examiner took full possession and closed the doors; in which condition the bank remained until March 18, 1882. Decem-

ber 13, 1881, the directors voted that the \$38,700 of the proposed increase of its capital, which had not been taken be canceled, and that the comptroller of the currency be notified that the capital had been increased in the sum of \$461,300, which had been paid in as a part of the capital. Such certificate was sent to the comptroller by the cashier on the same day; and on December 16, the comptroller, on the basis of such certificate, certified that the capital had been increased in the sum of \$461,300, and that such increase had been paid in as a part of the capital and was approved by him; and at the same time the comptroller notified the bank that its entire capital stock, amounting, as the notice from him assumed, to \$961,300, had been lost, and that unless such loss was repaired by an assessment of 100 per cent upon the shareholders within three months, or the bank went into liquidation, a receiver would be appointed to close up its business.

Up to this time nothing had been done with reference to the plaintiff's payment of \$4,000 on account of subscription to stock in the proposed increase of \$500,000, except to take her money and apply it to the general uses and purposes of the bank. She was not notified of the vote of the directors on December 13, to cancel a portion of the proposed increase, or of the certificate of the comptroller. And she was not notified of, nor did she assent to, any change in the proposed increase. But when said certificate and communication were received from the comptroller, the name of the plaintiff was, without her knowledge, registered in the stock register of the bank as the owner of 40 shares in said claimed increase of \$461,300. A certificate of said 40 shares was made in her name, without her knowledge, which was dated back to October 1, 1881, and which still remains in the certificate book, never having been called for by or tendered to the plaintiff.

January 10, 1882, the plaintiff demanded payment of said \$4,000, on the ground that the conditions upon which the defendant received it had not been performed. On the same day, after this demand was made, the annual meeting of the defendant was held, which the plaintiff attended by her proxy, authorized specially to act only upon the 40 shares of stock which the plaintiff owned in the original capital; but her proxy did not vote upon any stock.

March 14, 1882, the plaintiff brought this suit to recover the \$4,000. March 18 the directors, by permission of the comptroller of the currency, took possession of the assets of the bank and resumed business. May 20, 1882, the bank again suspended business, the directors voted to go into liquidation, and a receiver was appointed by the comptroller.

Mr. J. H. Benton, Jr., for plaintiff:

A stockholder to the original capital of a corporation is not, in this Commonwealth, liable upon his subscription unless the whole amount of the capital is subscribed.

Cabot & West S. Bridge v. Chapin, 6 Cush. 50.

But if a subscriber to the original stock of a national bank is, under the United States law, liable upon his subscription although the whole amount is not subscribed, such is not the case with reference to a subscription to a proposed increase of capital. An increase of the capital

of a national bank depends on a compliance with the conditions of the Act of Congress and articles of association, not on any arrangement between the bank and its shareholders or other persons.

U. S. Rev. Stat. § 5142; *Charleston v. People's Nat. Bank*, 5 Rich. (S. C.) N. S. 103, 115.

To create an increase in the capital of the defendant corporation it was necessary, first, that the directors should vote to increase the shares to a certain number within the limit provided by the articles of association; second, that the increase of shares thus voted should be all subscribed and paid for; third, that the comptroller of the currency should certify his approval of such increase, and that it had been duly paid in as a part of the capital. Until these three things were all done, no shares in any proposed increase could exist.

Stockholders in national banks are individually responsible for all contracts, debts, and engagements of the bank, to the extent of the amount of their stock therein at its par value.

U. S. Rev. Stat. § 5151.

The attempted application by the defendant of the plaintiff's money to the payment for 40 shares in an increase of 4,613 shares, instead of the payment for 40 shares in an increase of 5,000 shares, was really an attempt to make her take 43 shares when she had only agreed to take 40.

People's Ferry Co. v. Balch, 8 Gray, 303, 314; *Katama Land Co. v. Jernegan*, 126 Mass. 155.

It is not necessary in this case to consider whether the assumed *post mortem* increase of 4,613 shares was valid or not, for it was not the increase of capital in which the defendant agreed to give the plaintiff 40 shares for her \$4,000.

Morrison v. Price, 23 Fed. Rep. 217; *Delano v. Buller*, 118 U. S. 634 (Bk. 20, L. ed. 260).

These cases really support the plaintiff's contention here, by putting the liability of the defendants in them upon the ground that they are estopped to say the increase in which they voluntarily and knowingly took shares was not the increase in which they had agreed to take them.

It seems necessary to say that the certificate of the comptroller could not change the nature of the contract between the plaintiff and defendant. If the contract was to take shares in an increase of 5,000 shares, the plaintiff was not bound to take shares in any other increase because it was made and the comptroller approved it.

Mr. A. A. Ranney, for defendant:

A certificate of stock is only evidence of ownership, and is not the stock itself. It was for the plaintiff to call for it, and not for the defendant to tender the same.

1 Morawetz, Corp. §§ 56, 148, and notes.

The money appears to have been paid voluntarily, and without accident, fraud, or mistake.

It was paid for the quota of the new stock to which the plaintiff was entitled, and which she consented verbally to take; and the receipt uncontrolled so shows. The money cannot therefore be recovered back.

Nutter v. Lexington & W. C. R. R. Co. 6 Gray, 85.

The money was demanded back on the express ground that the conditions had not been 2 Mass.

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complied with, whereas there were no conditions.

In case of an authorized increase of capital stock, the subscriber is liable to pay without respect to the number of shares taken.

1 Morawetz, Corp. § 142, note; *Nutter v. Lexington & W. C. R. R. Co. supra*; *Clarke v. Thomas*, 81 Ohio St. 46.

In order to hold those subscribing, it was not necessary that all the increase first proposed should be taken.

Chubb v. Upton, 95 U. S. 665 (Bk. 24, L. ed. 523), approving *Rensselaer & W. Plank Road v. Westel*, 21 Barb. 56; *Nutter v. Lexington & W. C. R. R. Co. supra*.

When the plaintiff proceeded to take the quota of stock to which she was entitled by law and the vote, she was bound to contemplate, and must be held to have contemplated, the existing contingencies including just what happened.

The payment of the money and the subscription evidenced by the receipt being without condition, none can be attached to them now.

Morgan County v. Allen, 108 U. S. 498 (Bk. 26, L. ed. 504); *Boston & A. R. R. Co. v. Pearson*, 128 Mass. 445; *Nutter v. Lexington & W. C. R. R. Co. supra*.

It is not enough to say that the plaintiff supposed or understood that the increase of capital stock first voted (\$500,000) would be taken and paid for, and the capital fixed at \$1,000,000.

The new stock was valid.

U. S. Rev. Stat. § 5142; *Charleston v. People's Nat. Bank*, 5 Rich. (S. C.) N. S. 103.

The certificate of the comptroller was conclusive as to the validity of the increase of the capital stock.

Casey v. Galli, 94 U. S. 679 (Bk. 24, L. ed. 168, 307); *Cadle v. Baker*, 20 Wall. 650 (87 U. S. bk. 23, L. ed. 448); *Kennedy v. Gibson*, 8 Wall. 498 (75 U. S. bk. 19, L. ed. 476); *Germania Nat. Bank v. Case*, 99 U. S. 628 (Bk. 25, L. ed. 448), confirmed in *U. S. v. Knox*, 102 U. S. 426 (Bk. 26, L. ed. 216).

No irregularity in the proceedings is available.

Chubb v. Upton, supra; *Upton v. Tribilcock*, 91 U. S. 45 (Bk. 23, L. ed. 203); *Pullman v. Upton*, 96 U. S. 328 (Bk. 24, L. ed. 818); *Scovill v. Thayer*, 105 U. S. 143 (Bk. 26, L. ed. 968).

The registry was conclusive as to ownership.

U. S. Rev. Stat. § 5210; *Iron v. Massachusetts Nat. Bank*, Reporter, July, 1886, p. 69; *Davis v. Essex Baptist Soc.* 44 Conn. 582; *Johnson v. Laffin*, 108 U. S. 800 (Bk. 26, L. ed. 532).

The directors, not being able to dispose of the privilege of subscribing, when the old stockholders failed to take all of the new stock first proposed, saw fit to change the amount of the increase to the sum actually taken. They were made the agents of the stockholders in the premises, and the action taken was binding.

Swayer v. Hoag, 17 Wall. 610 (84 U. S. bk. 21, L. ed. 731).

The ratio of interest was the same in either event, and the difference in the amount was inconsiderable.

The capital stock is a trust fund; and the rights of the creditor are such that neither fraud nor irregularity, as between the bank and the stockholders, will avail as a defense to a suit to recover the same.

Scovill v. Thayer, supra; *Ogilvie v. Knox Ins.*

Co. 22 How. 380 (63 U. S. bk. 16, L. ed. 349); Upton v. Tribilcock, 91 U. S. 47 (Bk. 23, L. ed. 203); Chubb v. Upton, supra; Payson v. Withers, 5 Biss. 269; Oakes v. Turquand, L. R. 2 H. L. 325; Stone v. City & C. Bank, 3 C. P. Div. 307; Wright's Case, L. R. 7 Ch. App. 60; Henderson v. Royal B. Bank, 7 El. & Bl. 356; Daniel v. Royal B. Bank, 1 H. & N. 681; 2 Morawetz, Corp. §§ 839, 840, notes; Sanger v. Upton, 91 U. S. 56 (Bk. 23, L. ed. 220); Hatch v. Dana, 101 U. S. 205 (Bk. 25, L. ed. 885).

If such is the law relating to suits to recover on a subscription, *a fortiori* the doctrine should apply to a suit brought to get back the money paid as capital.

When the money was demanded back, the bank had failed, and the rights of the creditors had attached.

The money paid was the basis of the approval and certificate of the comptroller, and the registry is what the creditors as well as the comptroller had a right to rely on.

The questions raised are Federal questions; and we ask for a decision with such steps taken as will enable the suit to be carried to the United States Supreme Court, if there is occasion for it.

Field, J., delivered the opinion of the court:

This is an action of contract brought in the superior court, and by the defendant removed to this court, where it was tried without a jury and reported to the full court. When the action was brought, the bank was not in the hands of a receiver; and the receiver, afterwards appointed, has not formally intervened or appeared in the suit, but it was understood at the argument that the action was defended by him, and that he desired that it should be prosecuted for the purpose of determining the liability of the bank. See *Bank of Bethel v. Palquique Bank*, 14 Wall. 388 [81 U. S. bk. 20, L. ed. 840].

The case was reserved for the consideration of the full court, presumably under Pub. Stat. chap. 150, § 8. The facts have been found; and although the questions of law have not been stated in the report, it is plainly the intention of the report to reserve the question of law; whether on the facts found, or such of them as are competent, judgment should be entered for the plaintiff or defendant. We are of opinion that the reservation is within the power conferred by this section of the statutes, and we consider the case as if it were reserved for judgment upon the facts found, which are in the nature of a special verdict. See *Terry v. Brightman*, 129 Mass. 535.

By the articles of the banking association, "the capital may be increased, according to the provisions of section 5142, of the Revised Statutes, to any sum not exceeding \$1,000,000," and the board of directors shall have power "to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made. The vote of the directors of September 13, 1881, to increase the capital stock to \$1,000,000, which was an increase of \$500,000, and the subsequent vote of December 13, 1881, to increase the capital stock by \$481,900 instead of \$500,000, were therefore within the power of the board.

The case raises a question which was suggested but not decided in *Delano v. Butler*, 118

U. S. 634 [Bk. 30, L. ed. 260]. It was there said, at page 650: "It will be observed that without waiting to see what the future action of the association and the comptroller of the currency might be on the question of the ultimate amount of the increased stock, the plaintiff in error paid for his shares and accepted his certificate. This he did, in legal contemplation, with knowledge of the law which authorized the association and the comptroller of the currency to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors; and such payment and acceptance of the certificates in accordance therewith might amount under such circumstances, on his part, to a waiver of the right to insist that he should not be bound unless the whole amount of the proposed increase should be subscribed for and paid in. But, without insisting upon that point or deciding it, we think that the subsequent conduct of the plaintiff in error amounts to a ratification," etc. In the present case the plaintiff paid in her money, but did not accept a certificate of stock.

To make the increase of the capital stock valid, it must be authorized in accordance with the articles of the association; the whole amount of it must be paid in; notice thereof must be transmitted to the comptroller, and he must certify "that it has been duly paid in as part of the capital of such association," and must approve of it. U. S. Rev. Stat. § 5142. The plaintiff therefore was compelled to pay in her money before the final action of the comptroller in order to become entitled to any part of the new stock. Within the maximum of the increase of capital stock provided for by the articles of association, the comptroller could not determine the amount of the increase except by approving, or refusing to approve the amount authorized by and paid into the bank. The united action of the bank, or its directors, of the subscribers to the new stock, and of the comptroller were required to effect an increase of the capital stock; and when the plaintiff paid in her money, she ran the risk that the contemplated increase of \$500,000 might fail, either because it might not all be subscribed for and paid, or because the comptroller might refuse his approval; but she did not run the risk that if it were all paid in, the comptroller might without any further action of the bank, or its directors, reduce the amount of the increase, because he had not the lawful power to do this. If the comptroller refused his approval, the plan failed. The directors, by a new vote, might authorize another and a different increase of the capital stock, which, if the amount was paid in and the comptroller approved of it, would become an actual increase of capital stock. But this would be an abandonment of the first plan by the bank, and the adoption of another.

Upon the ordinary principles of contract, if the plaintiff paid in her money for 40 shares on the condition that 5,000 shares of stock should be created, she could not be bound to take the 40 shares if the condition was not performed. If there was such a condition, the plaintiff could not be required to take 40 shares if the condition was not performed. If there was such a condition, the plaintiff could not be re-

quired to take 40 shares out of 4,613 shares which the bank by a subsequent vote authorized, unless there is something in the facts which shows that the amount of stock to be created was immaterial; or unless she assented to the change, or her assent is to be implied; or unless, on grounds of public policy and the rights of creditors, she cannot be permitted to withdraw her money after the comptroller has certified that a certain amount has been paid in for an increase of the capital stock, which amount included the sum she had paid.

Whether the plaintiff shall become the owner of 40 out of 4,163 shares cannot be regarded as immaterial; particularly in a corporation where the stockholders are liable to an assessment, to the amount of the stock held by each, to supply a deficiency in the capital stock (U. S. Rev. Stat. § 5203), and are also held "individually responsible, equally and ratably, and not one for the other, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein at the par value, in addition to the amount invested in such shares." U. S. Rev. Stat. § 5151. Neither can we perceive any sound reason why, in legal contemplation, she must be held to have assented to the change whereby the amount of the contemplated increase was reduced to \$461,300. She paid in her money under a vote whereby the capital stock was to be increased by \$500,000. If this amount was not paid in, or the comptroller did not approve of this increase, there was an end of the proposition which had been voted, and which she and the bank had in contemplation when she paid in her money. If the directors of the bank, after she paid in her money, abandoned their original vote and passed another vote for an increase different in amount, it is difficult to see how she was bound by it. They were not her agents; the new vote was not passed in furtherance of the original proposition to make the increase \$500,000; the vote was not a reduction of the capital stock of the bank, because the increase had not then been made, and the capital stock of a banking association can only be reduced by a vote of the shareholders. U. S. Rev. Stat. § 5143. To make the increase of the capital stock \$461,300 instead of \$500,000, was essentially a new proposition, authorized for the first time on December 13, 1881, nearly two months and a half after the plaintiff paid in her money.

On the facts found, the intention of the directors and the comptroller is apparent. The bank failed November 18, 1881; and, before this, \$461,300 had been paid into the bank for new stock to be created under the vote passed September 13, 1881. It was not likely that any more money would be paid in for this purpose after the failure of the bank. The bank had received this money and had used and lost it. On its failure, a bank examiner took possession of the bank and its assets, and remained in possession until March 13, 1882. While its assets were in the possession of the bank examiner, it was decided to make this \$461,300 a part of the capital stock of the bank; it would then cease to be a debt of the bank, and the creditors of this sum, having thus been made stockholders, would then be liable to an assessment to an equal amount to supply the deficiency of cap-

ital stock, and would also be liable to pay another equal amount to satisfy the debts of the bank. The directors accordingly passed the vote of December 13, 1881, which in form is a reduction of the capital stock by the sum of \$38,700; but in fact is a vote authorizing the increase of the capital stock by \$461,300; and they attempted to apply the money paid in under the previous vote to this new increase which they had voted, and then voted that the comptroller of the currency be notified that the capital had been increased by this sum, and that the whole amount had been paid in; and they requested the comptroller to issue his certificate. The cashier on the same day sent to the comptroller a copy of the foregoing votes and his certificate that the capital had been increased by the sum of \$461,300, all of which had been paid in. The copy of the votes sent to the comptroller informed him that the attempt to obtain \$500,000 for an increase of the capital stock had failed; and because it had failed, that the directors had fixed the amount of the increase at \$461,300, and had declared the money paid in under the previous vote as paid in for the new stock voted on December 13. The comptroller of the currency, on December 16, 1881, issued the usual certificate approving of "said increase of capital stock" to the amount of \$461,300; and on the same day sent to the bank a notice that its entire capital stock, including the increase he had just then approved, having been lost, an assessment of 100 per cent must be laid upon the shareholders; otherwise the bank must go into liquidation or a receiver must be appointed, according to U. S. Rev. Stat. § 5234.

It is argued that the certificate of the comptroller is conclusive on the plaintiff that the sum of \$461,300 was actually paid in as an increase of capital stock, and that this includes the amount she paid. Undoubtedly the public, in dealing with the bank, do rely to some extent upon the certificate by the comptroller of the amount of the increase in the capital stock of the bank, and that this amount had been actually paid in; and so long as the certificate remains unrevoked, it may be taken to establish the amount of the capital stock of the bank. If the certificate happens for any reason to be false, it is probable that an assessment could be laid upon the shareholders to make up the deficiency in the capital stock. But that the certificate of the comptroller makes anyone a shareholder who is not one, or enables the bank to appropriate a debt it owes to a payment for stock, or to treat one of its creditors as a shareholder, is a proposition to which we cannot assent. The obligation of the plaintiff to take the new shares depends upon her contract with the bank. If we assume that, immediately after the vote of December 13, 1881, the plaintiff could have treated the original vote as abandoned, and could have demanded her money, and brought and maintained an action to recover it,—the action of the directors and of the comptroller in erroneously including the amount she had paid in the amount which had been paid in to increase the capital stock by \$461,300, cannot affect her legal relations with the bank unless she has assented to or ratified that action, or is estopped by her conduct, or has been guilty of laches.

As she demanded payment on January 10, 1882, of the money she had paid, she is not guilty of laches; and it is not contended that there is any estoppel; and it is plain that there is no evidence of actual assent or ratification.

The defendant denies that it was the contract between it and the plaintiff that she should receive 40 shares out of 5,000 shares of new stock; and says that the contract was that she should receive 40 shares of new stock, and that there was no condition attached to the contract that the capital stock should be increased by \$500,000. This objection is fundamental. The plaintiff did not subscribe for stock, but paid in her money in pursuance of the vote of September 13, 1881, and she took a receipt. There is no express condition; but construing the receipt in connection with the vote, it is plain that she paid in her money for 40 shares of the new stock voted on September 13.

In *Warwick R. R. Co. v. Cady*, 11 R. I. 131, 137, it is said: "If the charter had provided for a definite capital, or if, by the general law, provision had been made that the enterprise should not be commenced until some definite proportion or amount should be subscribed, * * * or if, before subscription, the capital had been fixed by vote or agreement, then it might well be held that the raising the whole amount was a condition of the subscription. And so also if the amount was named in the paper subscribed." This statement of the law is supported by our own decisions and many others. *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Troy & G. R. R. v. Newton*, 8 Gray, 596; *Atlantic Cotton Mills v. Abbott*, 9 Cush. 423; *People's Ferry Co. v. Balch*, 8 Gray, 308; *Cabot & West Springfield Bridge v. Chapin*, 6 Cush. 50; *Central Turnpike v. Valentine*, 10 Pick. 142; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. 23; *S. C. 9 Pick. 187*; *Read v. Memphis G. G. Co.* 9 Heisk. 545; *Santa Cruz R. R. Co. v. Schwartz*, 53 Cal. 106; *Hughes v. Antietam Mfg. Co.* 34 Md. 316; *Ridgefield & N. Y. R. v. Brush*, 43 Conn. 86; *Ticonic Water Power & Mfg. Co. v. Lang*, 68 Me. 480; *Leveys Island R. R. Co. v. Bolton*, 48 Me. 451; *Pitchford v. Davis*, 5 M. & W. 2; *Altman v. Havana, R. & E. R. R. Co.* 88 Ill. 54; *Memphis Br. R. R. v. Sullivan*, 57 Ga. 240; *Peoria & R. I. R. R. Co. v. Preston*, 85 Iowa, 115; *Contocook Valley R. R. Co. v. Barker*, 32 N. H. 363; *Pierce v. Jersey Water Works Co.* L. R. 5 Exch. 209; *Norwich & L. Nav. Co. v. Theobald*, 1 Moody & M. 151.

If, however, the amount of the capital stock is left indefinite or the maximum and minimum of the amount only are defined, with the right in the corporators or directors subsequently to determine the amount, a subscription to stock must be deemed absolute unless there is an express condition inserted in the subscription, or unless a sufficient amount is not subscribed to enable the corporation legally to organize. *Boston, B. & G. R. R. Co. v. Wellington*, 113 Mass. 79; *Penobscot & K. R. R. Co. v. Bartlett*, 12 Gray, 244; *Boston & A. R. R. Co. v. Pearson*, 128 Mass. 445.

A subscription to an increase of capital stock manifestly differs from a subscription to the original stock in this: That the subscriber is dealing with a corporation already organized and doing business, and it has been said that there is no implied condition that the whole

number of the new shares created should be subscribed for or issued. But whether there is an implied condition attached to a subscription for new stock depends upon the contract of subscription, construed with reference to the law and the facts under which it is made; and this is to be determined in the same manner and upon the same principles in subscriptions for new stock as in subscriptions for original stock. In the common case of a corporation authorized to create new stock by a vote of its stockholders or directors, the stock is created by the vote. In the absence of any statute prescribing how it shall be disposed of, it may be allotted among the stockholders or it may be sold from time to time as the corporation needs money. It may be sold by subscription, and the stockholders may be entitled to a preference in subscribing, and they may sell their rights. If the law requires that the new stock be paid for at par before it is issued, this must of course be done; but unless a statute or by-law requires that the new stock shall all be subscribed for before it is created or issued, there is no implied condition that all the stock created shall be subscribed for or issued. The increase of the capital stock is fixed by the vote, and the corporation is left to dispose of the new stock as it can according to law. *Nutter v. Lexington & W. C. R. R. Co.* 6 Gray, 85.

But in the case at bar the provisions of the statutes of the United States relating to an increase of the capital stock are even more strict than those relating to the original stock. An association may be authorized to commence business when 50 per cent of the capital stock has been paid in. U. S. Rev. Stat. § 5140. But there can be no increase in the capital stock until the whole amount of the increase has been paid in. U. S. Rev. Stat. § 5142. The vote of the directors of September 13, 1881, was, we think, in the nature of a proposal to the stockholders to subscribe for 5,000 shares of new stock and to pay in for it \$500,000. The stock must all be taken and the money paid in before the new stock could be created. It was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the comptroller should certify that they had been done and approve of the increase. We think that the plaintiff paid in her money upon the implied condition that she should not be entitled to new stock unless \$500,000 was paid in and the comptroller approved of the increase, and also upon the implied condition that she should not be required to take new stock unless the amount proposed was created.

The result is that the plaintiff is entitled to judgment for \$4,000, with interest from January 10, 1882, the date of her demand.

So ordered.

Thomas BLANCHARD

v.

William A. COOKE et al.

1. After a defendant has appeared and the bill has been taken as confessed against him for want of an answer, he still has a right to be heard upon the

form of the decree, and to appeal therefrom.

2. **Where, after the commencement of a suit to enforce a contract-right to chattels, the defendant goes into insolvency, his assignee in insolvency (taking all the property which was the subject-matter of the suit) should be made a party thereto, even after a decree *pro confesso* against the original defendant; and such assignee is entitled to try the case upon the merits on his answer.**
3. **The effect of admitting the assignee to defend the suit on its merits is to suspend, if not actually vacate, the decree *pro confesso* against the insolvent.**
4. **In such a case, the assignee is not so far in privity with the insolvent that a decree against the latter would be conclusive upon the assignee.**
5. **A contract of sale of a stock of goods delivered to the vendee, providing that the vendee may manage and sell the same as a retail dealer, and that, for the security of the vendor, the legal title shall remain in him until the price is paid, and that the vendor shall be the legal owner of a fractional part of all goods in the vendee's store, which shall bear the same proportion to the unpaid purchase price of the particular goods sold by said vendor as the whole amount of goods should then bear to said unpaid purchase price,—is not a legal mortgage either of the goods bought of said vendor or subsequently bought by said vendee from other persons, but is a covenant for a fractional interest in the goods; and said vendor, the plaintiff herein, having taken possession of the goods in vendee's store,—*Held*, that his interest therein was to be determined by ascertaining the amount due him when he took possession, with interest according to the rule in case of partial payments.**
6. ***Held also*, that the covenant that the plaintiff should be the legal owner of said fractional part of goods subsequently bought by defendant from other parties, as well as of the goods bought from plaintiff, is inoperative to transfer the title to such after-acquired goods to plaintiff, as against an attaching creditor or the assignee in insolvency of the defendant, if plaintiff had not first taken possession.**
7. **The principle that a chattel mortgage is not void as matter of law because it permits the mortgagor to remain in possession and sell the goods in the ordinary course of business,—applied to the contract in suit.**
8. **An assignee in insolvency is not one of the "parties" within the meaning of the statutes providing that, unless a chattel mortgage is recorded or the property delivered to the mortgagee, "the mortgage shall not be valid against any person other than the parties thereto," etc.**

2 Mass.

9. **The limitation of time within which a chattel mortgage must be recorded to make the record effectual does not apply to the time within which mortgaged property must be delivered to and retained by the mortgagee, if the mortgage is unrecorded; and it is sufficient if the property is delivered to and retained by the mortgagee before the rights of third parties have attached.**
10. **In the case of informal instruments giving a right to chattels, not recorded and not technically mortgages (and, it seems, in the case of mortgages also), when the chattels are acquired and are identified by the terms of the instrument, the title passes as between the parties; and a possession rightfully obtained by the transferee (or mortgagee) and retained by him, vests the title in him as against third persons (including an assignee in insolvency) whose rights had not attached before possession taken; and delivery by the transferor (or mortgagor) is not necessary.**

(Worcester—Filed March 23, 1887.)

ON report.

Bill in equity to enforce an agreement. Heard in the superior court before Aldrich, J., who found the facts substantially as stated below. Both parties excepted to the rulings of the court and appealed from the decree as ordered, and the court reported the case to this court. *Cause remanded.*

Statement by Field, J.

This is a bill in equity brought against Cooke on December 4, 1884, and it alleges, among other things, that the parties on July 12, 1883, made the contract annexed to the bill; that the defendant then took possession of the stock of goods sold to him, and carried on business as a retail dealer in dry goods in the store where the goods were; that he bought other goods and mingled them with the original stock, and paid the plaintiff something of what was due him under the contract, but that about \$11,500 remained unpaid. It also alleges that the defendant had broken the contract; and that the plaintiff on November 28, 1884, took possession of all the goods in the store, "and claims the title aforesaid thereto, and the right to hold the same as a pledge and as security for his said debt, as provided in said contract, and in trust for the purpose of having the same applied to the payment of the said debt to him;" and that the plaintiff "believes that the defendant is largely indebted to other creditors, and is unable to pay his debts, and refuses to consent to any release of his rights" in the goods; and that, if the right to any fractional part of the goods has vested in the defendant, the defendant has money in his hands and accounts due him from the sales of the goods, not returned or accounted for to the plaintiff, and belonging to him under said contract, to a larger amount in value than the value of any interest the defendant has. The prayer is for an account, for an injunction restraining the defendant from transferring his interest in the goods, and for a receiver to take possession of the goods, to sell

them, and to distribute the proceeds according to the rights of the parties. An injunction was issued and a receiver appointed, who has sold the goods and paid the net proceeds, about \$13,000, into court. The defendant appeared, and on December 16, 1884, filed what is called a cross-bill. Afterward, other persons claiming to be creditors of the defendant and to have attached the goods were permitted to intervene.

On January 26, 1885, the plaintiff filed a supplemental bill, alleging that the defendant Cooke had money in his possession derived from the sale of the goods, which he intends to convert to his own use; that he has outstanding accounts for goods which have been sold, and that he intends to collect these accounts, and to apply the money collected to his own use; and that certain persons claim to be creditors of Cooke and to have an interest in the goods: and he prays that Cooke be ordered to deliver any money he has collected to the receiver, and to deliver to the receiver his books of account; that the receiver be authorized to collect these accounts and hold the proceeds subject to the order of the court; and that the creditors who have not already appeared, and whose names are given, be summoned to answer the bill as parties defendant. On April 1, 1885, these creditors, having appeared, filed their answer, and among other things alleged that, since filing the bill, Cooke had been adjudged an insolvent debtor by the Court of Insolvency for the County of Worcester. On November 4, 1885, the plaintiff filed a motion alleging that Cooke had been duly adjudged an insolvent debtor, and that George P. Staples had been duly appointed assignee in insolvency and had accepted the trust; and he prays that the assignee be made a party, and be ordered to file an answer, or have the bill taken as confessed against him. The motion also states that Cooke, although he has appeared, has not filed an answer, and prays that the bill may be taken as confessed against Cooke. On December 26, 1885, the court entered a decree that the bill be taken as confessed against Cooke, and that the plaintiff have leave to withdraw so much of his motion as relates to the assignee in insolvency. On the same day, after the bill was taken as confessed against Cooke, he filed a motion for leave to file an answer, on which no order appears to have been made. On January 11, 1886, a final decree was entered, which declared that the defendant Cooke, under the contract, was indebted to the plaintiff in the sum of \$12,512.30 and interest; that the legal title to the goods was, at the time of filing the bill, in the plaintiff, with the right to hold the same and to apply the proceeds thereof to the payment of said debt: and it ordered that this sum, with costs, be paid to the plaintiff from the funds now in the hands of the clerk; that the bill and supplemental bill be dismissed as to all the defendants except Cooke; that the cross-bill be dismissed without costs, and "that in case said sum in the hands of the clerk shall not be sufficient to satisfy said debt and costs, execution shall issue for the balance against said Cooke in favor of the said Blanchard." On January 15, 1886, Cooke appealed from this decree, and on January 23 George P. Staples, as assignee, filed a motion that the decree be vacated and that he be allowed to file his answer in the suit;

and on February 9, 1886, Staples, as assignee, claimed an appeal from the decree. On January 12, 1886, Staples, as assignee, filed a petition alleging that Cooke was an insolvent debtor, and that he was the assignee of his estate, and "that the title to a large part of the assets of said Cooke is involved in said suit, and that the same is claimed by your petitioner as assignee of said Cooke;" and he asked that the final decree and the order taking the bill for confessed as against Cooke be vacated, and he be permitted to come in, file his answer, and defend the suit, as assignee; and on the same day the court allowed him to become a party, file his answer, and defend as assignee, but refused to vacate the decrees; and on February 13, 1886, the assignee was permitted to file an answer on or before the 17th of that month, "provided that all appeals now pending are previously waived or withdrawn, and the assignee will hold himself ready for an early and final hearing of said cause upon the merits in the superior court." The appeals were withdrawn, and the assignee filed his answer on February 17, and upon issue joined thereon the cause was heard; and on June 2, 1886, a final decree was entered modifying the first decree, in which it was ordered that \$11,138.18 be paid the plaintiff from the funds in the hands of the clerk, together with \$407.62 interest; that \$1,861.82 be paid from said funds to Staples, as assignee, together with \$68.13 interest; and that the plaintiff have judgment against Cooke for \$1,885.44 (that being the balance of said Blanchard's claim against said Cooke after deducting said sum of \$11,545.80), and for costs of suit, and that execution issue against Cooke therefor. From this decree Cooke appealed on June 28, 1886, and on the same day filed a plea setting up his discharge in insolvency. On June 29 the plaintiff appealed, and on June 30, Staples, the assignee, appealed from the decree. The report finds that the plea of a discharge in insolvency was filed without leave asked or granted, and as it was filed after the final decree, there has been no hearing on it.

Messrs. A. J. Bartholomew and Frank P. Goulding, for plaintiff.

Mr. J. J. Myers, for defendant George P. Staples:

A mortgage of after-acquired property does not pass the title to the property unless possession thereof be given; or some further assurance or ratification be made, or some equivalent act done by the mortgagor after the property comes into the hands of the mortgagor; unless the mortgage contains a provision for the mortgagee's taking possession. And in the contract in question there is no hint of any such provision.

Jones v. Richardson, 10 Met. 481; *Moody v. Wright*, 13 Met. 17, 32; *Barnard v. Eaton*, 2 Cush. 303; *Chealey v. Josselyn*, 7 Gray, 490; *Pettis v. Kellogg*, 7 Cush. 456, 461.

In the case of a mortgage of after-acquired property, which contains a clause empowering the mortgagee to take possession in case of a default, the cases hold that he may do so in pursuance of that power, and that no assent or ratification or further assurance by the mortgagor is in that case necessary.

Wilson v. Russell, 136 Mass. 211; *Chase v. Denny*, 130 Mass. 566; *Rowley v. Rice*, 11 Met. 333.

But in the absence of such an authority in the mortgage, possession must be given, or some further ratification or assurance must be made by the mortgagor after he acquires the goods. Otherwise the property cannot be held against attaching creditors or an assignee in insolvency of the mortgagor. The judge should, therefore, have ruled as requested.

Jones v. Richardson and *Moody v. Wright*, *supra*.

Both of those cases are, it is submitted, still good law in this court.

And after the first publication of notice of the filing of the petition in the insolvency proceedings against Cooke, no action taken in this case, the assignee not being in, could affect the rights of the assignee, which related back to the time of the first publication.

Butler v. Mullen, 100 Mass. 453; *Judd v. Ives*, 4 Met. 401; *Clarke v. Minot*, 4 Met. 346; *Edwards v. Sumner*, 4 Cush. 393, 395; *Gallup v. Robinson*, 11 Gray, 20; Pub. Stat. chap. 157, § 46.

Field, J., delivered the opinion of the court: The procedure in this case suggests some interesting questions of practice which have not been argued, but we have considered only the questions which have been argued and the matters involved in them. We assume that it was within the power of the superior court to admit the assignee as a party at the time when and in the manner in which he was admitted. We assume too that the court could modify the original decree according to the facts established at the final hearing. The defendant Cooke, having appeared,—and the bill having been taken as confessed against him for want of answer,—had still the right to be heard upon the form of the decree, and to appeal from it. Whether, if the bill was not so definite or was not of such a nature that a decree could be entered upon it without hearing evidence, Cooke could, after the bill was taken for confessed against him, appear and controvert the evidence offered by the plaintiff, need not be determined; for there is nothing in the record or report indicating that any such right was claimed by him. It is plain that the assignee in insolvency, after Cooke became an insolvent debtor, had an interest in the suit; as the assignment vested in the assignee not only all the property of Cooke which he could "have lawfully sold or conveyed," but also all property "which might have been taken on execution upon a judgment against him." Pub. Stat. chap. 157, § 46. *Bingham v. Jordan*, 1 Allen, 373.

The superior court, on being informed of Cooke's insolvency and the appointment of an assignee, should have required the assignee to be summoned in and made a party, unless he voluntarily appeared. The error in this respect was, however, ultimately cured by the admission of the assignee as a party. The assignee was admitted for the purpose of trying the cause upon its merits. Although the court had refused to vacate the final decree against Cooke, or the decree taking the bill for confessed against him, still, the assignee, so far as his interest was concerned, was entitled to try the case upon the merits involved in the issue joined upon his answer, in the same manner as

if he had appeared in the suit before these decrees against Cooke were entered. The assignee did not take merely the defendant Cooke's title *pendente lite*. He took all the property which was the subject-matter of the suit on which an execution against Cooke could lawfully have been levied, or which he could lawfully have conveyed at the time the assignment in insolvency took effect; and his position in the case might be adverse to that of the insolvent debtor. If it be assumed—which is not clear—that the frame of the bill is such that, on a decree taking it for confessed against Cooke, a decree could be entered that the plaintiff recover any money of Cooke personally on which an execution could issue against his body or estate,—the amount would necessarily depend upon the amount of the whole indebtedness of Cooke to the plaintiff under the contract, after deducting whatever amount was ordered to be paid to the plaintiff out of the fund in the hands of the clerk; and any change in either of these two amounts would change the amount which the plaintiff would recover against Cooke personally.

The necessary effect of admitting the assignee to defend the suit upon its merits was to suspend the original decree against Cooke, if it did not actually vacate it; and the decree finally entered, although it purports to modify the original decree, in effect vacated it, except that part of the decree which dismisses the bill and supplemental bill as to all the defendants but Cooke, and dismisses the cross-bill. Indeed, the original decree did not define the amount for which execution should issue against Cooke, and ought not to have been entered in the form in which it was entered. After the assignment in insolvency, if the assignee claimed the property, Cooke had no interest in it except to have it properly applied in payment of his debts, unless there was a remainder which should be paid to him, and no other interest in the suit except to prevent the plaintiff from obtaining a personal decree against him. If it was material to the rights of the assignee to show that Cooke had not violated the conditions of the contract, and that Blanchard did not rightfully take possession of the goods on November 28, 1884, he should have been permitted to prove these facts, in the same manner as a creditor who had levied an execution against Cooke upon the property might prove them. The assignee is not so far in privity with Cooke that a decree against Cooke would be conclusive upon the assignee.

For the same reason, if the evidence offered that Cooke never consented to Blanchard's taking possession and refused any such consent was material, it should have been admitted; but, as we read the bill, it contains no allegation of any such consent, and is to be construed to mean that Blanchard took possession without the consent of Cooke, and that Cooke refused to release any rights he had in the property. There seems to have been no exceptions taken to the findings of the court upon the original indebtedness of Cooke to Blanchard under the contract, or to the amount of the payments made by Cooke to Blanchard. The value of the goods which had been purchased by the defendant of other persons than the plaintiff, and which were included in the goods of which the

plaintiff took possession on November 28, 1884, is not found, although the court finds that they constituted a large portion of the goods. The court also finds that the amount of goods purchased by Cooke in September, October, and November, 1884, on credit, the bills of which remained unpaid, was \$6,467.84, and that the greater part of these goods were in the store on November 28, 1884. Fraud, either at common law or under the statute relating to insolvency, is not set up in the answer.

The principal questions in the case are: What are the rights of the plaintiff and of the assignee to these goods or the proceeds of them, assuming that Blanchard took possession of them on November 28, 1884, for an alleged breach of the contract? and, How are these rights affected, if the fact was that there was then no breach of the contract by Cooke?

The contract is of a sale of a stock of goods by Blanchard to Cooke for the sum of \$14,214.94, and a delivery of possession to Cooke, "with full powers and authority to manage, deal with, and sell the same in the regular course of business as a retail dealer of dry goods;" and it provides "that, for the security of said Blanchard, the legal title in said goods shall be and remain in said Blanchard until said sum of \$14,214.94, with interest at the rate of 7 per cent per annum, shall have been fully paid, it being agreed, however, that said title may vest in said Cooke in the proportion to the amount which at any time he shall have paid on account of said \$14,214.94, and interest." This relates to the goods sold by the plaintiff. The clause cited then proceeds as follows: "Said Cooke hereby covenanting and agreeing that said Blanchard shall be the legal owner of a fractional part of the stock of goods in said store, whether it be these goods or goods subsequently purchased by said Cooke; which fractional part shall at all times bear the same proportion to the balance of \$14,214.94 and interest then unpaid and due from said Cooke that the whole amount of goods now bears to said sum of \$14,214.94." This contract cannot be considered as a legal mortgage either of the goods bought of Blanchard or of the goods subsequently bought of other persons. It does not purport to convey to Cooke the title in the stock of goods that belonged to Blanchard, and then to reconvey that title in mortgage to Blanchard. As to this stock of goods, it purports to be a conditional sale, with a provision whereby the title to a fractional part of the goods shall vest absolutely in Cooke upon payments of portions of the amount due. As to the after-acquired goods, the contract operates only by way of covenant; it does not purport to be a present conveyance to Blanchard of the title, defeasible upon the performance by Cooke of his part of the contract.

The assignee in effect concedes that Blanchard is entitled to his fractional part of such of the goods sold by him as were on hand when he took possession. Under this conditional sale, if Cooke did not comply with the conditions of purchase, Blanchard had the right to take possession of such of the original stock of goods as could be identified, either as owner or as owner in common with Cooke; and whether he took possession or not, his legal title remained. The plaintiff contends that he is entitled to the

whole of the goods as security that his debt be fully paid.

The contract must be enforced according to the intent of the parties as expressed in it; and we think that, construing all its provisions, the interest of the plaintiff in the goods, if Cooke made payments on account, was intended to be fractional; that this interest is to be determined by ascertaining the amount due the plaintiff on November 28, 1884, when he took possession, computing it with interest at the rate of 7 per cent, according to the Massachusetts rule when partial payments have been made. *Dean v. Williams*, 17 Mass. 417. If the amount thus computed equals or exceeds \$14,214.94, then Blanchard is entitled to all the proceeds of the goods which are a part of the original stock; if the amount is less than \$14,214.94, then Blanchard is entitled to a fractional part, of which fraction \$14,214.94 is the denominator, and the amount thus found due him is the numerator; and the assignee of Cooke is entitled to the remaining fractional part. Whatever Blanchard receives of these proceeds he receives as security for the payment of his debt. The provision that "Blanchard shall be the legal owner of a fractional part of the stock of goods in said store, whether it be these goods or goods subsequently purchased by said Cooke, which fractional part shall at all times bear the same proportion to the balance of \$14,214.94 and interest then unpaid and due from said Cooke that the whole amount of goods now bears to said sum of \$14,214.94," if construed literally, states ratios of equality. By transposing two of the terms the clause becomes intelligible, and it then would read: "Blanchard's fractional part shall at all times bear the same proportion to the whole amount of goods as the balance of \$14,214.94 and interest then unpaid bears to \$14,214.94." This seems to us the intention of the parties, and is the view taken by the superior court, as we understand the report.

The principal contest in the case is as to the rights of the parties to the proceeds of the goods bought by Cooke of other parties than the plaintiff, after the plaintiff's sale to him. By the agreement, Cooke covenants that Blanchard shall be the legal owner of the same fractional part of these goods as of the goods bought of Blanchard. That such a covenant would be inoperative to transfer the title to Blanchard as against an attaching creditor of Cooke or his assignee in insolvency, if Blanchard had not first taken possession, seems certain. *Chase v. Denny*, 180 Mass. 566; *Huntington v. Clemence*, 108 Mass. 482; *Wilson v. Russell*, 186 Mass. 211; *Potter v. Boston Locomotive Works*, 12 Gray, 154; *Pellis v. Kellogg*, 7 Cush. 456.

The effect of mortgages of after-acquired property has been considered in *Jones v. Richardson*, 10 Met. 481; *Rouley v. Rice*, 11 Met. 833; *Moody v. Wright*, 13 Met. 17; *Barnard v. Eaton*, 2 Cush. 303; *Howe v. Freeman*, 14 Gray, 566, 577; *Chealey v. Josselyn*, 7 Gray, 490. It was held in the early cases that at law a mortgage of chattels does not convey property of which the mortgagor was not the owner at the time of the conveyance. *Jones v. Richardson*, *ubi supra*, was an action at law; and the question was of title to after-acquired goods as be-

tween a mortgagee and an attaching creditor. The mortgagee offered to prove that he had taken possession of the goods for the purpose of foreclosing his mortgage. The court says: "But although the mortgagee with such a power (a power to take possession of all the goods, including those afterwards acquired) would be justified in seizing the goods of the mortgagor purchased by him subsequently to the date of the mortgage, it would not vest the property in the mortgagee." The plaintiff "did not prove nor offer to prove any act done by the mortgagor, after the mortgage deed was executed, by which he ratified the same as to the after-acquired property. All he offered to prove was that he had taken possession of the goods before the attachment. But this evidently was irrelevant." "As to such property the mortgage could not be valid except as between the parties thereto, unless such goods were delivered by the mortgagor to the mortgagee with the intention to ratify the mortgage, and the mortgagee retained open possession of the same until the time of the attachment." And that "the record of the mortgage is no sufficient notice of a legal incumbrance as to subsequently-acquired property."

A delivery to the mortgagee or a taking possession by him with the consent of the mortgagor, before the attachment, when the mortgagee retained possession, was held in *Rouley v. Rice*, *ubi supra*, to give to the mortgagee, either as a pledgee or as a mortgagee, the right to hold the goods as against an attaching creditor. See *Codman v. Freeman*, 3 Cush. 306, 309.

In *Moody v. Wright*, *ubi supra*, which was a suit in equity under Stat. 1888, chap. 163, § 18, the mortgagee had not taken possession, and it was held that the mortgage was void as against an assignee in insolvency. The reason given is "the want of any binding original contract which *per se* could have force and effect to charge the after-acquired property without some further act of the parties after the property should have come into existence. Such act we deem to have been necessary to perfect the title of the petitioner, whether his rights of property in such after-acquired articles are sought to be enforced in equity or at law." And it is said that "a stipulation that future-acquired property shall be holden as security for some present engagement is an executory agreement of such a character that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence and is the subject of transfer by his debtor, and hold it for his security; and when he has so taken it into his possession before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same."

In *Cheley v. Josselyn*, *ubi supra*, it was said: "Whatever may be the agreement of the parties, the mortgage cannot bind property subsequently acquired, without some further act of assurance or ratification." In *Chase v. Denny*, *ubi supra*, the *dictum* declared in *Moody v. Wright* was recognized and enforced in an action at law. The rule was stated to be that if "the after-acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien by the operation of the

provision of the mortgage in regard to it." The taking of possession was the assertion of a right which had been previously acquired by the mortgagee; and it could be asserted after the mortgagor had become actually insolvent, if the rights of third persons had not intervened.

In *Brett v. Carter*, 2 Lowell, 458, it was decided that a mortgage of after-acquired chattels, which we infer had been duly recorded, was good against an assignee in bankruptcy, although it does not appear that possession had been taken by the mortgagee; and it was suggested that this court might reverse the decision in *Moody v. Wright*. Judge Lowell followed the decisions in England and in some of the States of this country, and cites the case of *Mitchell v. Winslow*, 2 Story, 630, which this court had refused to follow. But in *Mitchell v. Winslow* it ought to be noticed that the deed was duly recorded, which is perhaps immaterial, and that the mortgagee took actual possession of and sold the property before proceedings in bankruptcy were begun; and, although the assignee in bankruptcy acquired only the rights of the debtor, while an assignee in insolvency acquired something more, yet the result reached in that case is in accordance with the *dictum* in *Moody v. Wright*, *supra*, and with our decision in the present case.

The recent decisions of this court show no disposition to extend the law beyond the *dictum* declared in *Moody v. Wright*, *supra*, or to adopt the principles of which *Holroyd v. Marshall*, 10 H. L. Cas. 191, is the leading case. In this Commonwealth a sale of personal chattels is not good against creditors unless there has been a delivery of the property. An unrecorded mortgage of personal chattels is void against creditors unless the property is delivered to and retained by the mortgagee; and a pledge of chattels is equally void unless the pledgee retains possession. An executory agreement to sell such chattels as are usually bought and sold in the market is not one that is specifically enforced, and it does not create a trust; and, besides, the English statutes of bankruptcy give some relief by vesting in the trustee in bankruptcy property of which the bankrupt was the reputed or ostensible owner with the consent of the true owner,—a doctrine unknown to our laws. The facts in this case show that contracts for security on after-acquired chattels may operate as traps to catch other creditors, even when no fraud was intended; and we are satisfied with the rule that to enable a mortgagee, as against an attaching creditor or an assignee in insolvency, to hold chattels acquired after the execution of a mortgage, there must be a delivery to him, or possession must be rightfully taken by him before, and the possession must be retained until, they have been attached or levied upon by creditors, or before proceedings in insolvency are begun.

The only apparent change in our decisions is that, by the recent cases, possession of after-acquired chattels rightfully taken by a mortgagee under the power contained in the mortgage, if the possession is retained, vests the title in the mortgagee as against third persons, and a delivery by the mortgagor is no longer held to be essential. In these cases, except perhaps *Rouley v. Rice*, the mortgages were in fact duly re-

corded, but this does not appear to have been considered material except upon the question of fraud. The record of a mortgage of after-acquired chattels has never been held sufficient to make the mortgage valid against other persons than the parties to it. Such a mortgage has not been considered to be within the provisions of the statute relating to the record of mortgages. *Jones v. Richardson, ubi supra.*

In the present case the contract is not a mortgage, and it was not recorded, and there is no express provision that Blanchard may take possession for breach of the contract. No actual fraud is alleged, and we cannot say that the contract, on its face, is fraudulent and void as to creditors. A mortgage is not void as matter of law because it permits the mortgagor to remain in possession and sell the goods in the ordinary course of business. Such a provision is at most only evidence of a fraudulent purpose, and we think that the same principle applies to this contract. *Fletcher v. Powers, 131 Mass. 333.*

As the effect of the contract is that Cooke covenants that the legal title to a fractional part of the after-acquired goods shall vest in Blanchard as security for the payment of the debt due to him, Blanchard's position even in equity ought not to be better than if he held an unrecorded mortgage of these after-acquired goods as security for the debt; and a mortgage of after-acquired goods cannot in any event give a better title than a mortgage of goods belonging to the mortgagor when the mortgage is executed. Our statutes concerning mortgages of personal chattels provide: "Unless a mortgage is recorded as aforesaid within fifteen days after the date thereof, or unless the property mortgaged is delivered to and retained by the mortgagee, the mortgage shall not be valid against any person other than the parties thereto, except as is hereinafter provided." Pub. Stat. chap. 192, § 1. An assignee in insolvency is not one of the parties within the meaning of the statutes. The limitation of the time of record was first enacted in Stat. 1874, chap. 111, § 1 (see Stat. 1875, chap. 14); and before this statute it was sufficient if the record was made at any time before the rights of third persons had intervened. *Mitchell v. Black, 6 Gray, 100.*

We think that the limitation of time within which the mortgage must be recorded to make the record effectual does not apply to the time within which mortgaged property, if the mortgage is unrecorded, must be delivered to and retained by the mortgagee; and that it is sufficient if the property is delivered to the mortgagee before, and is retained by him until, the rights of third persons have attached. *Carpenter v. Snelling, 97 Mass. 452; Wright v. Tetlow, 99 Mass. 397.*

In *Wright v. Tetlow, ubi supra*, it is said: "The manifest intention of the Legislature was to require, in the case of an unrecorded mortgage of chattels, such delivery of possession as would be necessary in the case of an absolute sale, which need not be recorded." In the case of the sale of a chattel which is identified, the title to which has passed as between the parties, and upon which the vendor has no lien for the

price, and when it is the duty of the vendor to deliver the chattel immediately to the vendee, we are not aware that it has ever been held that possession rightfully obtained by the vendee and retained by him did not constitute a delivery as against third persons, although the vendor had done no act indicating an intention to deliver. Our recent decisions have therefore proceeded upon the theory—which by a *dictum* in *Jones v. Richardson, supra*, was denied,—that, when the chattels are acquired and are identified by the terms of the mortgage, the title passes as between the parties; and a possession rightfully obtained by the mortgagee and retained by him vests the title in him as against third persons whose rights have not attached before the possession is taken; and that delivery by the mortgagor is not necessary; and in the case of informal instruments, not technically mortgages, and not recorded, this has been distinctly decided. *Mitchell v. Black; Wilson v. Russell, and Chase v. Denny, supra.* See *Huntington v. Clemence, supra.*

Following the analogy of these cases, if the contract between the plaintiff and defendant Cooke was not actually fraudulent and void as against the creditors of Cooke, either at common law or under the statutes relating to insolvency, and if the plaintiff rightfully took possession of the goods before they were attached or before proceedings in insolvency were instituted, and retained this possession, we think his title, to the extent of his interest, is good against the assignee in insolvency. This is in effect the ruling of the superior court. But the plaintiff's possession must be rightful in order to enable him successfully to assert his title against the assignee. If he had no right to take possession when he took it, his possession cannot avail him. Our construction of the contract is that Blanchard had not the right to take possession unless there had been some breach of the contract by Cooke; but, if there had been a substantial breach, that the plaintiff had this right while the default continued. The evidence offered by the assignee, "that there had been no breach of said contract by said Cooke, on or before November 28, 1884," should therefore have been admitted. The assignee was not concluded on this issue by the decree which had been entered against Cooke. The plaintiff's title to that part of the original stock which can be identified has not been lost, whether he rightfully took possession or not.

The decree entered on January 11, 1886, except that part of it which dismisses the cross-bill and dismisses the bill and supplemental bill as to all the defendants but Cooke, is reversed, and the final decree entered on June 2, 1886, is also reversed. Cooke is to have leave to plead his discharge in insolvency, and to be heard upon it. It is in the discretion of the superior court whether the decree taking the bill as confessed against Cooke be vacated or not, and whether any of the parties be permitted to amend their pleadings. The cause is remanded to the Superior Court for further proceedings in accordance with this opinion.

So ordered.

CONNECTICUT.

SUPREME COURT OF ERRORS.

WILLIAM ROGERS MANUFACTURING CO.

v.

SIMPSON, HALL, MILLER, & CO.*

1. The law permits the manufacturer to use his own name as a trademark, but such use exposes him to the danger that some other person bearing the same name may be the manufacturer of similar articles, and may impress it upon them, thereby creating a possibility of mistake on the part of the consumer as to the origin and ownership of the articles they are about to buy; but such possibility of mistake does not render the use of the name necessarily, as a matter of law, a fraudulent misrepresentation,—actual fraudulent intent must be proven as a fact.
2. The law also gives to the manufacturer the right to use his own name as a mark upon his goods, although it be the same as that of another manufacturer of similar goods who has previously made his name part of his own trademark, if in such use by the former there is no false representations.
3. If the first appropriator of his name as a mark adopts the name simply, without any accompanying word or symbol, or prefix or suffix, another manufacturer of similar goods having the same name may lawfully impress it upon his goods, if he accompanies it by such distinguishing devices of prefix or suffix that a consumer who will take note of the whole will not be misled. But the second may not use his name in connection with like marks, figures, symbols, or words as those used by the first appropriator; nor with such as so closely resemble that the association will probably mislead; nor make such use with intent to mislead.
4. Where the plaintiff, a corporation, engaged in the manufacture of silver-plated ware, had a right to the use of trademarks as follows, "Wm. Rogers Mfg. Co."—"1865, Wm. Rogers Mfg. Co."—"Anchor) Wm. Rogers & Son," having secured such right by assignment from William Rogers, Sr.; and by long-continued use, William Rogers, Jr., son of William Rogers, Sr., who from boyhood had had connection with the manufacture of such ware by the various concerns with which his father was connected, and, by reason thereof, since 1864 to this present, has had a valuable independent reputation in the market for skill and integrity in such manufacture, as a manufacturer of silver-plated ware, had the right to impress thereon the stamp "(Eagle) Wm. Rogers (Star):" Held, that said William Rogers, Jr., had the right to contract with a manufacturing com-

pany that it should make the ware for him under his supervision, he to receive, sell, and stamp for himself; the corporation to receive a percentage for its labor and capital, he a percentage for his skill, supervision, labor, and valuable reputation in the market: or, he had a right to contract with a manufacturing company that it should furnish machinery and materials, he the supervising, labor and skill, the valuable reputation and stamp, giving the corporation the use of the latter; the corporation selling the ware and receiving payment therefor; the profits being divided equally,—there existing on the part of neither contracting party in either case any intent to mislead consumers.

5. The finding by the committee that a circular issued by the corporation defendant with which William Rogers, Jr., contracted, "is not misleading to a person familiar with the facts stated therein, and with the fact that Wm. Rogers, Sr. died in 1873; but persons not so familiar might be led by it to suppose that the Wm. Rogers who was the inventor of sectional plate in 1855, was in the employ of the defendant at the time the circular was printed,"—will not authorize an injunction restraining the defendant from the use of the circular.

(Hartford—Filed April, 1887.)

CASE reserved. Complaint dismissed.

Complaint for the violation of certain alleged trademark rights, and prayer for an injunction.

The case was referred to a committee who found the facts and reports them to the superior court which reserved the case for the advice of this court.

The facts material to the questions decided appear from the opinion.

Messrs. O. H. & J. P. Platt, for plaintiff.

Messrs. C. E. Mitchell and C. R. Ingersoll, for defendant.

The defendant has not exceeded its lawful rights, even if the plaintiff has lawful trademarks, as claimed.

Rogers v. Rogers, 53 Conn. 121; *Meriden Britannia Co. v. Parker*, 39 Conn. 450; *Williams v. Brooks*, 50 Conn. 278; *Hallett v. Cumston*, 110 Mass. 29; *Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.* 11 Fed. Rep. 495.

The plaintiff has no lawful title to any of the trademarks mentioned in the complaint.

Meriden Britannia Co. v. Parker, 39 Conn. 456; *Hall v. Barrows*, 32 L. J. N. S. Ch. 548; *Hall v. Barrows*, 4 De G. J. & S. 150; *Leather Cloth Co. v. American Leather Cloth Co.* 4 De G. J. & S. 137; *S. C.* 11 H. L. C. 523; *Bury v. Bedford*, 4 De G. J. & S. 352; *Re Swezey*, 62 How. Pr. 215.

The plaintiff has, by its conduct in connection with its stamps, disintitiled itself to relief in equity.

Leather Cloth Co. v. American Leather Cloth Co. 4 De G. J. & S. 137; *Edelsten v. Vick*, 11 Hare, 78; *Post v. Marsh*, L. R. 16 Ch. Div. 395; *Petridge v. Wells*, 13 How. Pr. 385; *Palmer v. Harris*, 60 Pa. 156; *Laird v. Wilder*, 9 Bush, 131; *Wolfe v. Burke*, 56 N. Y. 115; *Con-*

*See *Rogers v. Rogers*, 1 New Eng. Rep. 411.

solidated Fruit Jar Co. v. Dorfling, 6 Am. L. T. N. S. 511; *Manhattan v. Wood*, 23 U. S. Pat. Gaz. 1925; *Seabury v. Grosvenor*, 14 Blatchf. C. Ct. 262; *Helmbold v. Helmbold Mfg. Co.* 53 How. Pr. 453; *Connell v. Reed*, 128 Mass. 477; *Burton v. Stratton*, 73 L. T. 349; *McNair v. Cleave*, 9 Phila. 155.

Pardee, J., delivered the opinion of the court:

Between the years 1847 and 1850, William Rogers, Sr., acquired, and preserved to his death in 1872, a valuable reputation in the market as a skillful and honest manufacturer of silver-plated ware. His son, William Rogers, Jr., from boyhood had connection with the manufacture of such ware by the various concerns with which his father was connected. By reason thereof since 1864 to this present, he has had a valuable independent reputation in the market for skill and integrity in such manufacture.

The plaintiff is a corporation organized in 1872, and engaged in the manufacture of silver-plated ware at Hartford, using since its organization trademarks as follows, viz.: "Wm. Rogers Mfg. Co.," "1865, Wm. Rogers Mfg. Co." and "(Anchor) Wm. Rogers & Son," claiming to own the exclusive right to them by the assent of Wm. Rogers, Sr., and by long continued use, and denying to the defendant and Wm. Rogers, Jr., the right to use any stamp of which the word "Rogers" shall be a distinctive and characteristic part. The defendant is a corporation engaged in the manufacture of silver-plated ware at Wallingford, Conn. In 1878 it made a contract with Wm. Rogers, Jr., by which it was agreed that he should exercise his skill in supervising the process of manufacture, and control the quality and style of ware, and allow his name to be stamped thereon, and defend the use thereof. The consideration for this agreement is a commission upon sales. Wm. Rogers, Jr., has performed his contract in every particular. The ware has been sent into market bearing the stamp "(Eagle) Wm. Rogers (Star)." This stamp is liable to mislead those dealers and consumers who take note of the word "Rogers" or words "Wm. Rogers" only, or who are not familiar with the stamps of the plaintiff, of which the plaintiff complains.

The complaint and briefs of the plaintiff make it quite clear that the one valuable word in its name and trademarks, the one word which it is the purpose of this proceeding to preserve for its sole and exclusive use upon silver plated ware, is the word "Rogers," the right to the possession and use of which it derived from Wm. Rogers, Sr., and it denies to Wm. Rogers, Jr., the right either to manufacture silver-plated ware without intervention of any agency, and stamp his name thereon; or the right to manufacture through the agency of the defendant, and stamp; or the right to manufacture under the particular arrangement which exists for that purpose with the defendant, and stamp. The prayer is that the defendant be enjoined from every form of representation that Wm. Rogers, Sr., is in any way connected with it in the manufacture of silver-plated ware, and from offering for sale any ware upon which is impressed any mark or de-

vice of which the words "Wm. Rogers" are the distinctive and characteristic part.

The following are among the additional facts of the case: The defendant was well aware of the value of the name "Rogers" on spoons, if it represented a person who had belonged to the family of Wm. Rogers, Sr., had been connected with him in the manufacture of silver-plated goods, and had acquired a valuable reputation in the market for skill in that art. It entered into the contract with Wm. Rogers, Jr., for the purpose of using his name upon such goods as should be the result of his skill; and of availing itself of his taste, skill, and judgment; and from the belief that consumers would regard spoons manufactured under his supervision as being the goods of a genuine Rogers because his skill had been acquired under the instruction of Wm. Rogers, Sr., his father. It stamped its goods (Eagle) Wm. Rogers (Star) for the purpose of informing the public that they were the product of the skill of Wm. Rogers, Jr., for the purpose of taking advantage of his reputation in the market; a reputation acquired because of the knowledge of the public that he had been associated with, and had acquired skill in the art from his father and others. He had been known to the trade during many years, and had acquired and retained a valuable independent reputation in the market; and goods known to have been the product of his skill alone had for that reason a better selling value. For the preceding thirteen years he had been almost constantly employed in connection with such manufacture with the plaintiff and the Meriden Britannia Co., and both of those companies had extensively circulated his portrait in connection with that of his father, and had thus brought him prominently to the notice of the trade in connection with his father. He had always insisted that his name should be used only on goods of a certain high standard of value. He does in fact superintend the manufacture of all articles upon which his name is placed. His stamp has a high and independent value. By the terms of the contract between the defendant and Wm. Rogers, Jr., the latter has the right to authenticate the goods made under his superintendence by stamping thereon his name, with such accompanying devices as he may adopt. The finding is that the stamp "(Eagle) Wm. Rogers (Star)" was not adopted by the defendant for the purpose of imitating the trademark of the plaintiff, but as a new and distinctive trademark indicating the personal supervision and control of Wm. Rogers, Jr. It is also found that the arrangement is valuable to him, and that it is only through the medium of this or some similar contract that he is able to make his special training in the business available to himself; that the name of Wm. Rogers, Jr., is not used by himself or the defendant in such association with place, or marks or symbols or signs, or forms of packages, or style or color of labels, as thereby to mislead consumers; and that the word "Rogers," used with or without differing symbols, is the misleading word. As a fact, it does mislead many consumers who are not familiar with the marks both of the plaintiff and the defendant, and many who take no note of anything in the marks beyond the word "Rogers."

This the plaintiff seeks to prevent.

Passing over the defendant's denial of the plaintiff's right to the exclusive use of the trademark which it has adopted, and assuming, for the purposes of the case, that the plaintiff is a person who, bearing the name "Wm. Rogers," has adopted and used his name as a trademark, yet, the prayer for injunction must be denied.

By the rule prevailing in this jurisdiction, the facts of this case have been conclusively settled by the court below acting through the instrumentality of its committee. By the finding, fraud in intent or deed has been eliminated from the case. The misleading has resulted simply from the fact that the plaintiff and Wm. Rogers, Jr., bear the same name, and such consumers only have been confused as could not take note of the distinguishing symbols accompanying the use of the name of Wm. Rogers, Jr., by the defendant.

When the second bearer of a name uses it with due distinguishing precautions and without actual fraudulent intent, or representation that his wares are those of the first, he is not responsible for such confusion as results solely from the fact of similarity.

The law permits a manufacturer to use his name as a trademark. If he has the confidence of the public in his integrity and skill, his name will doubtless be for some reasons the most advantageous trademark which he can adopt. It will be the most forcible and permanent presentation of the fact that his skill and integrity have gone into the article upon which his name is stamped. But such selection exposes him to this danger: some other person bearing the same name may be the manufacturer of similar articles, and may impress it upon them, thereby creating a possibility of mistake on the part of consumers as to the origin and ownership of the article they are about to buy. The law also gives to a manufacturer the right to use his own name as a mark upon his goods although it be the same as that of another manufacturer of similar goods who has previously made his name a part of his own trademark, if in such use by the former there is no false representation. Because of confusion resulting from the use of identical names with distinguishing symbols there is not necessarily, as a matter of law, a fraudulent misrepresentation; actual fraudulent intent remains to be proven as a fact. If the first appropriator of his name as a mark adopts the name simply, without any accompanying word or symbol by way of prefix or suffix, another manufacturer of similar goods having the same name may lawfully impress it upon his goods, if, as in the case at bar, he accompanies it by such distinguishing devices by way of prefix and suffix, as that a consumer who will take note of the whole will not be misled.

And if consumers who will take note of nothing but the name are misled, and there is consequent loss to either, it must be borne as the result of the act of taking a name as a trademark. If the first appropriator affixes such distinguishing marks, figures, symbols, or words as he may lawfully subject to his exclusive use, the second may not use his name in connection with like marks, figures, symbols, or words; nor with such as so closely resemble those of the first as that the association will probably mislead; nor make such use with in-

tent to mislead. *Rogers v. Rogers*, 53 Conn. 121; *Browne, Trademarks*, 2d ed. § 420.

In *Burgess v. Burgess*, 3 De G. M. & G. 896, Lord Justice Turner said as follows, viz.: "I concur in the opinion that this motion should be refused with costs. No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his goods as the goods of another. When a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods, sold by himself, as the goods of the person whose name he uses; but when the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is a false representation or not."

Of this in *Massam v. Thorley's Cattle Food Co.* L. R. 14 Ch. Div. 748, Lord Justice James said as follows, viz.: "That I take to be an accurate statement of the law, and to have been adopted by the House of Lords in *Wotherpoon v. Currie*, L. R. 5 H. L. Eng. & Ir. App. 508, in which the House of Lords differed from the view that I had taken in that case."

In Sebastian upon the Law of Trademarks, pp. 25 *et seq.*, it is said as follows, viz.: "The impossibility of a single manufacturer being allowed to arrogate to himself the exclusive use of a name which he shares in common with many other persons is apparent; and from this circumstance the rule was deduced, that while, as against persons bearing a different name, a manufacturer's right in his name trademark is absolute and exclusive, as against persons bearing the same name, no such exclusive right can be set up. Thus in *Deuce v. Mason*, Sebastian's Dig. 584, Malins, V. C., held that during the continuance of the partnership between two persons named Mason and Brand, they could not be prevented from using the latter's name in their business, notwithstanding that it was well known in connection with a similar older established business; and the court of appeals held that the same would be the case if a new *bona fide* partnership should be formed. This rule must, however, be qualified by the statement that where a person uses his own name for the purpose of fraud, and satisfactory evidence of fraudulent intention can be produced, such unfair conduct will be restrained, even though the free use of the man's own name may be thereby hindered. And the criminal law also admits of the punishment of such fraudulent user of a man's own name.

A valuable statement of the law was made by Lord Craighill in the Scottish Court of Session, in *Dunnachie v. Young & Sons*, in which he said: "The name of a person may be a trademark; there may be other manufacturers of goods of the same description, and the latter are not precluded from placing their own names on their goods by reason of the fact that this name has already become the trademark of another manufacturer. The only condition they must fulfil is, that the name as used by them shall be accompanied with something which shall be a distinction, if the bare name would lead to the deception of the public and

the injury of the trader on whose goods the name first appeared as a trademark."

And in the New York case of *England v. New York Publishing Co.* 8 Daly, 375, Daly, Ch. J., said: "The fact that a man has used his own name to designate the article he produces, and that the name has become valuable to him through the article becoming extensively known, gives him no right to exclude any other man of the same name from affixing his name upon the same kind of article if he manufactures it. The test is whether he uses the name honestly and fairly in the ordinary prosecution of his business, or dishonestly, to palm off his own commodity as the production of another."

And on pp. 226 *et seq.* as follows, viz.: "It was formerly sometimes supposed, and was held by the late Master of the Rolls and the court of appeal in *Singer Mfg. Co. v. Wilson*, L. R. 2 Ch. Div. 434, that for an action to restrain the use of a trade-name, to be successful, fraud must be proved; on the ground that when a trade mark was once affixed to the goods, it passed with the goods from hand to hand, thus silently repeating to each successive purchaser the original misrepresentation of the original infringer, while the improper use of a name not affixed to the goods was not the necessary consequence of being in possession of marked goods, but was the individual act of each person who used it in respect of the goods; so that there might be held to be an infringement of a trademark when, in analogous circumstances, there would be no infringement of a trade name. And when the case of *Singer Machine Manufacturers v. Wilson*, L. R. 3 App. Cas. 376, was remitted by the House of Lords to the court of first instance, on the ground of insufficiency of evidence, some of the law peers seem to have thought that different principles of law might possibly be applicable to trademarks and trade-names. But Lord Cairns, C., said: "It may well be that if an imitated trademark is attached to the article manufactured, there will, from that circumstance, be the certainty that it will pass into every hand into which the article passes, and be thus a continuing and ever present representation with regard to it; but a representation made by advertisements that the articles sold at a particular shop are articles manufactured by A. B. (if that is the legitimate effect of the advertisements, which is a separate question) must, in my opinion, be as injurious in principle, and may possibly be quite as injurious in operation, as the same representation made upon the articles themselves. And in *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 15, Lord Blackburn took the view that the law of trademarks and trade-names, when not affected by legislation, was the same. Whether there is or is not property in a trade-name, as Lord Blackburn suggested, it is a fraud on the part of one person to attract to himself the custom intended for another by a false representation, direct or indirect, that the business carried on by himself is identical with that of the other person by whose ability and exertions the name has acquired the reputation it possesses. The question is not whether the defendant's business is represented as being similar to the plaintiff's, but whether it is represented as being that very identical business. If such a false representation has been made, whatever may have been

the motive of the persons making it, when proceedings are taken in consequence of it, all the court requires is to be satisfied that the names are so similar as to be calculated to produce confusion between the two,—so calculated to do it that, when it is drawn to the attention of those adopting the name complained of that that would be the result, it is not honest for them to persevere in their intention, though originally the intention might not have been otherwise than honest."

The cited remark of Lord Blackburn was made by him in determining a case in which the defendant neither bore nor had acquired any right to use the name of "Singer," the distinctive and conspicuous portion of the plaintiff's trademark. *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 15, and such is the fact in *Singer Mfg. Co. v. Wilson*, L. R. 2 Ch. Div. 434; and we think we are correct when we say that the same fact pertains to all of the cases cited by Mr. Sebastian, and that neither the citations nor his comments concern cases where the question is between parties bearing the same name.

By the law applicable to the facts established by the finding, Wm. Rogers, Jr., as a manufacturer of silver-plated ware, had the right to impress thereon the stamp complained of; had the right to contract with the defendant that it should make the ware for him under his supervision, he to receive, stamp, and sell it for himself; the defendant to receive a percentage of the profits for its labor and its capital; he, a percentage for his skill, supervising labor, and valuable reputation in the market—his capital. By the present contract the defendant furnished machinery and materials; Wm. Rogers, Jr., the supervising labor and skill, the valuable reputation and stamp, and defends the use of the latter; the defendant sells the ware and receives payment therefor; the profits are divided. Under one mode, he would sell and take the risk of payment; under the other, the defendant would sell and take that risk; the same rule for division of profits presumably would obtain under either mode. The law regarding substance more than form, will not withhold from him in one of these modes what it would concede to him in the other. The law does not find in the mode in which he makes his skill, integrity, and valuable reputation available as his capital, any sufficient reason for barring him from access to the public, and from the resulting profits. His skill and supervising labor have gone into the ware bearing the stamp complained of; it is equal in quality to that of the plaintiff; as between him and the plaintiff, the question being as to his right to go into the market with his own name, the putting of his supervising skill and labor into the work with the reception of a share of resulting profits, constituted him a manufacturer thereof in the eye of the law. It is not a legal prerequisite that all of the capital and all of the profits shall belong to him; consumers have the result of his skill and integrity; and to them, that is all there is in the word "manufacturer;" he determines the kind, form, quality, and value of the ware,—it is his creation,—the defendant simply executes his commands. Indeed, it must be a matter of indifference to the plaintiff as to which of these modes of reaching the market he shall adopt.

Therefore, passing by the form and going directly to the substance, we take the case as if of record Wm. Rogers, Jr., is defendant. In no other way can the real question be reached and disposed of.

If any person or corporation shall hereafter place upon the market silver-plated ware bearing a stamp, the conspicuous and valuable part of which shall be the word "Rogers," and therefore liable to mislead consumers as to the origin and ownership of the same, the right to do so can be subjected to the test of judicial investigation and determination. If the judgment is that a person having the same name as that which this plaintiff has rightfully adopted and used, and a valuable name and reputation in the market for skill and integrity in the manufacture of silver-plated ware, has made an arrangement with a person or corporation having capital by means of which, upon a division of profits, he can gain access to the market and make his skill and name available to himself and beneficial to the public; that there is no intent upon the part of either to mislead consumers; that there has been no use of the name in association with misleading signs, words, figures, or symbols; and that in fact consumers are not misled by anything except the presence of the word "Rogers" and the omission to note distinguishing symbols; the law does not condemn the arrangement. The injurious result is one of the disadvantages assumed by the person on whom it falls when he selected a personal name as his mark. The objection on the part of the plaintiff, at this point, rests, not upon any legal principle, but upon its distrust as to the ability of the court to detect and prevent fraud. But it is to be remembered that contests between persons bearing the same name, as to their right respectively to stamp it upon goods, turn largely upon the intent; that it is a question of fact; and that courts have been and presumably will continue to be equal to the determination of it.

It is the argument of the plaintiff that its goods became known in the market as "Rogers goods;" that the defendant's goods are also known by the same designation; therefore that the latter should be enjoined. But the disadvantages attending the choice of the name of a person as a mark affect every result flowing from such choice. The speech of the market, calling the plaintiff's goods "Rogers goods," is only the spoken trademark of consumers in repetition of the one stamped upon the ware, induced by that. If Wm. Rogers, Jr., has a right to put the name "Rogers" on similar ware, that right cannot be affected by the fact that consumers apply the same spoken trademark to it. He is not to be injuriously affected by any use the public may make of a mark which the law allows him to use. The plaintiff has no greater right to prevent the misleading of consumers in the matter of calling the goods of both "Rogers goods," than it has to prevent the same result in the matter of using identical names accompanied by differing symbols as stamps. The mischief is the same in origin, kind, and degree. If the plaintiff had impressed the form of two elephants upon its ware as its trademark, neither the defendant nor Wm. Rogers, Jr., would have the right to so impress two elephants upon ware as to mis-

lead consumers as to the origin and ownership of the goods. If by reason of the plaintiff's mark its goods had come to be known in the market as "two elephant goods" neither the defendant nor Wm. Rogers, Jr., would have the right to so mark goods as that they should come to be similarly known. Wm. Rogers, Jr., has a right to the use of his own name; but he has no right whatever to the use of the form of two elephants in such manner as to interfere with the right of the first appropriator of that device. He would be a trespasser from the beginning in a forbidden field; and without necessity or excuse, for every other form in nature is at his service; and this, regardless of his intent, and even if he had done it in ignorance that the device had been appropriated by another.

The first count in the complaint charges the defendant with the publication of an advertisement to the effect that it is a manufacturer of the celebrated Wm. Rogers, Sr., spoons, forks, and knives. The finding is that the defendant knew that the use of the mark and the publication of the advertisement would cause its goods to be known in the markets as "Wm. Rogers goods;" but the advertisement was not intended or calculated to induce the public to believe that the goods so designated were manufactured by the plaintiff. The purpose of the publication was to direct public attention to the fact that the manufacture of its goods was controlled by Wm. Rogers, Jr., whose name they bear, and to the celebrity of its goods because of his supervising skill and reputation. Upon the facts, the defendant by permission from Wm. Rogers, Jr., for its own advantage and for his as well, has availed itself of whatever right he had to use his own name with cautionary accompanying devices, for the honest purpose and intent of informing consumers that his labors and supervising skill have gone into the manufacture of spoons at the manufactory of the defendant at Wallingford. The word "Rogers," regardless of the devices, is the sole source of confusion.

The portion of the defendant's circular complained of in the second count is as follows, viz.: "Sectional Plated Spoons and Forks (Eagle) Wm. Rogers X 12. Triple plated upon all points exposed to wear. Plated by the method invented by Wm. Rogers in 1855, who was the original inventor of sectional plate, Wm. Rogers (since 1878) Wallingford, Conn., formerly of Hartford and West Meriden."

The finding is that it "is not misleading to a person familiar with the facts stated therein and with the fact that Wm. Rogers, Sr., died in 1873, but persons not so familiar might be led by it to suppose that the Wm. Rogers who was the inventor of sectional plate in 1855 was in the employ of the defendant at the time the circular was printed" in 1890.

Upon the finding these statements are true; and there is no finding that they were made with the fraudulent intent to mislead the public into the belief that the goods so advertised were those of the plaintiff; and, as in all of the other parts of the case, upon the last analysis the confusion is found to reside in the fact that two manufacturers bearing the same name,—having equal skill and reputation in the same art,—have each stamped his name upon his goods with distinctive symbols. As has been said, having

equal rights under such circumstances they must share both the advantages and disadvantages of the situation.

The Superior Court is advised to dismiss the complaint.

In this opinion **Carpenter and Granger, JJ.**, concurred. **Park, Ch. J.**, and **Loomis, J.**, concurred fully in the legal principles laid down in the opinion, but thought that under the arrangement made by William Rogers, Jr., with the defendant company for the manufacture and sale of the ware stamped in the manner in question, he could not be regarded as standing in the position of a manufacturer of the ware.

Alonzo R. ABORN

v.

David Jewett RATHBONE.

1. A receipt in full, though given for a payment that is in itself but a part of the entire debt, will discharge the debt unless impeached for fraud or mistake.
2. If a receipt is given in full upon payment of a part of a debt, for the purpose of enabling the debtor to defraud other creditors, it will be effectual against the creditor by whom it was given as a full discharge.

(New London—Filed February, 1887.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas in New London County on a verdict for defendant in an action for goods sold and delivered. *Affirmed.*

The action was brought by appeal from a judgment of a justice of the peace, and tried to the jury before Mather, J.

The case is stated in the opinion.

Messrs. Brown & Perkins, for plaintiff, appellant:

A receipt in full is a written acknowledgment of the receipt of a certain sum or article, or the doing of some act as complete satisfaction of a specified debt, account, or demand. It is not a release or discharge in itself, but is evidence from which the law infers an agreement to release or discharge the debt, account, or demand in accordance with the terms acknowledged.

2 Bouv. L. Dict. *Receipt*; *Fuller v. Crittenden*, 9 Conn. 404; *Tucker v. Baldwin*, 13 Conn. 142; *Argall v. Cook*, 43 Conn. 161; *Bull v. Bull*, 43 Conn. 462-469; *Mitchell v. Wheaton*, 46 Conn. 316.

The defendant relied upon the rule that parol evidence is not admissible to contradict or vary a valid written instrument. But such rule has never been held to exclude evidence that "the instrument is altogether void, or that it never had any legal existence or binding force." Want of consideration may be proved to show that the agreement is not binding.

1 Greenl. Ev. § 284; *Baldwin v. Carter*, 17 Conn. 205.

The acknowledgment in a deed of the receipt in full of the consideration, notwithstanding the solemnity of the act of sealing, is conclu-

sive only as to a good consideration to support the deed; and evidence is admissible of the amount and payment of the consideration.

Meeker v. Meeker, 16 Conn. 387.

If the agreement of which the receipt is conclusive evidence is without consideration, then it is a mere nude pact and neither the agreement nor the receipt is binding.

The principle is the same whether we consider the writing a receipt in full or a release, provided it is not under seal.

Argall v. Cook, 43 Conn. 161; *Bull v. Bull*, 43 Conn. 462-469; *Mitchell v. Wheaton*, 46 Conn. 316; *Fitch v. Sutton*, 5 East, 230; *Wheeler v. Wheeler*, 11 Vt. 68; *Goodwin v. Follett*, 25 Vt. 388; *Puddleford v. Thacher*, 48 Vt. 574; *M'Creia v. Purmont*, 16 Wend. 460; *Ryan v. Ward*, 48 N. Y. 204; *Redfield v. Holland Purchase Ins. Co.* 56 N. Y. 354; *Twitchell v. Shaw*, 10 Cush. 48; *Harriman v. Harriman*, 12 Gray, 343; *Walan v. Kerby*, 99 Mass. 3.

The mere payment of part only of a definite, ascertained debt then due is not a good consideration for a promise to release the balance.

Warren v. Skinner, 20 Conn. 561; *Rose v. Hall*, 26 Conn. 395. See also cases cited above.

The court erred in charging the jury that, if the plaintiff gave the receipt to enable the defendant to defraud his creditors, then he was participating in the fraud, and could not set up fraud in his own behalf, because, even though the plaintiff gave the receipt believing that the defendant intended to use it to defraud his creditors, the evidence shows that he in fact had no other creditors, did not show them the receipt, and did not carry out the fraudulent intent. The rule in *pari delicto potior est conditio possidentis* does not apply to such a case.

Boies v. Foster, 2 H. & N. 769; *Symes v. Hughes*, 9 L. R. Eq. 475.

Mr. F. T. Brown, for defendant, appellee: A receipt such as that set forth in the record, intelligently given and fairly obtained, and purporting to be a receipt in full of the account due, will prevent a further recovery on the account, although more was collectible when the receipt was given than was actually paid.

It is submitted that the proposition that such a receipt, so given, is a bar to any further claim has been too often and too distinctly decided by our court of last resort to be an open question in this State.

Fuller v. Crittenden, 9 Conn. 406; *Tucker v. Baldwin*, 13 Conn. 144; *Hurd v. Blackman*, 19 Conn. 180, 181; *Beam v. Barnum*, 21 Conn. 204; *Bonnell v. Chamberlin*, 26 Conn. 492; *Rose v. Peress & Brooks Paper Works*, 52 Conn. 267.

In *Hurd v. Blackman*, 19 Conn. 180, 181, the court defines the circumstances under which a receipt in full will be set aside, and limits them to mistake, accident, surprise and fraud.

Bonnell v. Chamberlin, *supra*.

Granger, J., delivered the opinion of the court:

The defendant was indebted to the plaintiff to the amount of \$222, on the 1st of March, 1881. On that day the plaintiff gave the defendant the following receipt:

"Norwich, Conn., March 1st, 1881.

Received of Mr. Jewett Rathbone one hundred and fourteen $\frac{1}{100}$ dollars, account in full to date.

A. R. Aborn."

The defendant claimed, and offered evidence to prove, that at the time the receipt was given he offered to pay the plaintiff \$100 in cash, and receipt two small bills against him, coming to \$14.50, if he would accept it in full; and that the plaintiff accepted it in full and gave the receipt in question.

The plaintiff claimed, and offered evidence to prove, that the payment was made on account only, and a receipt on account given; and that after it was made a person in the defendant's employ came to him, and represented that the defendant wanted a receipt in full to show to his other creditors as a means of obtaining a more favorable settlement with them, and that it would not affect the plaintiff's claim, but that the defendant would pay the balance; and the plaintiff claimed that this was a fraud upon him on the part of the defendant, as the defendant had no other creditors except his father, with whom he did not attempt to compromise.

The plaintiff claimed that the receipt was void, as it had no other consideration than a part payment of the debt, which was insufficient; and that, if otherwise valid, it was rendered void by the fraud of the defendant in obtaining it; and he requested the court to charge the jury in accordance with the claim, if they found the facts claimed by him to have been proved.

The court instructed the jury as follows:

"If you find, as claimed by the plaintiff, that this receipt was given solely as a receipt for the money paid on account, and that the plaintiff did not intend and did not execute said receipt to discharge the balance of his account (unless it was so given to aid the defendant in defrauding his creditors), then the receipt is no defense to this action, and your verdict should be for the plaintiff. Or if you find that the defendant, intending to defraud the plaintiff, obtained this receipt in the manner claimed by the plaintiff, and without any intention on part of the plaintiff, by giving such receipt, to aid the defendant in defrauding his creditors, then the receipt is void, and the plaintiff can recover the unpaid balance of his account. Giving a receipt in full for a debt operates to defeat any further claim for the debt, unless the receipt is obtained under such circumstances of mistake, accident, surprise, or fraud as would authorize a court of equity to set it aside. If the receipt was given by Aborn to enable Rathbone to defraud his other creditors, then Aborn was participating in the attempt to defraud, and has no right to set up fraud in his own behalf, to make the receipt inoperative against himself."

We think the plaintiff has no ground for complaint against this charge. The general principle laid down with regard to receipts in full has long been the settled law of this State, whatever it may be elsewhere. The receipt in this case, unless impeached for fraud or mistake, was valid, and discharged the whole debt though given for a payment that was in itself but a part of the entire debt.

And while the receipt, if obtained of the plaintiff by fraud, would be of no validity against him, yet where it was given, as the jury must have found it to have been, as a part of a scheme for enabling the defendant to defraud his other creditors, it is equally well-settled

law that the plaintiff cannot avail himself of that very fraud to set the receipt aside. No principle is better settled than that a man can never set up his own fraud for his own benefit.

The judge told the jury that if the plaintiff had this fraudulent intent in giving the receipt, yet if the defendant had no such fraudulent purpose, and it was wholly a false representation to the plaintiff, and a fraud upon him, the receipt was invalidated by the defendant's fraud, and the plaintiff could recover. This part of the charge being in the plaintiff's favor, of course he does not complain of it, and we need not consider it.

There is no error in the judgment complained of.

In this opinion the other Judges concurred.

George R. HURLBUT

v.

MCKONE BROTHERS.

1. The law will not interfere where the defendant's business is lawful and the **use of his own property is reasonable**; but the question of reasonable use is to be determined in view of the rights of others; and the location and surroundings of defendant's property are to be considered; for **what constitutes a nuisance in one locality may not in another**; although the fact that the plaintiff knew of the nuisance, and then went and took his abode near it, and the fact that the dwelling-houses in the vicinity are largely occupied by mechanics and tenants, are not proper matters for consideration.
2. **Where the using of defendant's property results in a matter of great physical discomfort, powerfully affecting the comfortable enjoyment of the plaintiff's home, impairing the health of his family and the value of his property, it constitutes a nuisance.**
3. An assignment of error that the court assessed damages for injuries not actionable, without mentioning what injuries are referred to as not actionable, is no more than a **general assignment of error**, which may be disregarded.
4. **Where the action, in addition to damages for injury caused by the nuisance, seeks the extraordinary remedy of injunction, a finding by the court covering matters material to both issues will not cause a reversal of the case, on the ground that the court considered matters embraced in the finding which should not properly form a basis in estimating the damage sustained.**

(Hartford—Filed March —, 1887.)

A PPEAL by defendants from a judgment of the Superior Court of Hartford County in favor of plaintiff in an action to recover damages for a nuisance caused by the operation of a steam planing-mill, and for an injunction to restrain the same. *Affirmed.*

The case was heard in the court below, before

Andrews, J., who found the facts and ordered judgment thereon for plaintiff for \$1,000 damages, and defendants appealed.

The facts are stated in the opinion.

Messrs. H. C. Robinson and Hyde & Joslyn, for defendants, appellants:

1. As to the injury to the health of the plaintiff and his family. The complaint alleges that the plaintiff's health is endangered, as a ground for an injunction, but does not allege that it had been injured, as a ground for damages.

2. As to the depreciation in the value of the real estate. To entitle the plaintiff to recover, some legal right of his must have been violated or infringed by the defendants.

Wood, Nuis. pp. 7, 16, 896.

There is a class of cases where the nuisance complained of works a destruction of, or causes a positive, tangible injury to, the adjoining property, permanent in character; and in these cases the rule of damages undoubtedly is the difference in value of the property in question.

Wood, Nuis. p. 887.

But when the nuisance is not of a permanent character, and the injury consists of personal or physical discomfort and annoyance, which will be done away with by the removal of the nuisance, the decrease in value of the property, the occupants of which are subjected to such discomfort and annoyance, cannot be taken into consideration in fixing the amount of damages; for the reason that such reduction of value is only temporary, and to-morrow the nuisance may be discontinued and the value fully restored.

Cumberland & O. Canal Corp. v. Hitchings, 65 Me. 140; *Bigley v. Numan*, 53 Cal. 403; *Hopkins v. Western Pac. R. R. Co.* 150 Cal. 190.

3. As to the annoyance and discomfort produced by the noise and vibration of the machinery. No man is entitled to absolute and perfect quiet in the enjoyment of his property; but the degree of quiet which he may insist upon as a legal right largely depends upon the general character of his particular location and surroundings.

Wood, Nuis. pp. 9, 10; *St. Helena Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *McCaffrey's App.* 105 Pa. 253.

4. As to the complaint on account of smoke and cinders, the same rule obtains that prevails in respect to discomfort caused by noise.

5. The court below evidently included in its judgment estimated damages to come, and this was error unless this judgment will bar another suit, and have the effect of a license to the defendants to maintain their shops. The rule is that, in the case of a continuing nuisance, damages only to the date of the writ can be recovered.

Cumberland & O. Canal Corp. v. Hitchings, 65 Me. 140; *Bigley v. Numan*, 53 Cal. 403.

Messrs. Charles H. Briscoe and Charles A. Safford, for plaintiff, appellee:

The decision of the question of a nuisance is one of fact, and not of law.

Burnham v. Hotchkiss, 14 Conn. 318; *Stowe v. Miles*, 39 Conn. 426.

The doctrine that he who is first in point of time in the occupancy of his estate is first in point of right, and thus those who go to a nuisance are remediless, was long since exploded in England.

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St. Helena Smelting Co. v. Tipping, 11 H. L. Cas. 642; *Crump v. Lambert*, L. R. 8 Eq. Cas. 409.

Such doctrine never had an existence in this country.

House v. Metcalf, 27 Conn. 639; *Bradley v. Weeks*, 3 Barb. 159; *Smith v. Phillips*, 8 Phil. 10; *Commonwealth v. Upton*, 6 Gray, 478; *Mulligan v. Elias*, 12 Abb. Pr. N. S. 259; *Campbell v. Seaman*, 63 N. Y. 568.

Noise is a nuisance when it sensibly injures property or its comfortable enjoyment.

Bishop v. Banks, 33 Conn. 121; *Brown v. Illius*, 27 Conn. 92; *Davis v. Sawyer*, 133 Mass. 289; *Dennis v. Eckhardt*, 3 Grant (Pa.), Cas. 390; *Fish v. Dodge*, 4 Den. 311; *Wesson v. Washburn Iron Co.* 13 Allen, 95; *Whitney v. Bartholomew*, 21 Conn. 213; *Soltan v. De Held*, 9 Eng. L. & Eq. 104; *Crump v. Lambert*, L. R. 8 Eq. Cas. 409; *Beir v. Cooke*, 37 Hun, 41.

Depreciation in value of property caused by a nuisance is actionable.

Balt. & P. R. R. Co. v. Fifth Baptist Church, 108 U. S. 317 (Bk. 27, L. ed. 739); *Wesson v. Washburn Iron Co.* 13 Allen, 100; *Dana v. Valentine*, 5 Met. 12; *Chipman v. Palmer*, 9 Hun, 517; *Pinney v. Berry*, 61 Mo. 359; *Park v. C. & S. W. R. Co.* 43 Iowa, 636; *McKeon v. See*, 4 Rob. (N.Y.) 450; *Francis v. Schoellkopf*, 53 N. Y. 155; *Dewint v. Wiltsie*, 9 Wend. 325; *Jutte v. Hughes*, 67 N. Y. 267.

The court says in the finding that "within 1,000 or 1,500 feet of the defendants' premises there are a number of other manufacturing establishments, and the neighborhood within the distance above stated is largely occupied by mechanics and tenement houses." These are entitled to the same protection as other and more valuable residences.

Ross v. Butler, 19 N. J. Eq. 294; *Cleveland v. Citizens Gas L. Co.* 20 N. J. Eq. 210; *Meigs v. Lister*, 23 N. J. Eq. 199; *Robinson v. Baugh*, 31 Mich. 290; *McKeon v. See*, 4 Rob. (N. Y.) 469; *S. C.* affirmed, 51 N. Y. 300; *Mulligan v. Elias*, 12 Abb. Pr. (N. S.) 259; *St. Helena Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Crump v. Lambert*, L. R. 8 Eq. Cas. 409; *Bamford v. Turnley*, 3 Best & S. 62.

The right to live well and comfortably is superior to the right of merely carrying on a trade in a particular place, and when they conflict, the right of trade must yield to the right of a comfortable home. To live comfortably is the chief and most reasonable object of men in acquiring property as a means of obtaining it; and any interference with the comfortable enjoyment of life is a wrong which the law will redress.

Whitney v. Bartholomew, 21 Conn. 218; *Cleveland v. Citizens Gas L. Co.* 20 N. J. Eq. 210.

Loomis, J., delivered the opinion of the court:

This is a complaint for an injunction, and for the recovery of damages on account of an alleged nuisance erected and continued by the defendants on their own land, adjacent to the plaintiff's dwelling-house.

The trial court found the issue for the plaintiff and assessed his damages at \$1,000, but, pending the suit, there was such a change made by the defendants in the mode of operating their works as to render the preventive remedy

asked for unnecessary, and therefore the injunction was denied. The eight errors assigned may, for the purposes of this review, be reduced to two, viz.: that the facts found will not sustain any judgment for the plaintiff; and that the court entertained improper elements of damage which increased the amount of the judgment.

1. Under the first head the question is whether the existence and operation of the defendants' steam planing-mill, in the manner in which it was conducted and located, so materially interfered with the comfort and enjoyment of the plaintiff and his family in their dwelling-house as to constitute a nuisance. The finding of the court is so full and strong on this point that it would seem conclusive. It is as follows:

"They, the defendants, use the shavings and sawdust from their machines for fuel to generate steam. Such light and combustible fuel makes a great deal of smoke and cinders. The machinery of the defendants' mill, whenever it is in motion, makes much noise; so great is the noise of the defendants' machinery, and so near is it to the plaintiff's house, that when it is in motion it is impossible for the plaintiff or the members of his family to read, write, or carry on conversation without great difficulty. It causes the house to jar so that the windows rattle in the casings; dishes or other like things standing on the table or on shelves will shake and jolt together. The health of the plaintiff and his family has been injured. A tenant in the house, a Mrs. Whiting, was sick there and died. Her medical attendant testified in court that she suffered greatly from the noise of the defendants' machinery, and that her disease was aggravated and her death hastened by it. The wife of the plaintiff, being in a delicate state of health, has suffered very much from headaches caused by the noise. The value of the house has been and is greatly impaired—especially its rental value. The plaintiff has been unable to procure tenants, and such as he does procure are unwilling to pay as much rent as he before received. The smoke and cinders from defendants' chimney came into the plaintiff's yard and into his house whenever a door or a window was opened. Clothes in the yard, hung out to dry, were made foul, so that they had to be washed again. Everything in the house was soiled—the floors, carpets, walls, windows, curtains, and even the table on which they ate their meals. Upon more than one occasion the plaintiff and his family were unable to eat the meal which had been prepared for them, so dense and noisome was the smoke which came into the house from the defendants' mill. In some or all of these ways, the plaintiff has been troubled, annoyed, injured, discomforted and distressed, and the house made almost uninhabitable, ever since the defendants erected their mill."

This surely was no trifling inconvenience which the civilities of good neighborhood, in a thickly settled and industrious community, required the plaintiff to bear in silence; nor was it a matter painful merely to a cultivated taste; but the finding makes it, beyond all controversy, a matter of great physical discomfort, powerfully affecting the comfortable enjoyment of

the plaintiff's home, impairing the health of his family and the value of his property.

But it is suggested that the defendants' business was *per se* lawful, and the use made of their own property was reasonable. We concede that the law will not interfere with a use that is reasonable. But the question of reasonable use is to be determined in view of the rights of others. Even a cooking-stove may be so located and used as to make it a nuisance to the adjacent proprietor, as in *Grady v. Wotner*, 46 Ala. 881.

The owner may erect buildings with chimneys and build fires therein in a proper manner, because these are among the necessary incidents to such property, but he has no right to burn fuel in the making of such fires that develops dense masses of smoke to the injury of his neighbor, or to build his chimneys so as to send the smoke into his neighbor's house. *Wood*, Nuis. § 432.

It is further said that the place in question was a manufacturing locality, and that the plaintiff's annoyances and damage were only such as were incident to the neighborhood where he had elected to reside.

In determining whether the defendants violated any just rights of the plaintiff, the location and surroundings are to be considered; for it is undoubtedly true that what constitutes a nuisance in one locality may not be in another, and we can fully accept the rule laid down in *McCaffrey's App.* 105 Pa. 253: "A person who resides in the center of a large city must not expect to be surrounded by the stillness which prevails in a rural district. He must necessarily bear some of the noise, and occasionally feel slight vibrations produced by the movement and labor of its people, and by the hum of its mechanical industries." And if we should adopt the distinction laid down by the *Lord Chancellor Westbury* in *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 650, cited by the defendants,—between a nuisance producing a material injury to property, where the right of action is absolute, and an alleged nuisance which produces merely personal annoyance and discomfort, where the right of action depends "greatly on the circumstances of the place where the thing complained of occurs," we still think there is no authority that would deny a right of action under the facts and circumstances of this case as described in the finding. The vivid language of *Thompson, J.*, in delivering the opinion in *Dennis v. Eckhardt*, 3 Grant, 390, with slight changes, would seem to describe this case: "Some discomforts must be endured as compensation for the conveniences of city life * * *; but I cannot find authority in law for saying that a thing which fills the atmosphere, that others have a right to live in, with offensive smoke and odors, stifles the breath, produces nausea and headache, * * * prevents the drying of clothes and ventilation of houses, darkens the sunlight, and converts pleasant residences into prison-houses in dog-days, and defiles carpets, curtains, and dinner plates with deposits of soot and dirt, is not a nuisance, even though the results are only occasional."

The claim of the defendants that the locality is one "given over to mechanical industries,"

is not in full accord with the finding. The plaintiff's house is on Governor Street, and on this street there is no claim that there are any manufacturing establishments. There are such on Sheldon Street, and it is found that within "1,000 or 1,500 feet of the defendants' premises there are a number of other manufacturing establishments, and the neighborhood, within the distance above stated, is largely occupied by mechanics and by tenement houses."

All these manufacturing establishments are of course still more remote from the plaintiff's house, and the distance obviously is so great as to preclude any annoyance from smoke, cinders, or the jar of machinery, and the noise must be so softened that it could not well be a nuisance.

All the discomfort which the plaintiff can suffer, therefore, of the kind referred to, must come from the establishment of the defendants, only 21 feet distant from his house. It is probably in the power of the defendants, without great expense, to avoid all just grounds for complaint. The court finds they have already done so, mostly in respect to smoke and cinders.

In regard to the suggestion that the plaintiff elected to reside in this locality, there is nothing to show that the objectionable business of the defendants had ever been carried on before the plaintiff took possession, but rather the contrary, for they did not build till 1884. If, however, it were otherwise, and the plaintiff knew of the nuisance, and then went and took up his abode near it, he would not thereby be precluded from maintaining his action. A man is not to be precluded from building and living on his own land because the adjoining proprietor first erected a nuisance, which, indeed, was no nuisance till somebody went there to live. *Hole v. Barlow*, 27 L. J. (N. S.) C. P. 208; *Commonwealth v. Upton*, 6 Gray, 473; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 [Bk. 24, L. ed. 1036].

In regard to any suggestion arising from the fact that the dwelling-houses in the vicinity are largely occupied by mechanics and tenants, we fully approve and adopt the language of *Chancellor Zabriskie* in delivering the opinion in *Ross v. Butler*, 19 N. J. Eq. 294: "I find no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences, and carrying on trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper or convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families, by offensive smells, smoke, cinders, or intolerable noises, even if the inhabitants themselves work at trades occasioning some degree of noise, smoke, and cinders. There is no principle in law or reason which would give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborers and their families the fewer and more restricted comforts which they enjoy."

2. The remaining question is whether there entered into the judgment any improper elements of damage.

The defendants say, in substance, that the court assessed damages for injuries not actionable; but what injuries are referred to the as-

signments of error do not mention at all. This amounts to no more than a general assignment of error, which is contrary to the rule on this subject, and might be disregarded; but as the defendants were heard in argument upon the question, it may be more satisfactory to dispose of it upon its merits.

Resorting, then, to the oral argument before this court, to supply the omission referred to, we find that, after a critical analysis of the finding, the counsel for the defendants are able to specify a few particulars wherein the court, in describing the effects of the nuisance, went beyond the allegations in the complaint. For instance, the complaint, in referring to the effect upon the health of the plaintiff and his family, says simply it was endangered, whereas the finding is that it was injured; also, where the complaint only speaks of the effect of the running of the defendant's machinery as causing an intolerable noise, making it impossible to hear conversation, the finding states, in addition, that it caused the house to jar, and made the windows rattle and the dishes jolt together. Now, without stopping to show how far these facts might come in under the general allegations of the complaint, in respect to being harassed, annoyed, and made uncomfortable, and the house being made unfit for habitation, we may concede, for the purposes of discussion, that in the two particulars mentioned the finding specifies injuries not especially alleged; and our answer is that the inference attempted to be drawn therefrom, that the court gave damages for those additional injuries, is unwarrantable.

It should be borne in mind that the action was for an injunction, and also for damage; and the evidence to be received, and the facts to be found and made part of the record, had reference necessarily to both remedies. All the necessary effects of running the defendants' machinery in close proximity to the plaintiff's house were to be inquired into upon the trial, in order to determine whether it was a nuisance, and whether it was such a one as to demand the extraordinary remedy—an injunction. The facts referred to, therefore, had a proper office to perform.

"Health endangered" was perfectly established when the court found health actually injured, for the greater must include the less, and "health injured" was a much stronger reason for an injunction, as the nuisance, if continued, might result in the permanent impairment of health. So as to the other facts. If the machinery operated with such tremendous power as to jar the house itself, the court not only would see how intense and intolerable the noise must have been, and that the allegation in that respect was true,—but that the necessity for an injunction was more urgent on that account. Now, our conclusion is that, as all the facts referred to had a perfectly legitimate office to perform in the mind of the trial judge, it is to be conclusively presumed, in the absence of any evidence to the contrary shown by the record, that they were so applied. This principle has often been invoked to prevent a new trial for an alleged improper admission of evidence, where there was a general objection at the time, and the court received the evidence, but gave no indication as to the use to be made

of it, and where for one purpose it would have been proper, but for another very improper. The party, in such cases, is never allowed to say it was used for the improper purpose.

The analogy is perfect, only in the case at bar there is stronger reason to apply the principle, because there was no objection at all to the facts in the court below; and yet, in effect, we are asked to reverse the presumption, and hold that where facts had a legitimate and an illegitimate purpose it must be conclusively presumed in favor of the latter. We cannot accede to such an extraordinary demand.

There was no error in the judgment complained of.

In this opinion the other Judges concurred.

Jacob GRISSELL

v.

HOUSATONIC R. R. CO.

1. The Statute of 1881, chap. 92, § 1, which gives a railroad company an insurable interest in property along its route, and declares that the person or corporation entitled to the care and possession of property injured, being innocent of contributory negligence, the person or corporation injured may recover from a railroad company damages for any injury done to "a building or other property" by fire communicated by a locomotive engine, is constitutional in its application to a railroad whose charter not only contains an explicit reservation of power in the Legislature to alter, amend, or repeal it, but makes it also subject to all general laws the Legislature may thereafter pass.
2. Where protection to persons or property may require otherwise, the Legislature is not restrained by the principle of the common law that for a lawful, reasonable, and careful use of property the owner cannot be made liable.
3. The statute does not cast a burden upon railroad corporations from which all others are exempt under similar circumstances, nor does it deny to them a good defense which, at common law, others would have under like conditions.
4. Legislation is not necessarily invalid or in violation of the principle of a just equality before the law, if the one using extra-hazardous materials or instrumentalities, which put in jeopardy a neighbor's property, is made by such legislation to bear the risk and pay the losses thereby occasioned when there is no fault on the part of the owner of the property, even though negligence in the party employing the dangerous instruments cannot be proved.
5. The words "a building or other property" embrace fences, growing trees, and herbage. The statute is remedial, and ought to be construed liberally, to effectuate the intention of the Legisla-

ture; and the enforcement of the statute is not dependent on the ability of the railroad company to obtain insurance upon the class of property injured, although the statute confers an insurable interest coextensive with the property for which the railroad company may be responsible, and gives liberty to the railroad company to obtain such insurance in its own name, with any other party who is able and willing to contract relative to the subject-matter. The statute does not, however, concern itself with such insurer.

(Hartford—Filed February, 1887.)

APPEAL by defendant from a judgment of the Court of Common Pleas of Litchfield County on a verdict for plaintiff in an action under the Act of 1881, chap. 92. *Affirmed.*

This was an action brought under the Act of 1881, chap. 92, for destruction of fences and trees upon the land of the plaintiff near the railroad of defendant company, by fire alleged to have been communicated by a locomotive of the defendant. The action was brought before a justice of the peace, and, by appeal, to the Court of Common Pleas of Litchfield County, and tried to the jury before Warner, J.

On the trial the plaintiff offered evidence to prove that on April 16, 1885, between the hours of 11 and 12 in the forenoon, the defendant was running a locomotive engine with a train of cars attached thereto, in a northerly direction, along the side of the plaintiff's land, which lies on the easterly side of the defendant's layout; that very soon after the train had passed, a smoke and fire were seen by witnesses on the easterly side of the defendant's track, and that traces of the fire were visible from the track over the defendant's layout to and upon the land of the plaintiff and land of one Gaylord; that no smoke or fire were seen in that vicinity prior to the passage of the train, although the witnesses were in a position to have seen the same if any existed; that at that time there was a high wind blowing from a northwesterly direction, and that the fire progressed with great rapidity and burned the plaintiff's fences, growing trees, and herbage. No witness testified that he saw the spark of fire come from the locomotive which set the fire.

The plaintiff also offered evidence to prove that he did not contribute to the injury, and that he was not negligent in the care of his property and did not expose it to fire from locomotive engines. He also offered evidence to prove the damage done to his fences, growing timber, and herbage by the fire.

To this evidence the defendant objected first, that there had been no proof of negligence on the part of the defendant; and second, that the plaintiff could not recover, under the provisions of the Act of 1881, until he should prove that the defendant had, or could have, an insurable interest in the property injured by the fire, and that the burden of such proof was on the plaintiff. The court overruled the objection and admitted the evidence, and defendant excepted.

The defendant called one Todd as a witness, who testified that he was a fire-insurance agent, and had been for the last eighteen years; and

that he did not know of any insurance company that insured growing trees and herbage or fences, against fire. This evidence was objected to by the plaintiff, but was heard, by agreement of the parties, subject to the ruling of the court in its charge to the jury.

The defendant requested the court to charge the jury that there was no evidence to prove that the defendant was guilty of any negligence; and, as there was no other evidence that the fire was communicated from the defendant's locomotive, the plaintiff could not recover; also that the Act of 1881 was unconstitutional and void, as it interfered with the charter rights, contracts, and duties of the defendant.

The court did not charge the jury as requested, but charged them as follows:

"It is your duty to determine from all the evidence adduced and the circumstances connected with the occurrence of the fire, whether the fire proceeded from the defendant's locomotive, or from some other cause, which injured the plaintiff's property. The defendant is not correct in his claim that the statute of 1881 is unconstitutional and void. I instruct you that if you find that the locomotive of the defendant communicated the fire to the land of the plaintiff, either directly or to the land of Mr. Gaylord, and from thence it ran on to the land of the plaintiff and did him the injury of which he complains, and you also find that the plaintiff in no wise contributed to that injury, then your verdict should be for the plaintiff. But this must be proved affirmatively by the plaintiff, and by a fair preponderance of evidence on his part. You must be satisfied from the evidence that the defendant's locomotive communicated the fire that did the injury to the plaintiff, and that he did not contribute to it. It was not incumbent upon the plaintiff to prove that said property of the plaintiff which was injured by the fire could have been insured by the defendant. The testimony of Mr. Todd, which was offered to prove that there was no insurance company that could or would insure such kind of property against fire, was not admissible, and is to have no influence on your minds. You will reject it. If you find that the fire that injured the property of the plaintiff did not come from the locomotive of the defendant, then your verdict must be for the defendant. Or, if you find that the fire came from said locomotive, and you also find that the plaintiff contributed to the spread and extension of that fire which did him the injuries of which he complains, then your verdict should be for the defendant."

The jury returned a verdict for the plaintiff of \$75 damages, and the defendant appealed to this court.

Messrs. Morris W. Seymour and Howard H. Knapp, for defendant, appellant:

Are "fences," "growing trees," and "herbage" (the only property proved to have been injured) "other property," within the meaning of the statute of 1881? The word "property," says Hinman, *Ch. J.*, in *Stanton v. Lewis*, 26 Conn. 449, "of course must include everything that is the subject of ownership." Literally, therefore, "other property" includes franchises, easements, incorporeal hereditaments, and other things incapable of being

either insured or destroyed by fire. Clearly, it seems to us, the Legislature intended no such sweeping change in our law. Again, that principle of interpretation denominated *nosctitur a sociis* requires the meaning of the words "other property" to be limited to the property of the same general character as "buildings."

2 Pars. Cont. 501, note *u*; *Potter's Dwar. Stat.* 236, 272, 292; *Wheeler v. McCormick*, 8 Blatchf. 267; *Chidsey v. Town of Canton*, 17 Conn. 476; *Bailey v. Close*, 87 Conn. 411; *Boon v. Aetna Ins. Co.* 40 Conn. 575; *Allen's Appeal*, 81* Pa. St. 302; *Renick v. Boyd*, 99 Conn. 555; *Reed v. Belfast*, 20 Me. 246; *Rez v. Wallis*, 5 T. R. 375, 379; *Rez v. Hall*, 1 Barn. & C. 237.

The words themselves being of doubtful interpretation, the intention of the Legislature in passing such a statute is a legitimate source from which to seek light. In this view, the provision in the latter clause of the same section that the railroad corporation "shall have an insurable interest in the property for which it may be so held responsible in damages, and may procure insurance thereon in its own behalf," certainly shows that the Legislature intended to limit the meaning of the words "other property" to such other property as is capable of being insured; to such other property as it is possible for the railroad corporation to have "insured in its own behalf."

Chapman v. Atlantic & St. L. R. R. Co. 37 Me. 92.

The Legislature had no constitutional power to enact such statute. The charter of the defendant is a contract between the State and the company which is within the protection of the Constitution of the United States, art. 1 § 10.

Enfield Bridge Co. v. Conn. River Co. 7 Conn. 48; *Derby Turnpike Co. v. Parks*, 10 Conn. 522, 541; *Washington Bridge Co. v. State*, 18 Conn. 64; *Dartmouth College v. Woodward*, 4 Wheat. 519 (17 U. S. bk. 4, L. ed. 629); *Planters Bank v. Sharp*, 6 How. 301 (47 U. S. bk. 12, L. ed. 447); *Fletcher v. Peck*, 6 Cranch, 132 (10 U. S. bk. 3, L. ed. 176); 3 Pars. Cont. 532.

The company is a citizen of this State, and like any other citizen is entitled to the equal protection of the laws of the State and of the United States, and especially that protection thrown around a citizen of the United States by the Fourteenth Amendment of the Constitution of the United States.

Louisville, etc. R. R. Co. v. Letson, 2 How. 497 (43 U. S. bk. 11, L. ed. 353); *R. R. Tax Cases*, 13 Fed. Rep. 722; *Southern Pac. R. R. Co. v. California*, 118 U. S. 109 (Bk. 30, L. ed. 102); *Santa Clara County v. Southern Pacific R. R. Co.* Id. 394 (Bk. 30, L. ed. 118).

The statute of 1881 does not pretend to take the property of the company for a public use. The fact that it does not provide for compensation would be fatal to any such claim if made.

Though the charter is subject to alteration, amendment, and repeal by the General Assembly, the Act of 1881 is not such an alteration or amendment.

State v. New Haven & N. Co. 43 Conn. 351.

If the statute be properly a police regulation, the Legislature would have full power to enact it, whether the charter were a close charter or one subject to alteration or amendment

Pierce, R. R. 460; *People v. Boston & A. R. R. Co.* 70 N. Y. 569.

Down to the enactment of this statute no railroad corporation in this State could have been held responsible in damages for a fire communicated by one of its locomotive engines, without showing either malice, negligence, or such a wanton disregard of the rights of others as to amount to malice.

1 Bl. Com. 431; Pierce, R. R. 431; *Morris v. Platt*, 32 Conn. 86; Cooley, Torts, 591, 592; *Clark v. Foot*, 8 Johns. 421; *Loose v. Buchanan*, 51 N. Y. 497.

The enactment of this statute can in no sense be considered the establishment of a rule of law, changing the common law as to where, thereafter, the loss occasioned by accidental fires should fall. The fact that it was confined in its operation to railroads would be fatal to any such claim.

1 Bl. Com. 45; *Dartmouth College Case*, 4 Wheat. 519 (17 U. S. bk. 4, L. ed. 629); Cooley, Const. Lim. 353, 354, 390, 393; *Chicago, etc. R. R. Co. v. Moss*, 60 Miss. 641; 20 Am. & Eng. R. R. Cas. 555.

Within proper limitations and due regard for the rights of all, fire is a subject-matter within the police regulation of the State.

Blackstone (4 Bl. Com. 162) defines the public police and economy as "the due regulation and domestic order of the kingdom, whereby the inhabitants of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations."

See also, to the same effect, Bentham's General View of Public Offenses (Works, pp. 9, 157); Cooley, Const. Law, 209; Cooley, Const. Lim. 571; *State v. New Haven & N. Co.* 43 Conn. 378; *Commonwealth v. Alger*, 7 Cush. 84; *Thorpe v. Rutland & B. R. R. Co.* 27 Vt. 140; *Munn v. Illinois*, 94 U. S. 145 (Bk. 24, L. ed. 77); *Beer Co. v. Massachusetts*, 97 U. S. 33 (Bk. 24, L. ed. 989).

But Shaw, *Ch. J.*, says that the police power must not be "repugnant to the Constitution."

Commonwealth v. Alger, *supra*.

The police power is not without limitations, and in its exercise the Legislature must respect the great fundamental rights guaranteed by the Constitution.

Re Jacobs, 98 N. Y. 110.

Cooley (Const. Law, 388, 389) says: "All property and rights within the jurisdiction of the State are subject to the regulations and restraints of its police power, except so far as they are removed therefrom by the express provisions or implications of the Federal Constitution."

Potter's Dwar. Stat. 458, says: "The limit to the exercise of the police power can only be this: The legislation must have reference to the comfort, the safety, or the welfare of society; it must not be in conflict with the provisions of the Constitution."

See also *Austin v. Murray*, 16 Pick. 121, 126; *Coe v. Schultz*, 47 Barb. 64; *People v. Marz*, 99 N. Y. 371, 396; *State v. Noyes*, 47 Me. 189; *Slaughter House Cases*, 16 Wall. 36, 87 (38 U. S. bk. 21, L. ed. 394).

To sum up the general doctrine, as gathered

from all the authorities, a statute, in order to be a police regulation, must possess the following characteristics: 1. It must have for its object the protection of life, of health, the comfort, the good order, the morals, the property of the community. 2. It must be for the equal protection and enjoyment of all. 3. It must not, in prescribing the use and enjoyment which one may make of his own, preclude a corresponding use and enjoyment of their own by others.

Strictly speaking, the words of this statute do not bring it within the legitimate objects regarding which the police power of the State may be exercised. It does not require of railroads the use of spark-arresters, or any other device to prevent the escape of fire, and as a penalty imposes an obligation to pay for all damage occasioned thereafter by fire. It is not a statute for the better protection of property. It simply imposes on the railroads an absolute liability. It requires nothing; it suggests nothing for the better protection of property; it simply shifts the burden of the loss, from where for all time it has rested, on to others.

If, under its police powers, the State has a right to vary the common-law rule and hold people responsible in damages for fires accidentally originating on their premises, as a legal police regulation it must apply to all alike. A statute which discriminates between classes of individuals is, for that reason, void.

Chicago, etc. R. R. Co. v. Moss, 60 Miss. 641; *Alabama R. R. Co. v. Morris*, 65 Ala. 193; *Durkee v. Janesville*, 28 Wis. 484.

Notwithstanding the statute of 1881 is not a legal police regulation, it would still be a law binding on the defendant corporation, unless it in some way interferes with the rights secured by the Constitution of the United States and of this State.

The Legislature cannot interfere with the obligations of contracts (U. S. Const. art. 1, § 10); nor deprive any person of life, liberty, or property without due process of law (5th Amendment, U. S. Const.); nor take private property for public use without just compensation (14th Amendment, U. S. Const., also Conn. Const. art. 1, § 2); nor deny to any person within its jurisdiction the equal protection of the laws (14th Amendment, U. S. Const.); nor deprive one of life, liberty, or property, but by due course of law (Conn. Const. art. 1, § 9); and all courts shall be open, and every person for an injury done to him in his person, property, or reputation shall have remedy by due course of law and right, and justice administered without sale, denial, or delay (Conn. Const. art. 1, § 12).

The right of the railroad to run by the use of fire and steam is one that cannot be taken away. The defendant railroad not only may run, but it must run. The State compels it to run.

State v. Hartford & N. H. R. R. Co. 29 Conn. 538.

The manner of its using fire and steam may, under proper circumstances and for proper objects, be regulated, but a regulation which amounted to a prohibition would be void. A regulation which partially permitted their use would impair their full power to use, and hence would be equally void.

New Orleans Gas Co. v. Louisiana Light Co.

115 U. S. 650 (Bk. 29, L. ed. 516); *Green v. Bidde*, 8 Wheat. 84 (21 U. S. bk. 5, L. ed. 568); *Dartmouth College Case*, 4 Wheat. 518 (17 U. S. bk. 4, L. ed. 629).

Railroads, inasmuch as they are built by private capital, in their relation to their stockholders, the property owned by them, and their income, are *privati juris*, and subject to the same limitations, and invested with the same security as the private property of an individual.

Benson v. Mayor, etc. of New York, 10 Barb. 245; *Commonwealth v. Pa. Canal Co.* 66 Pa. 41; *Chicago, B. & Q. R. R. Co. v. Atty-Gen.* 9 W. Jur. 847.

Even the essential right of taxation may be taken away from the State by the charter granted to a railroad, and any subsequent attempt to tax it would be a violation of the contract between the State and the company.

New Jersey v. Yard, 95 U. S. 104 (Bk. 24, L. ed. 352); *Farrington v. Tennessee*, Id. 679 (Bk. 24, L. ed. 558); *Humphrey v. Peques*, 16 Wall. 244 (83 U. S. bk. 21, L. ed. 326); *Pacific R. R. Co. v. Maguire*, 20 Wall. 36 (87 U. S. bk. 22, L. ed. 282).

A charter granting the exclusive right to a company to do a certain thing, even though it be a matter of public concern, is violated by giving another company the same privilege.

New Orleans Gas Co. v. Louisiana Light Co. 115 U. S. 650 (Bk. 29, L. ed. 516); *Boston & L. R. R. Co. v. Salem & L. R. R. Co.* 2 Gray, 1.

Can the money of the stockholders of the defendant corporation be given by law to one who shall suffer from a fire, the kindling of which they were guilty of no carelessness or malice in causing, and in regard to which, though they may have conclusive evidence that it was caused by an inevitable accident, the statute says in effect that they shall not be permitted to introduce it; and that money said to be taken by due process of law? Is there no such thing in law as "*damnum absque injuria*?"

Cooley, Const. Lim. 819. To the same effect *Wright v. Cradlebaugh*, 3 Nev. 341; *Taylor v. Porter*, 4 Hill, 140, 145; *Ohio & M. R. Co. v. Luckey*, 78 Ill. 55; *McCready v. Sexton*, 29 Iowa, 356, 391; *People v. Hays*, 37 Barb. 440; *Zeigler v. Alabama R. R. Co.* 58 Ala. 594; *Mayor v. Thorne*, 7 Paige, 261.

If a private individual cannot be held responsible for accidental fires, all citizens within this State have a right to demand the same protection.

Slaughter House Cases, 16 Wall. 36 (85 U. S. bk. 21, L. ed. 894); *R. R. Tax Cases*, 13 Fed. Rep. 722; *Southern Pacific R. R. Co. v. California*, 118 U. S. 109 (Bk. 30, L. ed. 108); *Santa Clara County v. Southern Pacific R. R. Co.* Id. 394 (Bk. 30, L. ed. 118).

The Legislature has no power to declare what shall be conclusive evidence of a given fact.

Wantan v. White, 19 Ind. 470; *White v. Flynn*, 23 Ind. 46; *Davis v. Minge*, 56 Ala. 121.

A law which in effect takes away titles without allowing parties to defend their rights is void.

Groesbeck v. Seeley, 13 Mich. 330, 342; *Blackw. Tax T.* p. 100; Cooley, Const. Lim. p. 368.

These cases seem to us to establish the rule that, so long as it is the law of the land that there shall be no responsibility for accidental fires, 394

by refusing the defendant the right to show that it was guilty of no negligence, its property is taken without due process of law.

See also *Re Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377; *New Orleans Gas Co. v. Louisiana Light Co.* 115 U. S. 650 (Bk. 29, L. ed. 516); *Zeigler v. S. & N. R. R. Co.* 58 Ala. 594.

Messrs. J. S. Turrill and J. F. Addis, for plaintiff, appellee:

Section 17 of the defendant's charter reads: "The said corporation and railroad shall be subject to all the general laws which have been or shall be made in this State relative to railroad companies and railroads." Priv. Laws, p. 1029. Section 20 reads: "This resolve may be altered, amended, or repealed at the pleasure of the General Assembly." Priv. Laws, p. 1030.

By this reservation the Legislature has the right to enact any amendments to the charter, or enact any general laws, and impose any restrictions on the company, or make any change that does not defeat or substantially impair the object of the grant, or any rights which have vested under it, that the Legislature may deem necessary to secure or protect public or private rights.

Comrs. of Fisheries v. Holyoke Water Power Co. 104 Mass. 451.

This statute does not establish a different rule of responsibility for one class than is established for others. This Act is a general one for all railroad companies who use locomotives on their roads.

Statutes Regarding Railroad Companies, p. 315, § 1; *Chicago, B. & Q. R. R. Co. v. Iowa*, 94 U. S. 163 (Bk. 24, L. ed. 94).

To the same effect, *Jones v. Galena & C. R. R. Co.* 16 Iowa, 6.

We have a statute of the same nature, to charge an individual in damages, for a like action, and no proof of negligence by plaintiff is necessary: "Every person who shall set fire on any land, that shall run upon the land of any other person, shall pay to the owner all the damages done by such fire, to be recovered in an action of trespass."

Stat. p. 489, § 6.

An Act similar has been passed in Kansas.

M. K. & T. R. R. Co. v. Davidson, 14 Kan. 349.

In various States a similar law has been enacted, making proof of fires communicated by railroad companies *prima facie* proof of the negligence of such companies, and the courts have held such laws constitutional and valid.

2 Wood, R. R. Law, p. 1367; *Cleveland v. Grand Trunk R. Co.* 42 Vt. 449; *Chicago & A. R. R. Co. v. Clampton*, 63 Ill. 95; *Same v. Quaintance*, 58 Ill. 889; *Baltimore & O. R. R. Co. v. Shipley*, 39 Md. 251.

It is necessary under the law of 1881 for plaintiff to prove the fire was communicated from the engine of the company, but it does not prescribe that plaintiff shall prove negligence, and under the statute the company is liable whether it is guilty of negligence or not.

Perley v. Eastern R. R. Co. 98 Mass. 414; *Hooksett v. Concord R. R.* 38 N. H. 242; *Rosell v. Railroad*, 57 N. H. 132; *Lyman v. Boston & W. R. R. Co.* 4 Cush. 291.

The Legislature has permitted this company to use engines that are of such a nature that

they necessarily expose the property of others to danger, injury, and destruction. A statute to afford indemnity against this risk to those exposed to it, and to throw the responsibility upon those who are thus authorized to use this dangerous apparatus, and who realize a profit from it, is a valid law, and not subject to any constitutional objection; it is within the police power of the State.

Hart v. Western R. R. Co. 13 Met. 99.

The charters of corporations are to be construed strictly; that is, favorably to the public and against corporations.

Thorpe v. Rutland & B. R. R. Co. 27 Vt. 147.

Where there is a reservation in the charter to alter, amend, or repeal, the Legislature is authorized to make any alteration which does not defeat or substantially impair the objects of the grant or rights which have been vested under it, which the Legislature may deem necessary either to promote the corporate purpose or secure other public or private rights,

3 Wood, R. R. Law, 1699.

In this charter there is not only this reservation of this right to amend, alter, or repeal, but it is subject to all general laws that the Legislature may thereafter pass.

Priv. Laws, *supra*.

All corporations, even if no power is reserved to alter, amend, or repeal, are subject to the police power of the State, and their charters are granted subject to whatever Act the Legislature may make under the police power of the State.

3 Wood, R. R. Law, p. 1702; *English v. New Haven & N. Co.* 32 Conn. 240.

Under this police power of the State, the power of the Legislature extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State.

3 Wood, R. R. Law, p. 1703, note 1; p. 1704; *Thorpe v. Rutland & B. R. R. Co.* 27 Vt. 49; *Coffin v. Rich*, 45 Me. 507.

The Legislature may control the actions, prescribe the functions and duties of corporations, and impose restraints upon them to the same extent as they can upon natural persons, in all matters coming within the general range of legislative authority, only subject to the limitation of not impairing the obligation of a contract.

It can, especially when power is reserved, impose upon corporations any additional conditions or burdens for the protection or welfare of the public which they might originally and with justice have imposed.

Any privileges which may exempt companies from the burdens common to individuals do not flow necessarily from the charter, and must be expressed in it, or they do not exist.

3 Wood, R. R. Law, pp. 1702, 1703, 1704, note 1; *Thorpe v. Rutland & B. R. R. Co.* 27 Vt. 145, 149; *Coffin v. Rich*, 45 Me. 509; *Comrs. v. Holyoke Water Co.* 104 Mass. 446; *Pratt v. Atlantic & St. L. R. R. Co.* 42 Me. 587; *Norris v. Androscooggin R. R. Co.* 39 Me. 273; *Lyman v. Boston & W. R. R. Co.* 4 Met. 291; *Rodemacher v. Milwaukee & St. P. R. R. Co.* 41 Iowa, 305, 306; *Munn v. Illinois*, 94 U. S. 113 (Bk. 24, L. ed. 77); *Lake Shore & M. S. R. Co. v. Cincinnati, S. etc. R. Co.* 80 Ohio St. 610; *People v. Boston & A. R. R. Co.* 70 N. Y. 569; *K. P. R. R. Co. v. Mower*, 16 Kan. 576; *Com-*
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monwealth v. Certain Intoxicating Liquors, 115 Mass. 153; *English v. New Haven & N. Co.* 32 Conn. 240.

Among many other Acts that have been by the courts held to be valid and constitutional under the police power of the State, and not impairing the obligation of a contract with any company previously incorporated, or with any person, are some following:

To regulate and station vessels in New York harbor.

Vanderbilt v. Adams, 7 Cow. 349.

Requiring passenger cars to be numbered and licensed.

Frankfort & P. R. R. Co. v. Philadelphia, 58 Pa. 119.

To impose on an old company the expense of a watchman at a crossing made by a new railroad.

Lake Shore & M. S. R. v. Cincinnati & S. etc. R. Co. 30 Ohio St. 604.

To build a bridge to carry a turnpike over railroad even where there is no reservation in charter.

People v. Boston & A. R. R. Co. 70 N. Y. 569.

To build bridges, cattle-guards, and fences, and to be liable for damages for injury to animals killed, if not built.

Bulkley v. New York & N. H. R. R. Co. 27 Conn. 479; *K. P. R. R. Co. v. Mower*, 16 Kan. 574; *Jones v. Galena & C. U. R. R. Co.* 16 Iowa, 6; *Thorpe v. Rutland & B. R. R. Co.* 27 Vt. 140; *Norris v. Androscooggin R. R. Co.* 39 Me. 273.

To build and widen bridges at request of city.

English v. New Haven & N. R. R. Co. 32 Conn. 240.

To build fences, and make company liable in double damages for stock injured that get on track by reason of failure of company to erect and maintain them.

Cairo & St. L. R. R. Co. v. Peoples, 92 Ill. 97.

To fix and establish a maximum rate of charges by railroad companies for transporting freight and passengers, and to fix such charges at a certain amount, notwithstanding power given to directors to fix rates.

Chicago, B. & Q. R. R. Co. v. Iowa, 94 U. S. 155 (Bk. 24, L. ed. 94); *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 (Bk. 24, L. ed. 97); *Chicago, Milwaukee & St. Paul R. R. Co. v. Ackley*, 94 U. S. 179 (Bk. 24, L. ed. 99); *Illinois Cent. R. R. Co. v. Illinois*, 95 Ill. 313.

To compel company after erecting a dam to erect a fishway.

Commissioners v. Holyoke Water Power Co. 104 Mass. 451.

To make stockholders liable for debts of company.

Coffin v. Rich, 45 Me. 507.

In Iowa, Code of 1873, § 1289, last clause, enacts "that any corporation operating a railway shall be liable for all damages by fire that is set or caused by the operating of a railway, and such damages may be recovered by the party damaged in the same manner as is set forth in this section in regard to stock killed, except double damages.

Rodemacher v. Milwaukee & St. P. R. R. Co. 41 Iowa, 297.

Each of the States of Massachusetts, Maine, and New Hampshire has passed Acts substantially like the Connecticut statute, except

there is no clause that the person whose property is injured shall be without contributory negligence. Our law in that respect is more favorable for the companies.

Hart v. Western R. R. Corp. 13 Met. 99, 105; *Lyman v. Boston & W. R. R. Co.* 4 Cush. 288, 291.

In the following cases such statutes have been sustained:

Massachusetts: *Ross v. Boston & W. R. R. Co.* 6 Allen, 87; *Ingersoll v. Stockbridge & P. R. R. Co.* 8 Allen, 488; *Trask v. Hartford & N. H. R. R. Co.* 16 Gray, 71; *Pierce v. Worcester & N. R. R. Co.* 105 Mass. 199; *Perley v. Eastern R. R. Co.* 98 Mass. 414. Maine: *Pratt v. Atlantic & S. L. R. R. Co.* 42 Me. 579; *Chapman v. Atlantic & St. L. R. R. Co.* 82 Me. 92. New Hampshire: *Hooksett v. Concord R. R.* 88 N. H. 242; *Rovell v. Railroad.* 57 N. H. 132. Vermont: *Grand Trunk R. R. Co. v. Richardson.* 91 U. S. 454 (Bk. 23, L. ed. 356). See also *Pierce, R. R. p. 444*; 2 Wood, R. R. Law, p. 1367.

The Supreme Court of Connecticut assumes this statute to be valid and constitutional.

Simmonds v. New York & N. E. R. R. Co. 52 Conn. 264.

As to insurable interest, and the right to recover for trees, fences, etc., see—

Eastern R. R. Co. v. Relief Ins. Co. 105 Mass. 570; *Chapman v. Atlantic & St. L. R. R. Co.* 87 Me. 92; *Pratt v. Atlantic & St. L. R. R. Co.* 42 Me. 579, 583; *Trask v. Hartford & N. H. R. R. Co.* 16 Gray, 71; *Ross v. Boston & W. R. R. Co.* 6 Allen, 87; *Rovell v. Railroad.* 57 N. H. 136; *Hooksett v. Concord R. R.* 88 N. H. 242; *Grand Trunk R. R. Co. v. Richardson.* 91 U. S. 459 (Bk. 23, L. ed. 356); and the other Massachusetts cases, *supra*.

Loomis, J., delivered the opinion of the court:

This action is founded on the Statute of 1881 (Sess. Laws 1881, chap. 92), the first section of which is as follows:

"Where any injury is done to a building or other property of any person or corporation, by a fire communicated by a locomotive engine of any railroad corporation, without contributory negligence on the part of the person or corporation entitled to the care and possession of the property injured, the said railroad corporation shall be held responsible in damages to the extent of such injury, to the person or corporation so injured; and any railroad corporation shall have an insurable interest in the property, for which it may be so held responsible in damages, along its route, and may procure insurance thereon in its own behalf."

The plaintiff was the owner and possessor of land adjoining the defendant's railroad track in the town of New Milford, and certain of his fences, growing trees, and herbage thereon were destroyed by fire communicated by the defendant's locomotive engine. There was no contributory negligence on the part of the plaintiff, and he brought this suit to recover damages for the injury received, and obtained a verdict in his favor in the court below.

The defendant gives six distinct reasons for his appeal to this court, but none of them can avail to set aside the plaintiff's verdict if the

statute is valid, and can be construed to cover the property injured. Our discussion therefore will be confined essentially to these two points:—

1. Is the statute a valid one?

The defendant's counsel in his argument presented a powerful arraignment of the statute as denying to railroad corporations the equal protection of the laws, in that it makes them liable for the consequences of a lawful act, without any fault or negligence; and as taking away their property without due process of law, in that it deprives them of a legal defense; and as impairing the rights given them by their charters, which authorize the use of fire, steam, and locomotive engines, while requiring trains to be run for the benefit of the public, for the unavoidable consequences of which acts the statute makes them liable. The several counts in this indictment seem to be based principally upon this one principle of the common law, that for a lawful, reasonable, and careful use of property the owner cannot be made liable.

But this principle is not so wrought into the Constitution or into the very idea of property, that it cannot be departed from by the Legislature, where protection to persons or property may require it.

But the defendant also invokes another principle, which it is claimed the statute violates, namely, the equal protection of the law. But to give force to this objection, it should appear that a burden is cast on railroad corporations from which all others are exempt under similar circumstances. There can of course be no such inequality if the circumstances are radically different. This consideration seems to have been ignored in the argument for the defendant, or else it was erroneously assumed that the circumstances were similar. Some of the cases cited in behalf of the defendant will illustrate the distinction to which we refer.

In *Durkee v. Janesville*, 28 Wis. 464, an Act had been passed providing that the city of Janesville should be held to pay no costs in any action brought against it to set aside any tax assessment or tax deed, or to prevent the collection of any tax. The Act was held void, because it exempted one corporation by name from a burden from which no other was exempt under like circumstances, and it enabled the city to recover its own costs if it recovered judgment, but denied it to the other party to the same litigation in case judgment was recovered against the city. So in *Ohio & Miss. R. Co. v. Lackey*, 78 Ill. 55, an Illinois statute was held unconstitutional and void which made the railroad company liable for all the burial expenses and coroner's fees incurred, where anyone happened to die or be killed in any way in the cars of such railroad. This Act attempted to make the company liable though a person might die from a mortal sickness which was upon him when he entered the car, or by his own hand, or in other ways in regard to which the company would have no agency whatever. The distinction between such a case and the one at bar is too manifest to require further comment.

The only case cited which supports the defendant's position in the least is the case of *Zeigler v. South Alabama R. R. Co.* 58 Ala. 594, where a statute of that State was held uncon-

stitutional which declared that railroad corporations should be liable and make compensation to the owner for all damage to live stock caused by their locomotives or trains, without any reference to the skill or diligence with which the train was operated, unless there was some contributory negligence on the part of the owner other than permitting the stock to run at large. There might be a difference of opinion in different jurisdictions as to the validity of such legislation. But assuming, for the sake of argument, that the decision was right, there is an important distinction between the two cases. There, the animals injured were where they ought not to have been,—trespassers obstructing the defendant's railroad track, directly exposing the defendant's property to hazard and loss; here, the property injured was where it ought to have been, on the plaintiff's own premises, occasioning no hazard to the railroad company. There, too, it was possible for the owner to have kept his stock on his own premises where they would have been safe; but here it was not possible for the plaintiff to avoid the loss that he suffered by any act of his own.

It is a mistake to suppose that it necessarily transcends the limits of valid legislation, or violates the principle of a just equality before the law, if the one using extra-hazardous materials or instrumentalities, which put in jeopardy a neighbor's property, is made to bear the risk and pay the loss thereby occasioned, if there is no fault on the part of the owner of the property, even though negligence in the other party cannot be proved. If the statute should make the owner of a vicious domestic animal liable for the damage it might occasion, without proof of *scienter*, or knowledge of its vicious propensity, as required by the common law, we do not think the Act would be void. Such a statute would only be a new application of an ancient common-law principle, that where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who caused the loss rather than upon the other who had no agency in producing it and could not by any means have avoided it.

An ancient statute of this State, which has been very often enforced, makes the owner of dogs, or, if the owner is a minor or an apprentice, the parent, guardian, or master, liable for all the damage done by them, irrespective of any fault or negligence on the part of the owner. Gen. Stat. p. 267, § 5. Another statute (Gen. Stat. p. 489, § 6) makes one who kindles a fire on his own or any land, liable for all damage it may do if it runs upon the land of another, and proof of negligence is not required. We are not aware that the validity of any of these statutes has been called in question. The dangerous character of the thing used is always to be considered in determining the validity of statutory regulations fixing the liability of parties so using it. Fire has always been subject to arbitrary regulations, and the common law of England was more severe and arbitrary on the subject than any statute. In Rolle's Abridgment (*Action on the Case, B, title Fire*) it is said: "If my fire, by misfortune, burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods and also my

neighbor's house, he shall have his action on the case against me. So, if the fire is caused by a servant, or a guest, or any person who entered the house with my consent. But otherwise if it is caused by a stranger who enters the house against my will."

It ought perhaps to be stated that this has not been adopted as the common-law rule in the United States. In most States, we presume, there are arbitrary police regulations concerning the transportation or deposit of gunpowder. Would the constitutionality of a statute be questioned that should make one who deposits large quantities of gunpowder or dynamite on his own premises, in dangerous proximity to the property of another, liable for any loss thereby occasioned to the latter, without proof of negligence?

There is no force in the objection that the statute under consideration unjustly selects only railroad corporations to bear the burden of an extraordinary risk. It is confined to them because they alone have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of the day and night, and at all seasons, whether wet or dry, with locomotive engines that scatter fire along the margin of the land not taken, thereby subjecting all combustible property to extraordinary hazard of loss, and that, too, for the sole profit of the corporation. The argument for the defendant is fallacious in erroneously assuming that the statute denies to the defendant a good defense which at common law all others would have under similar circumstances.

In *Jones v. Festiniog Railway Co.* L. R. 8 Q. B. 733, in a suit against an unchartered railway company, it was proved by the defendants that all reasonable precautions had been taken to prevent the omission of sparks from a locomotive engine used by them. But it was held, nevertheless, that they were liable on the ground that the locomotive was a dangerous engine to be brought and used by the defendants even upon their own premises, and that they must bear the consequences in case of damage to others. Wharton, in his treatise on Negligence, § 868, lays down the same doctrine as to the liability of unchartered companies at common law.

How then can it transcend the limits of just and valid legislation, to attach to chartered railroad companies, for doing the same act under the same circumstances, the same liability, where the charter, as in this case, is an open one expressly made subject to all general laws?

In *Hooksett v. Concord R. R. Co.* 38 N. H. 242, where the construction of a similar statute was under consideration, Eastman, J., in giving the opinion of the court, used this suggestive language: "The extraordinary use of the element of fire by which the property of individuals situated along the lines of railroads becomes endangered beyond the usual and ordinary hazard to which it is exposed, no doubt caused the Legislature to interfere. * * * By this exposure an increased risk of loss of property is caused. The risk must be borne by some one; and if the property is insured, a larger premium must be paid. Upon whom shall this risk fall and this burden rest? Upon the owners of the

property, or upon the corporations who make this extraordinary use of the fire?"

The only answer, it seems to us, which a due sense of justice can dictate, is the one given in that case,—that the responsibility and burden should rest on the corporations. No other mode of adjusting this risk can be suggested so just towards all parties as this. Before the statute upon taking land for railroad purposes, it was possible upon the appraisal to include something for the increased risk to buildings on the land not taken, confining it, however, to the diminished value of the remaining property caused by the risk. *Pierce*, R. R. 215; *Re Utica*, etc. R. R. Co. 56 Barb. 456; *Wilmington & Reading R. R. Co. v. Stauffer*, 60 Pa. 374.

But it would seem extremely difficult to make any just appraisal, even on this limited basis; and it could have no application to buildings afterwards placed on the land, nor to buildings which might be destroyed by fire from this source on land more remote from the railroad, no part of which was taken or appraised; nor to any personal property whatever. And it would, of course, be utterly impracticable to assess beforehand damages for property that might be destroyed in the future.

And here we may suggest that the statute under consideration, though often characterized as arbitrary, is really based on a principle quite similar to that which allows an assessment in favor of the landowner, founded on the risk of fire from the same source. In both cases it is assumed that there is a risk, and that it is justly placed on the corporation. The statute carefully guards the interests of the corporations by giving them an insurable interest in all the property for which they may be made liable; and section 4 provides that no appraisal of damages for land taken or injured by the location or construction of a railroad shall hereafter include any compensation for the increased risk to any building outside of such location, on account of sparks from the locomotive engines on such railroad.

This last provision suggests that the statute is not quite so equitable in its application to the defendant company, which established its railroad before the statute was enacted, as to corporations afterwards formed. It can, of course, derive no benefit from this provision, except as to land it may have taken since the enactment of the statute. The record is silent as to when the land in question was taken, or whether or not anything was at the time included or claimed as damages on account of the risk from fire to the property now owned by the plaintiff. No question founded on these facts was made in the court below, and, of course, is not to be entertained in this court for the purposes of decision. We may, however, remark as to the general provisions of the statute, that if they are valid as to railroads to be established, they may be equally so as to railroads already in existence. The defendant's charter not only contains an explicit reservation for the Legislature to alter, amend, or repeal it, but makes it also in terms subject to all general laws the Legislature may thereafter pass. And as to any defense suggested by the assumption that an appraisal of the general risk from fire may have been made to the plaintiff originally or his grantor, while we reserve a final decision of

the question for the case in which it properly arises, we may here suggest that where the original appraisal only gave damages to the extent that the property was diminished in value in consequence of the risk, and the same property is afterwards destroyed, the damages to be recovered under the statute would, of course, only represent the remaining or diminished value, so that the statute cannot properly be charged with allowing double damages for the same thing.

In other jurisdictions the original appraisal and the indemnity provided by the statute have not been considered so inconsistent as that both might not exist together.

Pierce v. Worcester & N. R. R. Co. 105 Mass. 199; *Bangor & Piscataquis R. R. Co. v. McComb*, 60 Me. 390; *Adden v. White Mt. R. R. Co.* 55 N. H. 413; *Lyman v. Boston & W. R. R. Co.* 4 Cush. 288.

In further confirmation of our reasoning as to the validity of the statute we make the following citations:

Redfield (R. R. Law, 1857, 1st ed. p. 360.), alluding to the statutes similar to the one under consideration, said: "We cannot forbear to add that the interference of the Legislatures upon this subject in many of the American States, seems to us an indication of the public sense in favor of placing the risk in such cases upon the party in whose power it lies most to prevent such injuries occurring." In *Pierce*, R. R. p. 444, it is said: "Statutes have been enacted making the company liable, even in the absence of negligence, for injuries to private property caused by fire communicated by its engines, which in effect make it an insurer in case of such injury. These statutes are constitutional, even when applied to pre-existing corporations." In 2 Wood, R. R. Law, § 321, it is said: "In some States railway companies are made liable, irrespective of the question of negligence, for fires set by their engines, and as a compensation for this extraordinary liability are given an insurable interest in such property; and these statutes have been held constitutional, even in their application to corporations established before the statute was passed, and although damages for the risk of fire were considered when the land was taken." In the well-considered case of *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, the court discussed at length the constitutionality of a provision of the Code of that State that "any corporation operating a railway shall be liable for all damages by fire that is set out or caused by the operating of any such railway," and fully sustained the Act, even as applicable to pre-existing railways.

The counsel for the defendant in the case at bar sought to impair the force of the decision by reason of the fact that in Iowa the Code had entirely supplanted the common law. The distinction seems to us not well taken. The Legislature surely could acquire no additional power by exercising its sovereign will twice, first in abolishing the common law, and then in enacting the statute. And the objection as to inequality before the law, so persistently urged against our statute, applies with equal force to the provision of the Iowa Code; for that applies exclusively to railway corporations, the same as our statute.

In *Lyman v. Boston & W. R. R. Co.* 4 Cush. 290, it was held that a similar statute in Massachusetts was applicable to railroads established before as well as since its passage, and that it extended as well to estates a part of which is conveyed by the owner as to those of which a part is taken by authority of law. The constitutionality of the statute was not discussed, but the principles stated as constituting its foundation directly apply. Dewey, *J.*, in delivering the opinion, on p. 291, said: "We consider this one of those remedial Acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the locomotive engine. The right to use the parcel of land appropriated to a railroad does not deprive the Legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and circumstances may reasonably justify." This reasoning clearly makes the legislation in question a legitimate exercise of the police power of the State. See also the comments of Shaw, *Ch. J.*, in delivering the opinion in *Hart v. Western R. R. Corp.* 13 Met. 105, and of Bigelow, *Ch. J.*, in *Ross v. Boston & W. R. R. Co.* 6 Allen, 90.

2. The remaining question relates to the construction of the statute. Do the words "other property" embrace fences, growing trees, and herbage, the property injured in this case?

The entire description in the statute is "buildings or other property," and the defendant invokes the benefit of the principle of interpretation known as *nosctitur a sociis*, that is, that the particular word "buildings," being followed by the general words "or other property," the latter only includes subjects *ejusdem generis*.

This rule has been often recognized and applied, but we think its application to this case would work injustice and tend to defeat in part the object of the statute. The statute is clearly remedial, and ought to be construed liberally to effectuate the intention of the Legislature, which was to give the owners of property along the route of the railroad indemnity for the loss of all property that might reasonably be said to be exposed to danger from the source referred to. And, besides, the above maxim would be exceedingly difficult of application unless the words "other property" should be entirely rejected. The hay, grain, farming tools, and live-stock in a barn, the goods in a store, the personal property in a house or factory, would hardly be *ejusdem generis* with a building; and can it be possible that the Legislature intended only a partial indemnity for the building alone, overlooking the greater value of property within and without?

Then, as to growing trees, the Legislature would have in view the fact that railroads traverse the forests as well as the open fields, and that, by reason of the annual deposit of dry leaves, the former were peculiarly exposed to danger from fire; and again we ask, Can it be supposed that in framing a general Act of indemnity the owners of this species of property were not to be included?

There is some disagreement as to the construction of this language as used in similar statutes in other jurisdictions, but in no instance has such property as was injured in this case been excluded. In the State of Maine it

is extended to all property having a permanent location along the route, such as buildings and their contents, fences, trees, and shrubbery, but it is held not to extend to a pile of cedar posts temporarily deposited near the railroad. *Chapman v. Atlantic & St. L. R. R. Co.* 37 Me. 92; *Pratt v. Atlantic & St. L. R. R. Co.* 42 Me. 579.

But it is said that a proper interpretation of the language we have been considering cannot be reached without first determining whether the railroad company could have procured insurance on the property injured. The argument in brief is that, as the statute gives a railroad company an insurable interest in all the property for which it may be made liable, it cannot be made liable where no insurance could have been obtained. Hence, in this case, a witness was offered to testify that he knew of no insurance company that would insure fences, growing trees, and herbage. This testimony was rejected, and this is made a distinct ground of error; but, as we stated at the outset, it depends upon the construction of the statute, and requires no separate consideration.

The statute would be extremely uncertain if its enforcement depended on the ability of the railroad company to obtain insurance. The withdrawal of insurance companies from issuing policies in a particular State, owing to unfriendly legislation or an alteration of their charters, might in effect nullify the law as to railroads in that State.

Undoubtedly the statute confers an insurable interest coextensive with the property for which the railroad company may be responsible, and gives liberty to obtain such insurance in its own name with any other party who is able and willing to contract relative to the subject-matter. If there was an inherent impossibility of obtaining insurance upon any particular species of property, the argument would have more force, but there is no such impossibility. It is a matter of common information that the scope and subject-matters of insurance are being extended constantly in all directions, so that now there are insurance companies that issue policies of insurance against a great variety of hazards, both physical and moral. The reason for conferring this insurable interest upon the railroad companies will further illustrate its meaning and effect. Before the statute, the risk from fire was upon the owner of the property, and he alone had an insurable interest; but as the statute shifted the risk from the owner to the railroad company, it also, as a matter of justice and equity, conferred upon the latter the insurable interest, with the right to obtain in its own name such insurance. The corporation now has the same capacity to contract for insurance that the owner had before. All that is needed to make a valid contract is a corresponding capacity on the part of some other corporation or individual. The statute, however, does not concern itself with the last-named party.

In Massachusetts a statute containing the same language as to the description of the property and insurance has been construed to include all kinds of combustible property, real and personal, even where the corporation had no knowledge or reasonable cause to believe that there was property situated where it was exposed to injury. *Ross v. Boston & W. R. R.*

Co. 6 Allen, 87. In *Trask v. Hartford & N. H. R. R. Co.* 16 Gray, 71, a part of the property injured consisted of a fence, and Hoar, J., in delivering the opinion of the court, said: "A fence is not so commonly insured, probably because its value and risk do not make insurance desirable; but it certainly can be insured. Whether a just construction of the Statute of 1840 would require any limitation of the extremely comprehensive language used to define the liability of railroad corporations created by it, this case gives us no occasion to consider. We certainly do not intend to intimate, by putting our decision upon the ground above stated, that the property must be insurable in the ordinary or commercial sense, of that word to make the corporation liable." In the State of Maine the clause in their statute relative to insurance has been applied in the construction of the statute so as to restrict its operation to such property, real or personal, as has some permanent location along the route of the railroad, because, as they say, it would not otherwise be practicable to obtain insurance; but, as we have seen, the courts of that State find no difficulty at all in extending the statute to fences and growing trees. *Chapman v. Atlantic & St. L. R. R. Co.*, and *Pratt v. Atlantic & St. L. R. R. Co.*, before referred to.

For the foregoing reasons we conclude that there was no error in the judgment complained of.

In this opinion the other Judges concurred.

BARNUM
v.
BOUGHTON.

An allowance by the probate court for the support of the widow and children of decedent out of the estate, during the settlement thereof, is in no such sense a debt from the estate to the widow as that her creditor can intercept it by attachment in its passage from the estate to her, under the statute which provides that any debt, legacy, or distributive share due to any one from the estate of a deceased person may be attached in the hands of the executor or administrator.

(Fairfield—Filed April 1, 1887.)

APPEAL by the plaintiff from a judgment of the Fairfield Superior Court in favor of the defendant on demurrer to an attachment proceeding by a creditor of the widow, to reach in the hands of the administrator an allowance made by the Probate Court for the support, during settlement of the estate, of the widow and children of decedent. *Affirmed.*

The case is stated in the opinion.

Messrs. William F. and H. W. Taylor, for plaintiff, appellant:

The defendant under his demurrer claimed: (1) that the administrator was not liable to garnishment under § 2, p. 397, Revision of 1875, General Statutes; (2) that the money being for support was exempt from attachment.

Neither of these claims is tenable. The section of the statute above referred to expressly

provides: "Where any debt, legacy, or distributive share is or may become due to such defendant from the estate of a deceased person," the plaintiff may factorize the executor or administrator.

This allowance was a debt due from the estate of Daniels to his widow; the very language of the statute (Revision of 1875, § 24, p. 391) plainly shows that it comes out of the estate; it reads as follows: "Courts of probate may allow, out of any estate of a deceased person in settlement before such courts, such amounts as they may judge proper for the support of the widow or family of the deceased during the settlement of the estate."

When the order of the probate court was passed, allowing this amount to the widow, it became a debt. It was the right of the wife in her husband's estate, allowed her by virtue of her marriage with the deceased, over and above her dower right. Her right to this money is based upon the same principles as her right of dower,—that is, as a purchaser; and in the event of the wife's death it passes to the wife's personal representatives, and not to the estate of the husband. Especially is this so after a decree passes, making the allowance to the widow.

Schoul. Ex. & Adms. § 454; Drew v. Gordon, 13 Allen, 120.

This court will hold, in accordance with its repeated decisions from the earliest settlement of our Commonwealth to the present time, to wit: "That the statute of foreign attachment, being made for the suppression of fraud, should always receive a liberal construction," and that the \$200 is either a debt or distributive share, and can be taken by foreign attachment.

Bacon v. Masters, 2 Root, 44; *Treadway v. Andrews*, 20 Conn. 391, 392.

An allowance made to a widow for support from her husband's estate, or to the family of both, is not exempt in Connecticut from attachment under any circumstances. The allowance to widow is not mentioned in the exemption laws of Connecticut, and the case falls within the reasoning of the Supreme Court of Vermont in *Carty v. Drew*, 46 Vt. 346, which holds "When a class of property is exempt, such as suitable apparel, bedding, household furniture, etc., such as may be necessary for upholding life, a liberal construction by the court will be made. But when a specific article is exempt, the court cannot extend the statute to another and different article." The widow's allowance is neither specifically mentioned, nor is it included in any class mentioned in our statute.

Even if the law in ordinary cases would exempt the widow's allowance, it will not be exempt in this case because she has sold it; and the law is too well settled at this day to admit of controversy that exempted articles can be pledged and the pledge enforced by law, and that they can be sold and the purchaser obtain a good title.

Patterson v. Taylor, 15 Fla. 336; *Cronam v. Honor*, 10 Heisk. 353; *Bayne v. Patterson*, 40 Mich. 658; *Kulage v. Schurter*, 7 Mo. App. 250; *Harrier v. Fassett*, 56 Iowa, 264.

This identical equity of redemption which raised this allowance money had been by the widows and heirs, before administration was

taken out, pledged by mortgage to plaintiff, and pledged upon the promise made by the widow and heirs that no creditor would take out administration; but instead of using the money for payment of debts they neglect so to do, and make the plaintiff lose his security and debt. The title of the widow and heirs to the land which they mortgaged to the plaintiff vested in them immediately on Daniels' death, subject only to the right of his creditors. This was so at common law, and only so far as the widow is concerned has it been modified by our statute of descent.

Kingsbury v. Scovill, 26 Conn. 851.

It is unnecessary to cite law to show that the widow's right to this allowance rests upon the same ground as her right to dower, and that she and the heirs had the right to convey their interest in the land to plaintiff; and, if the personal property of Mr. Daniels had been sufficient to pay all charges against the estate, the widow and heirs would be estopped in claiming that at the time of their conveyance the property had not been distributed to them.

Knight v. Thayer, 125 Mass. 25; *Rogers v. Snow*, 118 Mass. 118; *Coe v. Talcott*, 5 Day, 98; *Hoyt v. Dumon*, 5 Day, 483; *Dudley v. Cadwell*, 19 Conn. 218; *Cross v. Robinson*, 21 Conn. 379.

The conveyance is good between the parties, and conveyed whatever interest they had in the land to the plaintiff; and the fact that the land has, by process of law, been changed into money cannot affect the plaintiff's equitable title to the money which was the proceeds of the sale of plaintiff's land; and that sum the defendant administrator has in his hands. Justice demands that the same should not be paid to the widow and heirs who have already received its equivalent from the plaintiff, even if it was exempt, for, having pledged the land which produced the money, they have pledged the money. They are not entitled to two supports.

Vogelsong v. Beltzhoover, 59 Pa. 57.

The facts alleged show that money loaned by plaintiff actually went to support of Daniels' family, and the circumstances under which the money was obtained from plaintiff. If there is any virtue or usefulness to the doctrine of estoppel as enunciated in the following authorities, it ought to be applied to the case at bar, and estop the claim of defendant that the money is exempt.

Bushnell v. Church, 15 Conn. 422; *Preston v. Mann*, 25 Conn. 181; *Roe v. Jerome*, 18 Conn. 153; *Taylor v. Ely*, 25 Conn. 258.

The defendant has no right to interpose this claim in behalf of the Daniels family. The plea that property is exempt is a personal privilege, and can only be interposed by owners of exempted property, and can by them be waived.

The record discloses no finding of indebtedness by the court in the original action, the defendant staying out of court under his privilege as an administrator, who by statute is not bound to disclose during settlement of the estate; and the defendant has also neglected to have the Daniels family cited in to defend, as he could and should have done under the Practice Act. So, whatever the law regarding exemption of allowances for support is, it has

not any application to this action in the present state of pleadings.

Trinam v. Swart, 4 Lans. N. Y. 263; *Smith v. Hill*, 22 Barb. 656; *Mickles v. Tousley*, 1 Cow. 114; *Wygant v. Smith*, 2 Lans. 185; *Knabb v. Drake*, 23 Pa. 489, 490, 491; *Scott v. Brigham*, 27 Vt. 561, 562; *Drake, Attachment*, § 658, 8th ed.; *Flogg v. Littlefield*, 68 Me. 52.

Messrs. Brewster, Tweedy, & Scott, for defendant, appellee:

Before the Statute of 1846, administrators and executors could not be held as garnishees.

Toller, Ex. 478; *Barnes v. Treat*, 7 Mass. 271; *Brooks v. Cook*, 8 Mass. 246; *Waite v. Osborne*, 11 Me. 185; *Beckwith v. Barter*, 3 N. H. 67; *Conway v. Armington*, 11 R. I. 116; *Colby v. Coates*, 6 Cush. 558; *Thayer v. Tyler*, 5 Allen, 94; *Stanton v. Holmes*, 4 Day, 87; *Winchell v. Allen*, 1 Conn. 385; *Stillman v. Iaham*, 11 Conn. 124.

In 1846 (Sess. Laws 1846 chap. 23), the following statute was passed: "Any debt or legacy due from an executor or administrator or trustee of an assigning debtor, and any other goods, effects, or credits in the hand of an executor or administrator or trustee of an assigning debtor, as such, may be attached in his hands by the process of foreign attachment."

In 1848 (Session Laws 1848, chap. 47), the Statute of 1846 was repealed, and in its place the following statute was passed: "Be it enacted, etc., that any debt, legacy, or distributive share due or which may become due to any person from the estate of any deceased person, or any debt due to any person from any insolvent estate assigned for the benefit of creditors may be attached in the hands of the executor, administrator, or trustee by process of foreign attachment, provided that so much of any debt for personal services as shall not exceed \$10, and such articles of personal property bequeathed or to be distributed as, if in the possession of the legatee or distributee, would be exempt from execution, shall be exempt from attachment."

So the law remained until the General Revision of 1875, where this section, p. 397, and Revision of 1887, § 942, reads, "where any debt, legacy, or distributive share is or may become due to such defendant from the estate of any deceased person or insolvent debtor."

The only clause in any of these statutes which could possibly include a widow's allowance was the clause in the Statute of 1846, which was not re-enacted in the Statute of 1848.

Adams v. Barrett, 2 N. H. 374.

There is nothing in the language or history of our statute on this subject that indicates that the words "debt," "legacy," or "distributive share," have any other than the ordinary legal meaning of such terms in such a connection. A debt against an estate in settlement means a claim legally due from the deceased at the time of his death, or a debt incurred by him becoming due after his death. A legacy is a testamentary bequest. A distributive share is a share distributed by distributors under the statute.

Not only is a widow's allowance not included in the statute, but there are imperative reasons why it ought not to be the subject of

garnishment. The allowance is merely "a necessary provision to enable her to support herself until her interest in the estate can be set off to her."

Woodbury v. Woodbury, 58 N. H. 44.

The allowance is never to be carried beyond the necessary requirements of the case.

Leavenworth v. Marshall, 19 Conn. 408.

As it is given for the support of the widow and her family and for no other purpose, it is like a trust fund given to a trustee for the support of a *cestui que trust*, and for no other purpose. But such a trust is held exempt.

White v. White, 30 Vt. 338.

And no agreement can waive an exemption.

Knettle v. Newcomb, 22 N. Y. 249; *Woodward v. Murray*, 18 Johns. 400; *Betts v. Betts*, 72 Ill. 392.

Even an agreement between the administrator and widow that the amount allowed be diverted to other use is void.

Moore v. Moore, 60 Cal. 526.

Much less could any agreement between the widow and a creditor divert the allowance from its original purpose.

But in fact the widow's allowance is in no just sense the widow's property at all, but simply an appropriation of a portion of her deceased husband's estate for her necessary wants during the settlement of his estate.

Adams v. Adams, 10 Met. 170, 171.

Pardee, J., delivered the opinion of the court:

The statute provides that the court of probate may allow out of the estate of a deceased person such amounts as it may judge proper for the support of the widow or family of the deceased during the settlement of the estate. Another statute provides that when any debt, legacy, or distributive share is or may become due to anyone from the estate of a deceased person, his creditors may attach it in the hands of the executor or administrator.

William A. Daniels died, leaving a widow and children. The probate court made an allowance of \$200 for their support during the settlement of the estate. The plaintiff, a creditor of the widow, attached it in the hands of the administrator. Upon demurrer the superior court determined that it could not be made the subject of attachment. The plaintiff appealed.

Upon the death of a man the law takes instant possession of his entire estate in the interest of an orderly appropriation thereof; first, to

the payment of certain preferred debts; secondly, of the remaining debts in equal proportions; thirdly, for the payment of specific legacies, the remainder to be divided among the heirs. If there are wife and children surviving, presumably they are without means for providing themselves with instant food and fuel, except as they may claim these necessities from the hand of public charity, and must so continue until the law has completed the work of division,—a work of statutory necessity, spreading over a considerable space of time.

In the interest of humanity, and for the prevention of what, in almost every case, would be an unseemly and unnecessary demand upon public charity, the law provides that the probate court may make such temporary allowance to the widow or children as shall supply their daily recurring needs. Of course, if it shall finally result that the estate is not equal to the debts, these last are to bear the burden of the temporary necessities of the family. This is no hardship, because every man knows when he gives credit to another that death may overtake the debtor when he is unable to pay, and that a portion of such assets as he may have will be expended for the temporary support of his wife and children; it is a risk intentionally assumed, and the result, therefore, not to be complained of. If such an allowance has been made to a widow, it is in no such sense a debt from the estate to her as that her creditor can intercept it by attachment on its passage from the estate to her. The grant is in derogation, possibly, of the rights of creditors of the estate. It is permitted for one purpose only,—to feed her from day to day; dedicated by statute to a particular use in such measure as to be incapable of appropriation to any other. She could neither ask nor receive it for the payment of her debts; the probate court could not grant it for that purpose; and, even if allowed, the court upon coming to the knowledge of the fact that it was not needed for the supply of her wants might revoke it. If one allowance can be intercepted, so can every other; for if the door is opened for one creditor, it cannot be closed against any; and the entire estate might thus be diverted from its legal destination. The law will not permit the instant necessities of the widow, and the ultimate rights of the creditors of the estate, to be postponed, in its name, to the demands of her creditors.

There is no error in the judgment complained of.

In this opinion the other Judges concurred.

RHODE ISLAND.

SUPREME COURT.

William H. CLAPP

v.

PAWTUCKET INSTITUTION FOR SAVINGS.

1. Where **real estate, owned by copartners in certain shares, and used in the firm business, is mortgaged, and sold under a power contained in the mortgage, one of the partners alone cannot sue the mortgagee for his share of the surplus money remaining in the mortgagee's hands after payment of the mortgage debt; but his copartners should join with him, they being tenants in common, and the action being in relation to the personalty and not to the realty.**
2. Where the undertaking on the part of the mortgagee is to account to the mortgagors and their heirs and assigns for the surplus money, it is an **undertaking to pay the mortgagors jointly and not severally; and therefore an action by the mortgagors to recover the surplus from the mortgagee must be joint and not several.**
3. In actions *ex contractu*, the objection to the **nonjoinder of parties plaintiff** is not, as in actions *ex delicto*, waived by neglecting to plead in abatement.

(Providence—Decided March 5, 1887.)

ASSUMPSIT by one tenant in common to recover from a mortgagee his proportion of the surplus arising on sale of the mortgaged premises. *Judgment for defendant.*

The case was heard by the court, jury trial being waived.

The facts appear from the opinion.

Messrs. William H. Clapp and John D. Thurston, for plaintiff:

An action for money had and received is the proper proceeding on the part of the owner of mortgaged real estate to recover the surplus of money due him after sale of the estate by the mortgagee.

Jones, Mort. 3d ed. § 1940, and cases cited; *Cook v. Basley*, 123 Mass. 396.

Messrs. Oscar Lapham and John P. Gregory, for defendant.

Matteson, J., delivered the opinion of the court:

This is an action of assumpsit for money had and received. The plea is the general issue. It appeared in evidence at the hearing, jury trial having been waived, that Daniel D. Sweet, Ephraim W. French, and Harrison Howard, copartners in business as D. D. Sweet & Co., executed and delivered to the defendant a mortgage deed, dated November 1, 1866, conveying certain real estate therein described, owned by the mortgagors, and used by them in carrying on their partnership business. This mortgage contained a power of sale authorizing the mortgagee, in case of a breach of the condition of the mortgage, to sell at public auction the

mortgaged estate and to receive the proceeds of sale, and requiring it, after payment from such proceeds of the expenses of sale and the mortgage debt, to account to the mortgagors, their heirs and assigns, for the surplus. It also appeared in evidence that, subsequently to the making of this mortgage, Daniel H. Arnold was admitted into the firm of D. D. Sweet & Co., and received from his copartners a conveyance of one fourth of the mortgaged property, which was thenceforth, until the sale thereof by the mortgagee hereinafter mentioned, held by the owners thereof in fourths; that early in 1870 Daniel D. Sweet withdrew from the partnership, and conveyed his one fourth to Frederick Sherman, who then became a partner with the other persons named above in the place of Sweet; that on May 1, 1879, Daniel H. Arnold also withdrew from the partnership and conveyed his one fourth to Charles Moies; that on August 30, 1883, Harrison Howard assigned his one fourth to the plaintiff; that on August 9, 1884, the defendant sold the mortgaged property under the power above mentioned; and that, after payment of the expenses of sale and the mortgage debt, there remained in its possession a surplus of \$2,248.75. It further appeared that after the sale, on the same day, the plaintiff demanded from the defendant one fourth of this surplus; and that, payment being refused, he subsequently brought this suit to recover said one fourth, with interest.

The defendant takes the point that the plaintiff cannot recover because the evidence shows that French, Sherman, Moies, and the plaintiff are equally entitled to the surplus as tenants in common, and that one tenant in common cannot sue separately from his cotenants. We think the point is well taken.

R. I. Pub. Stat. chap. 280, § 1, relating to suits by tenants in common, extends only to actions of ejectment, or other actions where possession of the estate claimed is the object of the suit, and authorizes the bringing of suits by all, or by any two or more, or by each for his particular share. At common law, the rule in relation to suits by tenants in common was that in real actions they should sue separately; the reason being, it is said, that serious embarrassment might otherwise often arise, because, though the possession of tenants in common is joint, they hold by distinct titles, and as, in many cases, these titles were required to be stated and were subject to be traversed, it might often happen that numerous issues would be introduced into a suit to which some of the plaintiffs would be strangers, but which they nevertheless would be bound to maintain, or fail in the action. *Stevenson v. Cofferin*, 20 N. H. 150.

In personal actions, on the other hand, this difficulty did not exist; and hence, in such actions, whether arising *ex delicto* or *ex contractu*, tenants in common were required to join. The purpose of this latter rule is to prevent a multiplicity of suits, and it applies unless there has been a severance of the claim, as, for instance, where the defendant has, previous to the suit, promised to settle or has settled with one of the claimants for his share (*Austin v. Walsh*, 2 Mass. 401-405; *Baker v. Jewell*, 6 Mass. 460, 461; *Beach v. Hotchkiss*, 2 Conn. 697; *Stedman*

v. *Shelton*, 1 Ala. 86, 87, 88; *Parker v. Elder*, 11 Humph. (Tenn.) 546, 547; or where one of the cotenants has previously brought an action, and, the nonjoinder of the others being waived, the suit has been tried upon its merits and has resulted in a judgment for the defendant; in which case, as such cotenant is precluded by the principle of *res adjudicata* from suing again, his cotenants are permitted to sue without him (*Briezendine v. Frankfort Bridge Co.* 2 B. Mon. 82); or where one cotenant has previously brought suit and has, by the failure of the defendant to take advantage of the nonjoinder of the others, recovered judgment for his share, and can therefore maintain no further suit, in which case also the others may sue without him (*Sedgworth v. Overend*, 7 T. R. 279; *Starnes v. Quin*, 6 Ga. 84-87).

Hill v. Gibbs, 5 Hill, 56, was a case very much in point. It was a motion to set aside the report of referees in an action for money received to the plaintiff's use. The facts, as they appeared before the referees, were as follows, viz.: The plaintiff's wife and her sister, a Mrs. Bennett, as two of the five children and heirs at law of John F. Lossley, claimed each one undivided fifth of a tract of land containing 600 acres. They, with the consent of their husbands, employed the defendant, an attorney at law, to recover the land. The defendant brought actions of ejectment against the tenants in possession of the land, one of which was tried and resulted in a verdict for the plaintiffs. A compromise was then made by which the claimants released their interest in the land to the tenants, and the tenants agreed to pay the claimants \$4,000 and the taxable costs of suit. A part of the money was paid down, and for the residue securities were given, payable in installments. Some of the securities were made payable to the plaintiff and wife, some to Bennett and wife, and others in a different form, but without reference to the respective shares or interest of the two wives.

The defendant made this arrangement as the agent of the claimants, and the securities were left in his hands for him to receive the money when it became payable. Out of the first moneys received, the defendant was to be paid his expenses and charges beyond the taxable costs, and these were subsequently adjusted between the parties at \$381.86. The defendant received the money on the securities as it became due, and made remittances to the plaintiff from time to time, amounting in the whole to \$1,250. What payments he had made to Bennett did not appear. It was agreed between the parties that Mrs. Bennett was entitled to the larger share of the money, for the reason that the claim of Mrs. Hill to a part of the land had been barred by the Statute of Limitations; and the arrangement was that the defendant should decide between the two women, as to their respective shares, when the parties should all be together. The parties, however, lived in another State, and no meeting was had until after the suit was brought, when the plaintiff refused to have the defendant make the division. The whole business with the defendant was conducted by the wives with the consent of their husbands. Mrs. Bennett testified that the moneys received by the defendant were the joint moneys of her-

self and Mrs. Hill; that she and her sister were both agreed that she was entitled to the larger share, but could not agree upon the proper division. The referees decided that they could not report any sum for the plaintiff, upon the ground that the deposit of the securities with the defendant was the joint act of Mrs. Hill and Mrs. Bennett, and no proceedings had been had between the parties to enable the referees to decide what particular sum either party was entitled to receive, or whether the defendant had accounted to the plaintiff for as much of the fund as was his due; and they therefore made a general report that nothing was due the plaintiff. The court denied the motion to set aside the report. Bronson, J., giving the opinion of the court, says: "As the two wives were tenants in common of the land on account of which the money was received, the plaintiff insists that he may sue for his share without joining Bennett. But the general rule in relation to suits by tenants in common against third persons is this: When the action is in the realty, they must sue separately; when in the personalty, they must join. The action is not in the realty merely because it has some relation to land. Thus, debt for rent, and covenant for not repairing, upon a joint demise, are personal actions, and tenants in common must join. So, too, they must join in actions for a trespass or nuisance to land. The English cases say they may, ours that they must, join. Litt. §§ 311, 312, 315, 317; *Kitchin v. Buckley*, T. Raym. 80, 1 Lev. 109; *Austin v. Hall*, 13 Johns. 286; *Decker v. Livingston*, 15 Johns. 479; *Sherman v. Ballou*, 8 Cow. 304; *Chamter v. Clingo*, 5 Maule & S. 64; 1 Chitty, Pl. (ed. of 1837), 13, 75, and cases cited. If the plaintiff sues as a tenant in common he must fail, because this is a personal action in which the cotenant should have been joined as plaintiff." And see also, in addition to the cases cited above, *Brotherston v. Hodges*, 6 Johns. 108; *Bradiash v. Schenck*, 8 Johns. 117; *Thompson v. Hoskins*, 11 Mass. 419; *May v. Parker*, 12 Pick. 84, 88, 89; *Lane v. Dobyns*, 11 Mo. 105, 107.

So tenants in common must join in trespass or trover for the taking or conversion of a chattel (*Wheelwright v. Depeyster*, 1 Johns. 472, 485; *Putnam v. Wise*, 1 Hill (N. Y.), 234; or in case for diverting water (*Rich v. Penfield*, 1 Wend. 380, 385); or for destroying title deeds (*Daniels v. Daniels*, 7 Mass. 185, 187).

And so, too, tenants in common must join in an action of assumpsit for money had and received, where there has been a conversion of goods and chattels and the tort is waived. *Gilmore v. Wilbur*, 12 Pick. 120, 124; *Irwin's Admr. v. Brown's Exrs.* 35 Pa. 331, 332; *Putnam v. Wise*, 1 Hill (N. Y.), 234; *White v. Brooks*, 48 N. H. 402, 408.

Coke, 1 Inst. § 816, stated the rule in actions of debt for rent, as follows: "If two tenants in common make a lease of their tenement to another for a term of years, rendering to them a certain yearly rent during the term, if the rent be behind, etc., the tenants in common shall have their action of debt against the lessee, and not divers actions, for that the action is in the personalty." And see *Decker v. Livingston*, 15 Johns. 479, 482; *Foley v. Addenbrooke*, 12 L. J. Rep. N. S. Q. B. 163, 165; *Wall v. Hinds*, 4 Gray, 256; 64 Am. Dec. 64, 71.

But apart from the consideration that the plaintiff is a tenant in common with others, we think that the form of the defendant's undertaking is such that the plaintiff is not entitled to sue alone. The action is based upon the implied promise of the defendant, arising from its legal duty, to pay over the surplus proceeds of the sale in accordance with the reservation in the power. That reservation is to the mortgagors, their heirs and assigns, collectively, and not to them separately, according to their several interests. The language is, "accounting to us and our heirs and assigns for all sums over and above," etc. The undertaking, therefore, was to pay to all of the owners of the equity of redemption at the time of the sale jointly, and not severally; in this respect it is different from the statutory power of sale in England, which directs the payment of the surplus to the mortgagor, his heirs, executors, administrators, or assigns, according to their respective rights and interests therein. 2 Jones, Mort. 674, note 1.

In *Hill v. Gibbs*, 5 Hill (N. Y.), 56, 59, cited above, the court further says: "But the tenancy in common has little to do with the case, except to make out the plaintiff's title. * * * The securities were placed in the defendant's hands as the joint act of the plaintiff and Bennett, and the defendant was to receive the money on their joint account. The defendant's contract was with both, not with each severally, and he ought not to be subjected to more than one action." Where a covenant is in its terms expressly and positively joint, the covenantors must join in an action upon it, although as between themselves their interest is several. Dacey, Parties, *113; *Bradburne v. Botfield*, 14 M. & W. 559, 563, 564, 572, 573; *Sorbie v. Park*, 12 M. & W. 146, 157, 158; *Keighley v. Watson*, 3 Exch. 716, 721; *Capen v. Barrows*, 1 Gray, 376, 379; *Houghton v. Bayley*, 9 Ired. 337; *Sweigart v. Berk*, 8 Serg. & R. 908, 311.

A covenant with several persons to pay them a sum of money is a joint covenant with all, in the performance of which they have a joint interest, so that one of them cannot sue for his particular share or portion of the money, but all must join in one action for the whole; and even the pointing out of the share which each is to take of the entire amount, it is held, will not create a separation of interest, so as to enable the parties to maintain separate actions. *Lane v. Drinkwater*, 1 Crompt. Mees. & R. 599, 612; 5 Tyrw. 40; *Byrne v. Fitzhugh*, Id. 613, note, Id. 54; *English v. Blundell*, 8 C. & P. 382, 386; *Wallace v. Hinds*, 4 Gray, 256, 64 Am. Dec. 64, 71.

In actions *ex contractu*, the objection to the nonjoinder of parties plaintiff is not, as in actions *ex delicto*, waived by neglecting to plead in abatement; since, in the former, the objection, if it appear on the face of the pleadings, may be taken by demurrer, in motion in arrest of judgment or in error, and if the objection does not appear on the face of the pleadings, the defendant may avail himself of it, either by plea in abatement, or as a ground of nonsuit at the trial, or as a variance upon the plea *non est factum*, if the action be on a specialty, or if upon any other contract, under the plea of the general issue. 1 Chitty, Pl. *15.

Judgment for the defendant for costs.

Caroline C. WINDSOR

v.

George T. BROWN.

1. When an officer of the court, as an attorney, withholds funds unconscionably, or to an amount clearly above any legal claim, the court, not undertaking to settle the exact sum due, but to enforce good faith and fair dealing, will require its officer to pay so much as is beyond dispute.
2. Where a client has obtained a judgment for the whole amount due him, he has thereby waived his right to summary process; for the parties no longer stand in the simple relation to each other of counsel and client.
3. The summary jurisdiction of the court cannot be invoked when the relation of attorney and client has been changed to that of debtor and creditor, by the rendition of a judgment in favor of the client against the attorney.

(Providence—Decided November 17, 1886.)

PETITION for an order of court requiring the respondent to pay over certain moneys collected by him as the petitioner's attorney.
Dismissed.

The case is stated in the opinion.

Mr. Cyrus M. Van Slyck, for petitioner.
Mr. George T. Brown, pro se.

Stiness, J., delivered the opinion of the court:

The petitioner asks for an order of the court requiring the respondent, an attorney at law, to pay over a balance of money due to her upon an execution which she holds against him. It is admitted that he collected a claim for her; that, upon a disagreement between them about the amount which he was entitled to retain for services, she brought suit against him and recovered judgment; and that he has paid over to her something more than he claimed he ought to pay, but less than the amount of the judgment in her favor. As stated in *Burns v. Allen*, Index W, 81, it is not the province of the court, in a proceeding of this kind, to adjust accounts between counsel and client.

Neither does the court undertake to collect disputed claims for clients against attorneys in whom there has been an unfortunate and misplaced confidence. Nevertheless, when an officer of the court withholds funds unconscionably, or to an amount clearly above any legal claim, the court, not undertaking to settle the exact sum that may be due, but to enforce good faith and fair dealing, will require its officer to pay so much as is beyond dispute. In such a case the question before the court is that of honesty and the fair performance of official duty. In *Balsbaugh v. Frazer*, 19 Pa. St. 95, Black, Ch. J., said: "If the client is dissatisfied with the sum retained, he may either bring suit against the attorney, or take a rule upon him. In the latter case the court will compel immediate justice, or inflict summary punishment on the attorney, if the sum retained be such as to show a fraudulent intent. But if the answer to the rule convinces the

court that it was held back in good faith, and believed not to be more than an honest compensation, the rule will be dismissed, and the client remitted to a jury trial." See also *Re Harvey*, 14 Phila. 287.

In the case before us the petitioner claims that, as the amount due has been determined by suit and judgment, the balance is unlawfully detained, and should be subject to the order of the court. But this is not so. The respondent cites authority to the effect that a client, in proceeding by one process, waives the right to proceed by the other. In *Cottrell v. Finlayson*, 4 How. Pr. 242, the language seems to imply that, as remedies by suit and by summary process are concurrent, the election of one is a waiver of the other, because there should not be two suits to recover the same debt. If this is so, it follows that a petitioner seeking a summary order will be bound by that order as to the amount which may be left to be claimed for fees. Instead, therefore, of saying that one retention is so illegal or unjust as to call for the interference of the court, or that another retention, though possibly too large, is still within the range of reasonable and lawful dispute, the court would become the tribunal to try the question of fees, involving, also, questions of fact. We do not need to go so far as to decide whether the election of one remedy is a waiver of the other. This involves the question whether an application to compel an attorney to pay over a balance which he has no claim to hold deprives either of the parties of their right to a jury trial as to the amount that may fairly be disputed between them. It is not clear that the disputable and the indisputable claims are one and the same debt. They certainly stand on different grounds. But there can be no question that, where a client has obtained a judgment for the whole amount due him, he has thereby waived his right to summary process; for the parties no longer stand in the simple relation to each other of counsel and client. The respondent is not before the court simply as its officer. He is the petitioner's judgment debtor. The summary jurisdiction of the court cannot be invoked when the relation of attorney and client has been changed to that of debtor and creditor. As stated in *Re Davies*, 15 *Weekly Reporter*, 46: "The money owing from Davies, which had been received by him as attorney, has been converted into a judgment debt, and no longer exists as the debt which was due from him as an attorney." See also *Bohannon v. Peterson*, 9 Wend. 503, where the client had taken a note from the attorney.

The petition must therefore be dismissed.

STATE, *ex rel.* Edwin METCALF,
Atty-Gen.,
v.
Frederic N. GOFF.

1. The offices of justice of a district court and deputy sheriff are incompatible, and cannot both be held by the same person at the same time.
2. Where a person holding the office of justice of a district court accepts the

office of deputy sheriff, he vacates the former office.

(Providence—Decided March 5, 1887.)

QUO WARRANTO. *Judgment of ouster.*
The case is stated in the opinion.
Messrs. Charles E. Gorman and J. Osfield, Jr., for relator.
Mr. Frederic N. Goff, respondent, pro se.

Stiness, J., delivered the opinion of the court:

The respondent became justice of the District Court of the Eleventh Judicial District, July 1, 1886. He was appointed and qualified a deputy sheriff in the county of Providence, July 21, 1886. The question before us is whether he vacated his office as justice of the district court by accepting the office of deputy sheriff.

It is well settled that when a person accepts an office incompatible with one which he then holds, he thereby impliedly resigns or vacates his former office. *State v. Brown*, 5 R. I. 1; *Cotton v. Phillips*, 56 N. H. 220; *State v. Buttz*, 9 Rich. 156; *People v. Carrique*, 2 Hill, 93; *Magie v. Stoddard*, 25 Conn. 565; *Stubbs v. Lee*, 64 Me. 195; *People v. Nostrand*, 46 N. Y. 375.

We have to inquire, then, whether these two offices are incompatible.

In deciding this question, we are not much aided by the cases cited in the relator's brief, for about all of those cases rest upon some constitutional or statutory provision. Thus, in Connecticut a statute declared that no judge or justice of the peace should hold the office of sheriff or constable. In Maine the Constitution provided that no person belonging to either one of the three departments of the government should exercise any of the powers belonging to another. The opinion of the justices, 3 Me. 484, 486, held that the offices of justice of the peace and sheriff were incompatible because of this provision, the former office being judicial and the latter executive. In New York the Constitution prohibits a sheriff from holding any other office, and upon this rests the case of *People v. Nostrand*. In Virginia and Louisiana also there are constitutional limitations.

In cases where the question of the incompatibility of offices has arisen independently of statutory or constitutional provision, two rules are generally recognized. First, that incompatibility does not depend upon the incident of the offices; as upon physical inability to be engaged in the duties of both at the same time. For example, in *People v. Green*, 5 Daly, 254, it was held that the offices of member of the Legislature and clerk of the court of special sessions might be held by the same person, even though attendance upon the one office prevented, for the time being, the performance of the duties of the other. This point was approved on appeal. *People v. Greene*, 58 N. Y. 295.

These opinions contain an elaborate review of the early cases, and clearly point out the tests by which the question of incompatibility is to be determined. So, too, in *Commonwealth v. Kirby*, 2 Cush. 577, 580, the court says: "It has never been supposed that persons holding minor offices appertaining to the executive de-

partment of the government, such as deputy sheriffs, constables, or coroners, were thereby disqualified from holding seats in the Legislature. The same was formerly true of the judges of the court of common pleas, who frequently held the office of senator or representative while in commission as judges, and were only disqualified by the Statute of 1820 and the eighth article of the Amendments of the Constitution, adopted in 1821."

2. The test of incompatibility is the character and relation of the offices, as where one is subordinate to the other, and subject, in some degree, to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices. In *Rez v. Pateman*, 2 T. R. 777, it was declared that where a town clerk acts ministerially under the aldermen, who are judicial officers, one cannot hold both offices. Much stress is laid upon the fact that the accounts of the clerk were subject to the revision and control of the aldermen. *Rez v. Tizard*, 9 B. & C. 418, is to the same effect. In *Cotton v. Phillips*, 56 N. H. 220, where one was chosen a member of the presidential committee and also an auditor in a school district, it was held that he could not hold both offices. The court says: "If the same person could hold both offices, he would in fact sit in judgment on his own acts."

In England a sheriff's duties are ministerial, and, to a limited extent, also judicial. While these peculiar functions are recognized in some cases as being necessarily imposed upon the office by legislation and custom, no case upholds the propriety of exercising both the ministerial and judicial functions at the same time and in the same case. *Widow v. Clarke*, 1 Cro. Eliz. 76, case 38. See also argument of Shepherd in *Milward v. Thatcher*, 2 T. R. 81.

Under our law there is no such confusion of duties. In this State, and doubtless in this country generally, a sheriff is simply a ministerial officer. If he performs judicial duties, it is by virtue of another office voluntarily assumed. But the incongruity of such offices in one person is manifest, to say nothing of the breach of dignity and propriety which would result from the attempt to perform the duties of judge and officer together; the power of a judge to pass upon the sufficiency of the officer's return, and to allow or disallow his fees, is quite sufficient to bring these offices within the recognized rule of incompatibility, by reason of the judicial supervision of one office and the accountability of the other. Moreover, in this State an officer is required to serve any process duly tendered to him, and thus a judge of a district court might have the process of his own court tendered him to be served, and become liable to a penalty if he did not do it. In many cases he is the complaining officer, whose complaint could only be made to himself, if he were also judge, unless aided by some special legislation.

In *Commonwealth v. Kirby*, *supra*, it is held that the offices of justice of the peace and constable are not incompatible. The question is only considered on the ground of constitutional provisions; the relation of the officer as judicial or revisory, is not at all discussed. The decision is.

defendant was charged with hindering an officer. The defense was that the process was void, because the justice of the peace who issued it had vacated his office by accepting the office of constable. Inasmuch as the court held the process to be good, as that of a *de facto* justice, a discussion of the relation of the two offices was probably deemed unnecessary. The court adds, however: "A very different case would be presented if the defendant had attempted to exercise the two functions of a justice of the peace in issuing a warrant and of a constable in serving the same warrant."

It may be said, however, that the respondent need not, and probably will not undertake to act in both offices at the same time; but in the words of Ames, *Ch. J.*, in *State v. Brown*, 5 R. I. 1, "the admitted necessity of such a course is the strongest proof of the incompatibility of the two offices," and "the question of incompatibility is to be determined from the nature of the duties of the two offices, and not from a possibility or even a probability that the defendant might duly perform the duties of both."

We think the offices of justice of a district court and deputy sheriff are incompatible, and that by accepting the latter the respondent vacated the former.

The answer sets out that the respondent has recently resigned the office of deputy sheriff, but we do not see that this fact affects the case. If the office of justice became vacant, the respondent could not put himself back into it by his own act. The vacancy can only be filled in the way provided by law.

Judgment of ouster.

James CAMPBELL, Admr.,

v.

John H. COLLINGWOOD.

1. The question whether a new promise sufficient to take the case out of the Statute of Limitations was made is a question of fact, and is not revisable on exceptions.
2. In order to take a case out of the Statute of Limitations by a part payment, it must appear that the payment was made on the debt for which the action is brought, and that it was made as part payment of a greater debt.

(Providence—Decided February 19, 1887.)

ON plaintiff's exceptions to the Court of Common Pleas. *Sustained.*

The case is stated in the opinion.

Messrs. Wilson & Jenckes, for plaintiff:

The plaintiff contends that the payments of May 14 and June 21, 1879, ought, in the absence of any evidence as to their application, to be applied towards liquidating the first items for rent in so far as they would.

The Statute of Limitations begins to run from the time the cause of action accrues. The statute began to run on the 16th of September, 1878, and thereafter on each item for rent on the 16th day of each month respectively.

Fee's Admr. v. Fee, 10 Ohio, 469.

The fact that each item for rent is subse-

quently, by one of the parties, made out in the form of an account, does not change its character, nor the time when each item of monthly rent became due and an action for the recovery of the same accrued.

A general payment made by a debtor to his creditor will, in the absence of any evidence of direction by the debtor to apply it to some special debt, or evidence of its application by the creditor to some special debt, be applied to the debt earliest accrued.

Clayton's Case, 1 Meriv. 585; *Dave v. Holdsworth*, Peake, N. P. C. 64, 65; *Burn v. Boulton*, 2 C. B. 476; *Fairchild v. Holly*, 10 Conn. 175; *Genin v. Ingersoll*, 11 W. Va. 549, 559; *Thurlov v. Gilmore*, 40 Me. 880; *St. Albans v. Failey*, 46 Vt. 448.

The time of the filing of the plea is set off in the time when the running of the Statute of Limitations is stopped, not when the action is commenced.

Gilmore v. Reed, 76 Pa. 462; *King's Exr. v. Coulter's Exr.* 2 Grant, Cas. 77; *M'Clure v. M'Clure*, 1 Grant, Cas. 222.

No evidence was offered as to the application of these payments to each separate debt or item for rent.

At the time of these payments both notes were in full force, and every item of the claim for rent was in full force and not barred by the statute. These payments were made without any special direction by the debtor where to apply them, nor did the creditor apply them specially. We therefore say that the law will apply them to those items first accrued. If so, those accrued more than six years prior to the commencement of this suit or the filing of defendant's plea in set-off should be barred by the statute.

If the items in the plea of set-off be regarded as a running account, when payments are made, as in this case, upon such account, or when there are several distinct debts existing, as in this case, and neither the debtor nor the creditor has made any specific application of the payments, the presumption is that the first items, or the debts first in point of time, are first discharged.

Sprague v. Hazenwinkle, 53 Ill. 419; *Crompton v. Pratt*, 105 Mass. 255; *Allen v. Brown*, 39 Iowa, 330; *Worthley v. Emerson*, 116 Mass. 374; *Harrison v. Johnston*, 27 Ala. 445.

The ruling of the presiding justice of the court of common pleas cannot be sustained on the ground that there were mutual accounts between the parties, because—

1. There were separate and distinct demands, the one against the other, independent and separate, and such do not form a mutual account.

Green v. Caldcleugh, 1 Dev. & B. L. 320; *Caldwell v. Beatty*, 69 N. C. 371; *Hodge v. Manley*, 25 Vt. 210.

2. Our statute (Pub. Stat. chap. 205, § 3), following the statute of 21 James I. chap. 16, does not exempt from its operation mutual accounts other than accounts between merchant and merchant, and it has been held that such a statute does not extend to accounts between parties not merchants, and respecting transactions which do not possess a mercantile character.

Blair v. Drew, 6 N. H. 235; *Livermore v. Rand*, 6 Fost. (N. H.) 85; *Lansdale v. Brashear*, 230

3 T. B. Mon. 330; *Smith v. Dawson*, 10 B. Mon. 112; *Craighead v. Tenn. Bank*, 7 Yerg. 399.

But if there existed mutual accounts between the parties, the \$500 note should have been held good and allowed.

Interest was properly refused, because there was no evidence of any demand for rent made.

Perret v. Dupre, 19 La. 341; *Cooke v. Wise*, 8 Hen. & M. 463; *Benzein v. Robinett*, 2 Dev. Eq. 67.

The evidence presented at the trial was sufficient evidence of an acknowledgment or a new promise to take the \$500 note out of the operation of the statute.

Mr. Dexter B. Potter, for defendant.

Per Curiam:

This is assumpsit on two promissory notes, one for \$1,000, due January 14-17, 1874, and the other for \$500, due June 8-11, 1874. The defendant pleaded the Statute of Limitations and a plea in set-off. The \$1,000 note contained indorsements of payment within six years, and no question was made of the right of the plaintiff to recover upon it. The \$500 note contained no indorsements of payment, but the plaintiff offered testimony which he claimed showed a new promise. The court did not find a new promise. The plaintiff excepted.

The question of a new promise on the evidence was simply a question of fact, and is not revisable on exceptions. The first exception must be overruled.

The defendant, under his plea in set-off, filed an account for rent, consisting of divers charges for rent due monthly, running from September 16, 1878, to July 16, 1879. The account also contained two credits dated respectively May 14, 1879, and June 21, 1879. The plea in set-off was filed June 19, 1885, so that the last charge only is within the six years prior thereto. The plaintiff replied to the plea in set-off, setting up the Statute of Limitations. The defendant claimed that his account is taken out of the statute by the payments received and credited thereon. The court so ruled, and the plaintiff excepted.

We do not understand that there was any evidence in regard to the circumstances in which the payments credited were made, but only an admission that the defendant's account was correct. The defendant himself could not testify, the suit being by an administrator. Such being the case, the question is whether the court was entitled to infer from the payments a new promise to pay the entire claim. We think not. The rule upon this question is, in our opinion, stated with admirable clearness and correctness by Baron Parke, in *Tippets v. Heane*, 1 Crompt. M. & R. 252. His language is: "In order to take a case out of the Statute of Limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt; secondly, it must appear that the payment was made on account of the debt for which the action is brought. It is necessary, in the third place, to show that the payment was made as part payment of a greater debt; because the principle upon which a part payment takes a case out of the statute is that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an ad-

mission that more is due, it cannot operate as an admission of any still existing debt." And see also *Mills v. Fowkes*, 5 Bing. N. C. 455; *Wainman v. Kynman*, 1 Wels. H. & G. 118; *Burn v. Boulton*, 3 C. B. 476; *Beltshoover v. Jewell*, 11 Gill & J. 212; *Armistead v. Brooke*, 18 Ark. 521.

All that appears in this case is that payments were made. How, when, or in what circumstances they were made, does not appear. There is nothing to show that they were made upon any presentation of the account, or in any way which would authorize the inference that they were made as part payment of the entire claim. And it appears that the court in making its ruling was not influenced at all by the evidence recited under the first exception, the statement being that the court ruled that the payments took the entire account out of the statute, which we understand to mean that the court ruled that the mere fact payments were made was sufficient to have that effect. We think this was error.

The second exception is sustained, and the case remitted to the Court of Common Pleas for a new trial.

Exceptions sustained.

Re The PLURALITY ELECTIONS.

1. A plurality of the electors voting may elect lawfully and constitutionally a member of Congress, or a presidential elector.
2. The Constitution of the United States is "the supreme law of the land," and any provision of any State Constitution which is in conflict with it is void. State Constitution, art. 8, § 10, is in conflict with § 4 of art. 1 of the Constitution of the United States if it be construed to extend to elections of representatives to Congress.
3. R. I. Pub. Stat. chap. 11, §§ 6, 7, which provide that a plurality shall elect in the special congressional elections there designated, are lawful and constitutional.
4. The manner of appointment of presidential electors is left entirely to the Legislatures of the States, by the Constitution of the United States.
5. A plurality of the electors voting may elect lawfully and constitutionally a member of the city council of the city of Providence, or any civil officer in an election held by the people.
6. The State Constitution, art. 8, § 10, which makes a majority necessary in all elections held under such Constitution refers to the annual election of governor and other State officers provided for therein.

(February 9, 1887.)

THE House of Representatives of Rhode Island, February 8, 1887, adopted the following resolution under art. 10, § 8, of the Constitution of the State which provides that "the

R. I.

judges of the supreme court * * * shall * * * give their written opinion upon any question of law, whenever requested by the governor or by either House of the General Assembly."

1. *Whereas*, The statutes of this State provide in several instances for election by plurality vote;

2. *Whereas*, The lawfulness of this provision of the statutes is called in question by reason of its apparent conflict with § 10 of art. 8, of the State Constitution; and

3. *Whereas*, the existing Constitution provides that either House of the General Assembly may require the opinion of the judges of the supreme court upon any question of law, it is, therefore, hereby

Resolved, That the said judges of the supreme court be, and hereby are, requested, without unnecessary delay, to give their opinion to the House of Representatives upon the following questions:

1. May a plurality of the electors voting elect lawfully and constitutionally a member of Congress?
2. May a plurality of the electors voting, elect lawfully and constitutionally a presidential elector?
3. May a plurality of the electors voting elect lawfully and constitutionally a member of the city council of the city of Providence?
4. May a plurality of the electors voting elect lawfully and constitutionally any civil officer in an election held by the people?

OPINION.

To the Honorable House of Representatives:

We have received from your honorable body a resolution requesting our opinion in answer to the following questions, to wit:

1. May a plurality of the electors voting elect lawfully and constitutionally a member of Congress?
2. May a plurality of the electors voting elect lawfully and constitutionally a presidential elector?
3. May a plurality of the electors voting elect lawfully and constitutionally a member of the city council of the city of Providence?
4. May a plurality of the electors voting elect lawfully and constitutionally any civil officer in an election held by the people?

We answer the first question affirmatively. The office of representative in Congress is created by and depends solely on the Constitution of the United States. That Constitution, art. 1, § 4, provides as follows, to wit:

"The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof; but Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

Congress, under the power here reserved, has enacted that the election of representatives shall be in districts and by ballot, and has appointed a day, the same in all the States, for the regular biennial elections; but, in other respects, has left the Legislatures of the several States to the full exercise of the power conferred upon them. In some States, under statutes enacted by the Legislatures thereof, a plurality elects in all the elections; in this State in

all special elections. These statutes have been always recognized as valid by the Federal House of Representatives, which, under the Constitution of the United States, art. 1, § 5, is the ultimate "judge of the elections, returns, and qualifications of its own members."

Our attention has been drawn to § 10 of art. 8, of the Constitution of the State, which provides that "In all elections held by the people under this Constitution, a majority of all the electors voting shall be necessary to the election of the person voted for;" and also, as indicating that an election of representatives to Congress by the people is recognized as an election "under this Constitution" by the Constitution itself, to § 2 of the same article, which provides "that the voting for governor, lieutenant-governor, secretary of state, attorney-general, general treasurer, and representatives to Congress shall be by ballot." We think it doubtful, notwithstanding said § 2, whether § 10 was intended to extend to elections of representatives to Congress; but if it was, to that extent it is, in our opinion, of no effect, except in so far as it may be voluntarily deferred to by the General Assembly, as an indication of the popular will. The Constitution of the United States is "the supreme law of the land," and any provision of any State Constitution which is in conflict with it, is void. Section 10 of art. 8, of the State Constitution is manifestly in conflict with § 4 of art. 1 of the Constitution of the United States, if it be construed to extend to elections of representatives to Congress; for, so construed, it assumes to impose a restraint upon the power of prescribing the manner of holding such elections which is given to the Legislature by the Constitution of the United States without restraint, so long as, and to the extent that, Congress refrains from making regulations in the same matter. We have no doubt that §§ 6 and 7 of chap. 11 of the Public Statutes, which provide that a plurality shall elect in the special congressional elections there designated, are lawful and constitutional, and that any representative elected under either of them will be allowed to have his seat regardless of said § 10.

We answer the second question affirmatively. The Constitution of the United States, art. 2, § 1, requires each State to appoint presidential electors, at proper times, "in such manner as the Legislature thereof may direct." The manner of appointment is left entirely to the Legislatures. Under the statutes of this State a plurality has sufficed for the election of presidential electors since 1798. Such electors were previously appointed by the General Assembly.

We answer the third and fourth questions affirmatively. It is unquestionably competent for the General Assembly to determine that the officers elected by the people to fill the various offices in the State shall be elected by a plurality, unless the Constitution contains some provision which makes a majority necessary. The only provision in our Constitution making a majority necessary is § 10 of art. 8, which, as we have seen, makes a majority necessary "in all elections held by the people under this Constitution." The question is whether the words "under this Constitution" limit the generality of the preceding words. Doubtless there is a sense in which every election for either State

or town officers is an election under the Constitution; for the Constitution is the constituent and supreme law, paramount to every other law of the State. In construing it, however, we are not to use a speculative ingenuity, but to take the provisions, except when they have some technical or historical meaning, according to their more obvious and reasonable import. Section 10 is the last section of an article entitled "Of Elections," which provides for the annual election by the people, of the governor, lieutenant-governor, senators, representatives, secretary of state, attorney-general and general treasurer; prescribing with particularity the times and manner of their election and the mode of determining the result. These elections are clearly elections under the Constitution, since they are particularly provided for in it. It seems to us that the more natural and reasonable way of construing § 10 is to construe it as relating to these elections: since, if we construe it so, the words "under this Constitution" have an effect: whereas, if we construe it as extending to all State and town elections whatever, by the people, the words are mere surplusage.

THOMAS DURFEE,
CHARLES MATTESON,
JOHN H. STINESS,
GEORGE A. WILBUR.

Albert S. DOLIVER

v.

John^c H. COLLINGWOOD.

1. The rule at common law is that the **sheriff who begins the service of an execution during his term of office, shall finish it**, though his term of office expires before he can do so.
2. **This rule has not been modified by R. I. Pub. Stat. chap. 23, § 1, nor by R. I. Pub. Stat. chap. 201, § 29.** The former statute does not take away the right of the sheriff to finish business which he had entered upon prior to the expiration of his term of office, and the latter statute does not extend to writs or precepts delivered to the sheriff for service.
3. When a **deputy sheriff** had in his custody, at the time of the qualification of the succeeding sheriff, goods and chattels on which he had previously levied an execution,—*Held*, that his subsequent **retention of the goods and chattels was legal.**
4. **R. I. Pub. Stat. chap. 257, § 21, authorizing the court to allow to an officer for the keeping of personal property, relates only to the keeping of personal property attached and held on mesne process.**

(Kent—Decided March 5, 1887.)

ON plaintiff's exceptions to a Special Court of Common Pleas. *Sustained.*

Statement *per Curiam*:

This action was brought before a special court of common pleas, against the defendant as sher-

iff of Kent County to recover the amount of an execution and of costs incurred in keeping certain chattels levied on. The circumstances in which this action was brought are stated towards the close of the opinion of the court.

In the special court of common pleas the presiding justice gave the plaintiff judgment for the amount of the debt, on execution and costs incurred prior to June 7, 1881, but ruled out costs and keepers' fees incurred after June 7, 1881, by the deputy of the defendant's predecessor. To this ruling the plaintiff excepted.

Mr. Samuel W. R. Allen, for plaintiff:

The statute makes the sheriff liable in an action of this kind for the contents of an execution by him received, which upon demand he fails to pay over.

Pub. Stat. chap. 195, § 2.

The sheriff who levies the execution is bound to keep the property until he can dispose of it in some legal way, and is entitled to a just and reasonable compensation therefor. His term of office may expire after the levy and before the sale, but by the common law this does not terminate his authority over the execution nor over the property; for the law is that "an execution is an entire thing, and he who commences its service must complete it."

Freem. Ex. p. 485, § 291; Murfree, Sheriffs, § 1036; *Bondurant v. Buford*, 1 Ala. 359; 35 Am. Dec. 84.

The law invests the sheriff with power to attach personal property,—take it into his possession,—and imposes upon him the duty to keep the property attached, to respond to the judgment which may be obtained in the suit.

Tukey v. Smith, 18 Me. 125; *S. C.* 36 Am. Dec. 704.

The rule of the common law is that the officer who has received and levied an execution must perfect it by doing every act required to be done under or by virtue of the execution; and the sureties upon the sheriff's bond may be held when he fails to complete the service of an execution, after his term of office expires, which he has begun during his term of office.

Tyree v. Wilson, 9 Gratt. 59; *S. C.* 58 Am. Dec. 213; *Elkin v. People*, 3 Scam. 207; *S. C.* 36 Am. Dec. 541; *Lawrence v. Rice*, 12 Met. 583; *Tarned v. Allen*, 13 Mass. 204.

There is no rule of law that requires the new sheriff to complete the service of an execution commenced by his predecessor, and such service can only be properly done by force of the statute. And it is respectfully submitted that the language of our statute cannot be construed as conveying any such authority. In those States where there is a statute directing the manner of such services, the language is plain, and the intention clear.

State v. Hamilton, 16 N. J. L. 154; Murfree, Sheriffs, § 1041.

Independent of local statutes, the authorities hold that a sheriff who during his term of office has levied upon real estate, is the proper person to sell it, although he may have gone out of office; and also to execute the deed therefor to the purchaser, and this whether he is out of office by the expiration of his term or by resignation.

Loftand v. Erving, 5 Litt. 42; *S. C.* 15 Am. Dec. 41; *Allen v. Trimble*, 4 Bibb, 21; *S. C.* 7 Am. Dec. 726, 729; *Jackson v. Collins*, 3 Cow.

89; *S. C.* 15 Am. Dec. 44, note; *Lemon v. Craddock*, 12 Am. Dec. 301; *Purl v. Duvall*, 5 Harr. & J. 69; *S. C.* 9 Am. Dec. 490; *Bondurant v. Buford*, 1 Ala. 359; *S. C.* 35 Am. Dec. 38.

Mr. Dexter B. Potter, for defendant.

Per Curiam:

The rule at common law is that the sheriff who begins the service of an execution during his term of office shall finish it, though his term of office expires before he can do so. Two reasons are given for the rule. One is that the execution being an entire thing, he who begins must end it. *Purl v. Duvall*, 5 Harr. & J. 69, 77; Murfree, Sheriffs, § 1040.

The other is that when an execution is levied on goods and chattels, the sheriff thereby acquires a special property in them, which enables him to make the sale after his office has expired. Murfree, Sheriffs, § 1040.

The levy here was on goods and chattels. It follows that the deputy of the old sheriff committed no fault in retaining the goods and chattels levied on by him, after the successor of the old sheriff had qualified, unless the common-law rule has been modified in this State.

The defendant contends that the rule has been modified by statute. In support of this contention he cites R. I. Pub. Stat. chap. 28, § 1, which provides that every officer annually elected by the General Assembly may continue to officiate until his successor is qualified to act. This section applies not particularly to sheriffs, but to all officers of annual appointment, and empowers them to continue the execution of the duties of the office in full until the successor is qualified. It is an enabling statute. It does not purport to take away any power which the officer would have independently of it, but only to continue his powers, thus enabling him to exercise those which, but for it, he would no longer have. As applied to a sheriff, it enables a sheriff to enter upon new business after the expiration of his term. It does not take away any right to finish business which he had entered upon prior thereto.

The defendant also cites R. I. Pub. Stat. chap. 201, § 29, which provides that "all books, notes, bonds, obligations, and other papers, which sheriffs shall receive pursuant to this chapter, shall by them be delivered over to their respective successors in office as papers and documents pertaining thereto, and every sheriff unlawfully refusing to deliver the same on demand shall be fined," etc. We do not think this section extends to writs or precepts delivered to the sheriff for service. There is no section in the chapter pursuant to which the sheriff receives such writs, but only sections which direct or regulate the service of writs directed or issued to him. It will be noted, too, that § 29 speaks of the books, notes, bonds, obligations and other papers to be transferred, as papers and documents pertaining to the office; certainly writs or other precepts delivered to the sheriff for service and return are not papers or documents of that description. The section, too, says that all books, notes, etc., shall be delivered over, but writs and precepts are, by other provisions of the statutes, and from their very nature for the most part, not to be kept in the sheriff's office, but to be returned

to the courts from which they issued. There are books, notes, bonds, obligations, and other papers, which are or may be received pursuant to the chapter, viz.: books, notes, bonds, obligations, and other papers mentioned in §§ 6, 28, and also in § 29; inasmuch as the books, notes, bonds, obligations, and other papers, which by § 29 the sheriff is to deliver to his successor, will include those which he received from his predecessor. There are papers and documents pertaining to the office. We see no reason to suppose that the section was intended to apply to other kinds of papers.

To hold that the old sheriff ceases to have any official power whatever as soon as his successor is qualified might prove exceedingly detrimental to the interests of both suitors and the State; for to hold so would be to hold that if the old sheriff were in the act of attaching goods and chattels, or real estate, the qualification of the new sheriff would put an end to his power, and the suitor, thereby, might lose at least priority, if not his attachment altogether. It would also be to hold that if the old sheriff had made an arrest, on either civil or criminal process, and was taking his prisoner to jail or to court, in pursuance of his writ or warrant, the qualification of the new sheriff would release such prisoner, and he would be entitled to go free. We find nothing in the statutes to warrant the construction which might lead to such results.

The bill of exceptions shows that the defendant qualified June 7, 1881; that his predecessor's deputy had in his custody goods and chattels on which he had previously levied an execution; that he retained the custody of them until September 16, 1881, when he surrendered them to the defendant, and that the plaintiff had paid the deputy his fees for the custody during that period. The bill of exceptions also shows that the defendant, after receiving the goods and chattels, sold them under the execution, and received the money for them. This action is brought by the plaintiff for reimbursement for the fees paid by him to the deputy of the old sheriff. The defense set up is that the deputy was not entitled to fees after the new sheriff qualified, because his retention of the goods and chattels after that was illegal, it being, as claimed, his duty to deliver them immediately to the new sheriff. The defendant does not defend upon the ground that he had no right to complete the service of execution, and therefore we do not consider that question. He does not deny the right of the plaintiff to recover if the retention, after his qualification, of the goods and chattels levied upon was legal. We are of the opinion that it was legal.

We do not think that it was necessary that the fees for custody should have been allowed before the action; the provision for such allowance, R. I. Pub. Stat. chap. 257, § 21, as follows: "The supreme court, or court of common pleas, or justice courts, upon petition made by any sheriff or other officer setting forth the facts on oath, may allow such fair compensation for the keeping of personal property attached and held on mesne process as shall, on examination, be found to be reasonable," relating only to the keeping of personal property attached and held on mesne process.

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Exceptions sustained, and case remitted to Special Court of Common Pleas for new trial.

Charles B. ALLEN *et al.*

v.

John W. DANIELSON, Assignee, *et al.*

1. Where an assignment of all the debtor's property is made for the benefit of creditors, upon the trust to convert the property into money and apply the proceeds, after paying the preferred creditors, "for the equal benefit of all our creditors in proportion to their respective claims."—*Held*, that all the creditors, including those secured by mortgage, should be allowed to bring in their claims in full, and are entitled to dividends on the full amount thereof.
2. It is the duty of the assignee, if a secured debt is so reduced by the dividends that the security will more than pay it, to redeem for the benefit of creditors.
3. Where the assignee had already made two dividends, and no part of the first was paid to the secured creditors, and on the second such creditors received dividends on the unpaid balance remaining after applying to their debts the proceeds of sale of the mortgaged property,—*Held*, that, before a third dividend is made, the creditors who were secured are entitled to be paid so much as is necessary to put them on an equality with the other creditors, on the basis of their claims in full, if the assignee has so much; if he has not enough for that purpose, he is not bound to make good the deficiency out of his own means, he having acted in good faith and with the acquiescence of the creditors, in making the former dividends.

(Providence—Decided March 5, 1887.)

BILL in equity for an account and for distribution.

The facts appear from the opinion.

Mr. Joseph C. Ely, for complainants:

I. Danielson, as the assignee, was justified in making dividends to the bondholders on the basis of the proportion of the mortgage indebtedness not satisfied by sale under the mortgage, and not on the full amount of the mortgage debt. This is also the principle to be applied in making future dividends.

Petition of Knowles, 18 R. I. 90.

II. The principle of this case above cited is not applicable to Allen's assignee in trust, and its *cestuis que trust*, said complainants; nor any other rule of marshaling,—for:

1. Here was a levy, the validity of which was contested and actually in litigation.

Shedd v. Bank of Brattleboro, 33 Vt. 718; *Walker v. Conar*, 2 S. C. 16; *Kidder v. Page*, 48 N. H. 380; *Wolf v. Smith*, 36 Iowa, 456.

2. The doctrine of marshaling rests in equity, and there is no equitable reason here why the

assets should be marshaled in favor of the bondholders.

Lect v. Strithing, 51 Ind. 285.

The money received by Allen was not paid by any fund of the assignor, or its property thereby diminished. The property levied on was such that even if it had paid the execution (being as to all, but as against Allen, property of another person) no equity could arise. But the facts in this case show the money came to Allen from strangers, and by reason of fortuitous circumstances, which was Allen's good luck, and no detriment to any creditor of said Woonsocket Company; therefore no equity can arise in favor of these bondholders or against these complainants.

Marshaling does not apply when the two funds are not the property of the same person and the payors are not the same.

House v. Thompson, 3 Hcad, 512; *Ex parte Kendall*, 17 Ves. Jr. 514; *Dorr v. Shaw*, 4 Johns. Ch. 17.

Messrs. Charles Hart, James M. Ripley, and John C. B. Woods, also for complainants.

Messrs. Charles Bradley and Edwin Aldrich, for respondents:

The general doctrine of equity undoubtedly is that a creditor who has several securities or means of payment may receive a dividend from each of those securities, as a means for the payment of his debt. The statutes of bankruptcy have adopted a different rule. They provide that, from the assigned fund in bankruptcy, a creditor in bankruptcy can take only a dividend upon the balance of his claim after he has exhausted his other securities.

1 Story, Eq. Jurisp. § 564 b; Bisph. Eq. p. 319, § 434; Lewin, Tr. p. 389; *Re Xeres Wine Shipping Co. L. R. 3 Ch. App. *771-780*. See also *West v. Bank of Rutland*, 19 Vt. 403; *Findlay v. Hosmer*, 2 Conn. 350; *Woolcocks v. Hart*, 1 Paige, 185; *Ebertson v. Booth*, 19 Johns. 486; *Miller's Est.* 82 Pa. 113; *Citizens Bank of Paris v. Patterson*, 78 Ky. 294; Am. Bank. L. § 20, ¶ 2.

The question is whether the R. I. statute has adopted the rule in bankruptcy, and deprived a creditor who has other securities of his rights existing at common law and equity.

The language of the R. I. statute is as follows (Pub. Stat. chap. 237, p. 660, §§ 14, 15):

"No assignment hereafter made for the benefit of creditors shall give to any one creditor any preference over any other creditor; except the creditor be the United States or the State of Rhode Island, or for the wages of labor performed within six months previous to such assignment, not exceeding \$100 to any one person; provided, however, that the expenses of executing the assignment shall first be paid out of the estate."

"§ 15. Conveyances and payments made and securities given by an insolvent debtor, or by a debtor in contemplation of insolvency, within sixty days of the commencement of proceedings against such debtor, under the provisions of sections 12 and 13 of this chapter, shall be void as to all creditors receiving the same who shall have reasonable cause to believe such debtor was insolvent at the time of such preference; and the assignee of such debtor may sue for and recover the same."

R. I.

The courts of Rhode Island would doubtless hold (following the principle of the English case, *Re Xeres Wine Shipping Co. L. R. 3 Ch. App. 771*) that the law-making power in Rhode Island is presumed to be cognizant of the well-settled distinction of the difference between the rule in bankruptcy and the rule in equity; and they certainly have used no language showing that they intended to adopt the rule in bankruptcy; and, in the absence of such provision by statute, a court of equity must apply the well-settled law of that court.

There is one case in our reports which might seem to be in contravention of this principle of law above cited,—that is the case, *Petition of Knowles*, 13 R. I. 90. This was a petition under the R. I. Pub. Laws, chap. 563, § 16, and it does not appear to have been contested.

The authorities referred to in *Re Knowles* are quite distinguishable from the case at bar.

Messrs. James Tillinghast and Charles F. Ballou, also for respondents.

Durfee, Ch. J., delivered the opinion of the court:

The assignment under which the questions in this case are raised conveys all the property of the assignors, except such as is exempt from attachment by law, to the assignee, in trust to sell and convert it into money and apply the proceeds to the payment, first, of certain claims entitled or allowed to be preferred, and then, "for the equal benefit of all our creditors in proportion to their respective claims." At the time of the assignment some of the general creditors held claims which were secured by mortgage.

The first question is whether the creditors so secured were entitled to dividends on their full claims *pro rata* with the other creditors.

The rule in bankruptcy, both in England and in this country where we have a bankrupt law, is that creditors so secured shall have dividends only on the residue of their claims after converting and applying the security, or after deducting its appraised or agreed value. This rule has been applied sometimes in the settlement of an insolvent estate after the death of the debtor or under his assignment; but, according to the decided weight of authority, the rule is to allow all the creditors to bring in their claims in full and have dividends accordingly, it being the duty of the personal representative or assignee, if a secured debt is so reduced by the dividends that the security will more than pay it, to redeem for the benefit of the creditors. 1 Story, Eq. Jurisp. § 564 b; Bisph. Eq. § 343; Jones, Pledges, § 587; *Mason v. Bogg*, 2 Myl. & C. 443; *Re Xeres Wine Shipping Co. L. R. 3 Ch. App. 771*; *Moses v. Ranlet*, 2 N. H. 488; *West v. Rutland Bank*, 19 Vt. 403; *Walker v. Baxter*, 26 Vt. 710; *Findlay v. Hosmer*, 2 Conn. 350; *Logan v. Anderson*, 18 B. Mon. (Ky.) 114; *Citizens Bank of Paris v. Patterson*, 78 Ky. 291; *Shunk's App.* 2 Pa. 304; *Miller's Est.* 82 Pa. 113; *Van Marter v. Ely*, 12 N. J. Eq. 271; *Ebertson v. Booth*, 19 Johns. 486; *Jervis v. Smith*, 7 Abb. Pr. N. S. 217; *Bates v. Paddock*, 7 West. Rep. 222.

The ground of decision in these cases is that the creditors are, severally, creditors to the full amount of their claims, and are therefore entitled to dividends to the full amount; the se-

curity being regarded as something collateral, which does not reduce the debt, but only secures the creditor *pro tanto* in case the debtor or his estate cannot pay the debt in full.

And in the case at bar, this is the rule which comports with the language of the assignment declaring the trust, namely, that the assignee shall apply the proceeds, after paying the preferred creditors, "for the equal benefit of all our creditors in proportion to their respective claims;" not in proportion to their claims less the value of any securities which they hold.

In the case of *Petition of Knowles*, 18 R. I. 90, this court allowed a creditor under an assignment, who was secured, and who, after the presentation of her claim, had converted and applied her security, to share with the other creditors only to the extent of her unpaid residue. The case was a petition for an opinion on a case stated, and was doubtless submitted without full argument or presentation of authorities, so that the court, prepossessed in favor of the rule in bankruptcy, on the score of equality and by familiarity with it, and wishing to avoid a diversity of rules, supposing that there were two lines of decision of about equal authority to choose between, naturally, without the consideration which it might otherwise have bestowed, chose that line of decision which was in accord with the rule in bankruptcy. The case is not without respectable support (*Amory v. Francis*, 16 Mass. 308; *Farnum v. Boutelle*, 13 Met. 159; *Wurts v. Hart*, 13 Iowa, 515); but we have no doubt we should have decided the case differently if we had had before us when we decided it the same array of authorities which we have before us now. The question then is, Shall we adhere to it out of regard for the maxim *stare decisis*; or shall we adopt what we now consider the sounder rule? We have come to the conclusion that, considering how recently the case was decided, very little harm will come from overruling it; and that by doing so we shall not only establish the correct rule, but also, which is no inconsiderable gain, establish the rule which is generally prevalent elsewhere.

It appears in the case at bar that the assignee has already made two dividends. No part of the first was paid to the secured creditors when it was made, it being then supposed that the mortgaged property would suffice to pay them in full. Before the second dividend, the mortgaged property was sold and the proceeds were found to be insufficient, quite a large residue of indebtedness remaining unpaid. The assignee, in making the second dividend, recognized the secured creditors, in accordance with the rule laid down in *Petition of Knowles*, as creditors to the extent of the unpaid residue; and allowed them, as such, to share *pro rata* with the other creditors in the second dividend; and also made up to them for not participating in the first dividend. The assignee now has more assets to be applied; and the creditors who were secured contend that they are entitled to be paid out of said assets so much as is necessary to put them on an equality with the other creditors, on the basis of their claims in full, before any third dividend is made.

In *Midgley v. Stocumb*, 32 How. Pr. 428, the court held that a creditor under an assignment, who, having a security, had received payment

in part by converting it before dividends, was only entitled to share in the dividend as a creditor to the extent of the unpaid residue. So, likewise, in *Third Nat. Bank of Baltimore v. Lanahan*, 6 Cent. Rep. 425. The decision in both these cases, however, was predicated upon the construction given to the language of the assignments, which was supposed to require that the proceeds should be divided among the creditors in proportion to the claims which they held at the time the dividends were made.

In *Morris v. Olive*, 22 Pa. 441, which was a case of distribution under an assignment for the benefit of creditors, a creditor by bond and mortgage was held entitled *pro rata* on his whole claim, though he had collected the greater part out of the mortgaged property, the amount collected and the dividend together being insufficient to satisfy the debt. He was not restricted to a dividend on his claim as reduced by the proceeds of the mortgage. To the same effect are *Miller's App.* 35 Pa. 481, and *Gracff's App.* 79 Pa. 146, both of which were cases of distribution under assignments for the benefit of creditors. The doctrine of these cases is that such an assignment creates a trust for the benefit of the creditors in proportion to their claims respectively, as their claims exist at the time when the trust is created; and, accordingly, that they are entitled to the benefit of the assignment in the same proportion, so long as they continue to be creditors. We think the same doctrine applies to the assignment here; for, as we have seen, the assignment here is for the equal benefit of the creditors "in proportion to their respective claims," which means, in our opinion, in proportion to the claims which they respectively held when the assignment was made.

Our decision is that the creditors who were secured are entitled to receive out of the funds in the hands of the assignee so much as will put them on a par proportionately with the other creditors, on the basis of their claims as they were when the assignment was made, before any other dividend,—provided that what they receive shall not exceed what remains due to them as creditors,—if the assignee has so much. If the assignee happens not to have so much, we do not think he is bound to make good the deficiency out of his own means, he having acted in good faith under the rule as laid down in *Petition of Knowles*, with the acquiescence of the creditors, in making the former dividends.

Josiah HOWE *et al.*

v.

J. Avery TEFFT *et al.*

1. Mortgagees of a vessel by mortgage duly registered under the shipping laws of the United States hold their title under such laws; and an attachment under State laws cannot avail to interfere with, modify, or obstruct the exercise of their rights as such mortgagees. Such attachment is invalid as against such mortgagees.
2. The omission of the court to charge

defendant as garnishee having possession of the vessel.—Held, not to affect his right to set up the attachment, if valid, by way of justification in a suit of replevin for the vessel, brought by the mortgagees.

(Providence—Decided February 26, 1887.)

ON plaintiffs' exceptions to the action of the Court of Common Pleas sustaining the defendant Tefft's claim to hold certain property as garnishee in an action of replevin. *Exception sustained.*

The case is stated in the opinion.

Messrs. Crafts & Tillinghast, for plaintiffs:

Judgment should have been rendered, charging the garnishee to hold the attachment.

Pub. Stat. chap. 213, § 10, p. 582.

In *Sheffield v. Barber*, 14 R. I. 263, the court decided that the trustee was not held by the first attachment, because no judgment was rendered against him; although it intimates that such a judgment might have been rendered on the facts and papers, thus recognizing that the trustee is charged, when he makes disclosure, by the judgment against him. When the garnishee does not appear and disclose, he is made responsible by virtue of the statute, not by the judgment of the court. When he discloses, it is only by virtue of a judgment charging him that he becomes responsible.

Eddy v. Prov. Machine Co. Index W, R. I. Decisions, 7.

In *Cottle v. Am. Screw Co.* 13 R. I. 627, the trustee was held to be protected by the judgment against him, though erroneous, even as to a person not a party to the suit, because it was a judgment. Charging or discharging a garnishee is everywhere considered a "judgment" (*Sheffield v. Barber*, 14 R. I. 263, 264). "The proceeding by trustee process is an action against the garnishee as well as against the defendant" (Id. 264). "A judgment charging the garnishee" (*Cottle v. Am. Screw Co.* 13 R. I. 628). "Judgment;" "decision" (Id. 629).

"The court acts judicially with reference to the garnishee" when a disclosure is made.

Eddy v. Prov. Machine Co. Index W, R. I. Decisions, 10.

The execution cannot run against the estate of the defendant in the hands of the trustee, where the latter discloses, unless he has been charged by the court.

Pub. Stat. chap. 222, p. 611. § 21.

It is true that Pub. Stat. chap. 208, p. 573, § 16, provides that the trustee may turn out specific articles to the officer having the execution, without any mention of the necessity of his being charged by the court. Section 15 makes a similar provision for the payment by the trustee of any money in his hands, to the officer. But both these sections were made before the section which requires the court to determine the liability, and the extent thereof, of a garnishee when he discloses, and, of course, the latter and later section controls and modifies the antecedent law, as evidenced by the decisions.

Sheffield v. Barber, 14 R. I. 263.

Messrs. Dixon & Perrin, for defendants.

R. I.

Durfee, Ch. J., delivered the opinion of the court:

This case comes up on exceptions from the court of common pleas. The action is replevin for a schooner with her appurtenances. At the trial in the court below the plaintiffs, in proof of their title, adduced evidence to show that in February, 1881, Lyman R. Beebe of New Haven, Connecticut, being then sole owner of the schooner, mortgaged her to the plaintiffs as security for a promissory note for \$2,500, given by him to them, payable on demand; that the titles both of Beebe and themselves were duly registered or recorded under the laws of the United States, at New Haven; that within six months after the note was given, and frequently afterwards, they demanded payment, but that neither the note nor any part of it had been paid; that May 30 1884, they entered the schooner by their agent, while she was lying at the defendant's wharf in Westerly in this State, for the purpose of taking possession, and demanded possession, which was refused, whereupon they commenced their action.

The defendant, under appropriate pleas, adduced evidence to show that, before demand was made on him by the plaintiffs, he had been served as garnishee in an action in the court of common pleas against said Beebe by one Joseph W. Hancey, and May 1, 1884, had made affidavit, in said action, that he had the schooner and her appurtenances in his hands when served, and afterwards. In August, 1884, Hancey recovered judgment in said action against Beebe, and execution issued thereon; and he claimed that as garnishee he was entitled to retain possession of the schooner as against the plaintiffs. The court sustained the claim, and the plaintiffs excepted.

Under our statute, Pub. Stat. chap. 208, § 4, "personal estate, when mortgaged and in the possession of the mortgagor, and while the same is redeemable at law or in equity, may be attached on mesne process against the mortgagor, in the same manner as his other personal estate." Under this provision, if it stood alone, we think there could be no question but that the chattel, while in the possession of the mortgagor and redeemable, would be liable to attachment by garnishee process. The provision is connected with other provisions for the sale of the chattel attached, as if it were assumed that the chattel, when attached, would be in the hands of the officer; and from this it is argued that the only way in which an officer can attach a mortgaged chattel is by taking it into his possession. The argument is not without force; but we deem it unnecessary to decide whether it be tenable, inasmuch as we are of opinion that the attachment was invalid on another ground. The bill of exceptions shows that the plaintiffs are mortgagees by mortgage duly registered under the shipping laws of the United States. They hold their title under these laws; and the question is whether an attachment under State laws can avail to interfere with, modify, or obstruct the exercise of their rights as mortgagees under those laws. We think the question is virtually answered by the decision of the Supreme Court of the United States in the case of *Aldrich v. Ettna Co.* 8 Wall. 491 [75 U. S. bk. 19, L. ed. 473], cited for

the plaintiffs, and in the case of *Whites Bank v. Smith*, 7 Wall. 646 [74 U. S. bk. 19, L. ed. 211]. In the latter case the court held that the recording of a mortgage in the office of the collector of the home port protected the interest of the mortgagee against subsequent purchasers or mortgagees, by its own force, and consequently that a first mortgagee was entitled to his priority over a subsequent purchaser or mortgagee, though under the State law, if effect had been given to it, he had lost his priority by omitting to comply with one of its requirements. "Congress having created, as it were, this species of property," says the court, "and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubts but that this power may be extended to the security and protection of the rights and title of all persons dealing therein."

In *Aldrich v. Ætna Co.*, it was held that the mortgage of a vessel duly recorded under an Act of Congress cannot be defeated by a subsequent attachment under a State statute enacting that no mortgage of such property shall be valid as against the interests of third parties, unless possession be delivered to and remain with the mortgagee, or the mortgage be recorded in a manner in which the mortgage in controversy was not recorded,—the doctrine of the court being that the registration laws of the United States exclude all State legislation in respect to the same subject.

It is true that in those cases the claim of the subsequent purchaser, mortgagee, or attaching creditor was that the first mortgagee had lost his priority by an omission to comply with a requirement of the State laws; whereas, in the case at bar, there was no claim that the mortgagee had lost his priority by any such omission, but only an attempt to subject the mortgage, while recognizing its validity, to the attachment, in the manner provided for by the State laws. This only shows, however, that in the case at bar the interference of State and Federal law would be less complete, if permitted, than the interference would have been in the cases cited, if permitted; but nevertheless the interference would exist, for, notwithstanding the recognition of the mortgage as valid, the attachment is made paramount to it for the time being, the right of the mortgagee being held in abeyance until the determination of the suit, unless the mortgaged chattel is sold pending the suit, under R. I. Pub. Stat. chap. 208, §§ 5, 6; and, moreover, in case of sale under the attachment, either pending the suit or on execution after judgment, it is not simply the interest of the mortgagor that is sold, but the entire chattel,—the way in which the mortgage is recognized being by paying the proceeds of the sale, to the amount of the mortgage, to the mortgagee, and reserving only the balance for the attaching creditor. The interference with this right of the mortgagee by the attachment is therefore serious; it might be ruinous, if the vessel were long detained, to await the event of the suit, or if it were sold in some port at a distance from the mortgagee under unfavorable

circumstances. We think there can be no doubt that the Supreme Court of the United States would hold such an attachment invalid as against the mortgagee, under the laws of the United States.

The second exception is because the court below refused to rule that the attachment was no justification for the defendant, inasmuch as the defendant was not charged as garnishee in the attachment suit, when judgment was rendered for the plaintiff in that suit. We do not think the omission of the court to charge the defendant as garnishee could affect his right to set up the attachment, if valid, by way of justification in this suit. The second exception is overruled.

First exception sustained, and case remitted for new trial.

Walter B. VINCENT

v.

Charles A. MATHEWS *et al.*

1. A consent decree can be set aside or reformed, for mistake, by a bill of review. And this is so although the mistake has been confined to one of the parties, unless he is estopped by laches.

(Providence—Decided March 5, 1887.)

ON demurrer to bill of review to set aside or reform a consent decree on the ground of mistake. *Demurrer overruled.*

The case is stated in the opinion.

Messrs. Rollin Mathewson and Stephen Essex, for respondents.

Messrs. Arnold Green and Walter B. Vincent, for complainant.

Per Curiam:

This is a bill of review to set aside or reform a consent decree, on the ground that the consent was given by mistake. The defense is that a consent decree cannot be set aside or reformed on that ground. A consent decree can be set aside or reformed on the ground of fraud, because consent procured by fraud is not really consent; and for the same reason we think it can be set aside or reformed for mistake.

In *Lester v. Mathews*, 58 Ga. 403, on a bill to reform a decree, which the court said was in the nature of a bill of review, it was held that, where, by inadvertence or mistake, a decree is rendered by consent which does not speak the true intention of the parties thereto, equity will grant relief and reform it. In this case the mistake appears to have been mutual, or common to all the parties. We can see no reason why relief cannot also be granted where the mistake is confined to one of the parties, unless such party has been guilty of laches such as to estop him from having relief. *Anonymous*, 1 Ves. Jr. 98.

Mistake is one of the principal grounds of relief in equity.

Demurrer overruled.

VERMONT.
SUPREME COURT.

George A. MERRILL
v.
Gates B. BULLARD.

The defendant, having purchased in good faith the plaintiff's personal property of one who had its possession, but no right to sell it, used it as his own for more than six years, claiming title thereto. Held, that it was a conversion, but that the Statute of Limitations commenced to run at the time of the sale, and was a bar to an action of trover.

(Rutland—Filed March 1, 1887.)

TROVER. Pleas, general issue and Statute of Limitations. Trial by court, Landon, J., presiding. Judgment for the defendant. Affirmed.

The case came up from the Municipal Court of Rutland.

In 1864, plaintiff sold his residence to one Moore, and left with him a pair of brass andirons. In 1868, Moore sold the premises to defendant, and with them plaintiff's andirons. Plaintiff had them repaired and immediately put them to use and has used them hitherto. In 1883, and again in 1885, plaintiff demanded the andirons of defendant and was refused. This suit was brought to recover the value of the andirons.

Mr. L. W. Redington, for plaintiff:

There was no conversion until there was a demand.

Jackman v. Partridge, 21 Vt. 558; *Doherty v. Madgett*, 58 Vt. 323; 29 N. Y. 146; 86 N. Y. 814; 82 N. Y. 1; 100 N. Y. 298.

The Statute of Limitations commenced to run at the time of making the demand.

10 Pick. 112; *Noble v. Sylvester*, 42 Vt. 147.

The plaintiff never lost title. There was no adverse possession.

Hapgood v. Burt, 4 Vt. 155; *O'Neil v. Blodgett*, 53 Vt. 213; *Wilder v. Wheelton*, 56 Vt. 344; *Partch v. Spooner*, 57 Vt. 588; *Canfield v. Hord*, 58 Vt. 223.

A purchaser in good faith of one who is not the owner, and has no title, is not liable in trover to the real owner till after the true title to the goods has been made known to him and he assumes dominion over them.

Woodruff & B. Iron Works v. Adams, 37 Conn. 238; *Parker v. Middlebrook*, 24 Conn. 207.

Mr. J. C. Baker, for defendant:

There was an adverse possession for more than six years, and the statute is a bar.

Rev. Laws, § 959.

It is well settled that title to personal property may be lost or gained by six years' adverse possession.

Preston v. Briggs, 16 Vt. 124; *Baker v. Chase*, 55 N. H. 61; *Leffingwell v. Warren*, 2 Black, 599 (67 U. S. bk. 17, L. ed. 261); *Bicknell v. Comstock*, 113 U. S. 149 (Bk. 28, L. ed. 962); *Campbell v. Holt*, 115 U. S. 620 (Bk. 29, L. ed. 483); *Chapin v. Freedland*, 2 New Eng. Rep. 732.

The distinction between the operation of the Statute of Limitations when applied to property adversely held, and as applied to contracts vt.

for the payment of money is this: In the one case it acts on the title, and, when the bar is perfect, transfers it to the adverse possessor; while in the other, there is no such thing as an adverse possession, but the statute simply affects the remedy and not the debt.

Ang. Lim. § 804, note 2.

Ignorance of the conversion on the part of the plaintiff does not change the right.

Smith v. Bishop, 9 Vt. 110.

The time when the action accrues, is the time when the plaintiff may first maintain the action.

7 Wait, Act. & Def. 262 et seq.

This action having been commenced more than six years after the cause of action accrued, the remedy is barred by the express words of the statute.

Riford v. Montgomery, 7 Vt. 411; *Grant v. King*, 14 Vt. 367; *Deering v. Austin*, 34 Vt. 330; *Bucklin v. Beale*, 38 Vt. 653.

Taft, J., delivered the opinion of the court:

It is well settled that the title to personal property may be lost or gained by six years' adverse possession. *Preston v. Briggs*, 16 Vt. 124; *Campbell v. Holt*, 115 U. S. 620 [Bk. 29, L. ed. 483]. A purchaser of personal property from one having it in possession, but who is not the true owner, with no right to sell it, who takes possession of it, claiming title to it as owner, and puts it to use, is guilty of an actual conversion (*Riford v. Montgomery*, 7 Vt. 411; *Swift v. Moseley*, 10 Vt. 208; *Grant v. King*, 14 Vt. 367; *Deering v. Austin*, 34 Vt. 330), and is liable in trover without demand, though he purchased in good faith of one whom he supposed to be the owner and entitled to sell it. *Bucklin v. Beale*, 38 Vt. 653. The sale by Moore in 1868 was an actual conversion of the andirons, and the Statute of Limitations began to run against the plaintiff from the time of the sale. Six years having elapsed after the sale, before suit brought, the defendant gained a good title to the andirons by adverse possession.

Judgment affirmed.

Daniel H. STEELE,
v.

Horace W. LYFORD.

Under the statute (Rev. Laws, § 1556), actual use of a horse is not essential to its exemption from attachment; it may be exempt when kept with an honest intention of using it for team work within a reasonable time.

(Washington—Filed April 15, 1887.)

REPLEVIN for a horse taken by defendant as sheriff on a writ against the plaintiff. Heard on a referee's report, March Term, 1886, Washington County, Powers, J., presiding. Judgment *pro forma* for the defendant. Reversed.

The case appears in the opinion.

Messrs. Z. S. Stanton and J. J. Wilson, for the plaintiff.

Messrs. John H. Senter and George W. Wing, for the defendant.

Rowell, J., delivered the opinion of the court:

The question presented is whether the keeping of this horse with an honest intention of using it for team work within a reasonable time is sufficient to exempt it from attachment.

In *Rowell v. Powell*, 53 Vt. 802, the phrase "kept and used," found in the statute, was, in effect, defined to mean that the animal must be kept and have been actually used for team work, or be kept with an honest intention of so using it within a reasonable time. This case fulfills the alternative of that definition.

Present use is not necessary. Past use may be controlling. And in the case cited it is said that an intention of future use is as controlling as past actual use. And it ought to be; for if a man's horse or his ox can be taken from him before he has time or opportunity to work it, the watchfulness of creditors might make it difficult for an embarrassed debtor to have a team at all.

Nor is this idea of intention new in the cases. Thus, *Dow v. Smith*, 7 Vt. 485, goes upon the ground, not that the heifer was a cow, but that the plaintiff might "call and consider" her his cow, having no other better entitled to the appellation. A similar decision in Massachusetts was put upon the express ground of an honest "expectation and purpose" to keep the heifer for a cow.

Judgment reversed, and judgment for plaintiff for one cent damages and costs.

STATE of Vermont

v.

Frank P. ARCHIBALD.

1. A count in an indictment under the statute (Rev. Laws, § 4228) is sufficient, which charges that the respondent "quarreled with the said * * * by cursing * * * and by calling him opprobrious names * * * which carriage * * * had the effect * * * to disturb the public peace," although there was no allegation of intent.
2. The statute provides that a person who "disturbs or breaks the public peace by tumultuous and offensive carriage," etc., shall be punished, etc. The sufficiency of a count which merely charged that the respondent broke the public peace "by his tumultuous carriage," is doubted.

(Windsor—Filed April 15, 1887.)

INDICTMENT under Rev. Laws, § 4228.

The respondent demurred, and the demurrer was overruled. Trial by jury, December Term, 1885, Windsor County, Taft, J., presiding. Verdict, guilty. *Sentence on verdict.*

The court charged, in part:

"This is a prosecution for a breach of the public peace, and the meaning of the phrase 'public peace' is understood perhaps as well now as it would be after any explanation by the court. Any person is entitled to protection from any violence or disturbance by his fellow citizens; and the public peace is that sense of

security which every person feels, and which is necessary to his comfort, and for which government is instituted; and a breach of the public peace is the invasion of the security and protection which the law affords every citizen. Now, to apply the rules relating to this offense to this case,—these rules that I have stated to you,—the court tells you that a breach of the peace may be committed in the manner that is alleged in the indictment, by tumultuous carriage, and by quarreling in the manner that is stated and set forth in the indictment,—by the quarreling and calling names, applying these obscene and vulgar epithets to a party. For instance, if the respondent did the acts which the testimony tends to show he did; if he stood on the walk there, or platform in front of his house or his building, and in loud and angry tones spoke to Day as the testimony tends to show that he did,—or of him, using the language and epithets testified to,—language and epithets that are so vile and profane and obscene and vulgar that one blushes to repeat them,—with many persons then within hearing of him, and in the midst, as the testimony tends to show, of the village, so that he could be heard around the neighborhood to such an extent that it was an annoyance, and would wantonly annoy and disturb those in the vicinity, he would be guilty of a breach of the peace by these acts."

Messrs. Norman Paul and William E. Johnson, for the respondent:

The indictment is insufficient.

State v. Riggs, 22 Vt. 321.

An indictment accusing a man in general terms is uncertain.

5 Bac. Abr. 69; *State v. Matthews*, 42 Vt. 542.

It was necessary to allege everything which must be proved in order to convict.

State v. Philbrick, 31 Me. 401; *People v. Gales*, 13 Wend. 311; *State v. Benjamin*, 49 Vt. 101; *State v. Higgins*, 58 Vt. 191.

Mr. William Batchelder, *State's Atty.*, for the State:

The indictment set forth a breach of the peace by quarreling.

State v. Hanley, 47 Vt. 290; *State v. Barrows*, 57 Vt. 576; *Commonwealth v. Griffin*, 21 Pick. 528.

The allegation as to tumultuous carriage may be treated as surplusage.

1 Bish. Cr. Proc. 480.

The charge was correct.

State v. Benedict, 11 Vt. 236; *State v. Riggs*, 22 Vt. 321.

Boyce, Ch. J., delivered the opinion of the court:

The indictment is under Rev. Laws, § 4228, which provides that a person who "disturbs or breaks the public peace by tumultuous and offensive carriage, by threatening, quarreling," etc., shall be punished as prescribed; and the respondent claims that the indictment is insufficient, in that it does not allege that the respondent committed either of the offenses set forth in the statute, which constitute a breach of the public peace.

Referring to the indictment, it will be seen that it charges in the first count that the respondent, on a day certain, at a place certain, with force and arms "did disturb and break the public peace by his tumultuous carriage

then and there exhibited to the public," and then proceeds to specify wherein this "tumultuous carriage" consisted, and to declare that it had the effect to disturb the public peace. The second count, opening in the same language as the first, but charging the offense on another day, adds the allegation that the respondent "then and there quarreled with the said Day, by cursing and swearing at the said Day, and by calling him opprobrious, indecent, and obscene names," which, it is alleged, had the effect to disturb the public peace.

Several acts or offenses, necessarily different and distinct, are embraced within the terms of the statute; and an indictment under it must, unquestionably, charge with the degree of certainty and particularity required in criminal pleading the commission of some one of these acts or offenses, and that the effect of it was to disturb or break the public peace. The first count of this indictment is certainly open to criticism. "Tumultuous and offensive carriage," in the conjunctive, is one of the things denounced by the statute. The first count charges "tumultuous," but not "offensive" carriage, and the objection that it failed to charge a complete offense would have much force. A man's carriage might, conceivably, be "tumultuous," as in the noisy expression of joy over some great national good or achievement, and yet be the opposite of "offensive," and tend to spread rejoicing and good will rather than to disturb or break the public peace, in the true sense of that term.

But it is unnecessary to pass upon this point, as in our judgment the second count sufficiently charges another and distinct offense named in the statute, which is a breach of the public peace by quarreling; and, as the evidence strongly sustains that charge, the conviction may properly stand upon the second count. *State v. Hanley*, 47 Vt. 290; *State v. Carpenter*, 54 Vt. 551.

No allegation of an intent to break the public peace was necessary. The statute does not require it, and the act is of a character which necessarily imports intent.

In the view above taken, the respondent's second, third, and seventh requests to charge, as well as a part of the first, become immaterial; and upon the points raised by the other requests we think the charge of the court was as full and explicit as could be required, and that the law was correctly stated by the learned judge. The evidence received as to what was said by the respondent, the manner in which it was said, and what transpired, was properly admissible upon the question of whether the words and acts of the respondent amounted to quarreling and had the effect to break or disturb the public peace.

We find no error in the record, and the respondent takes nothing by his exceptions, and is sentenced to pay a fine of twenty dollars and costs, with the alternative sentence as prescribed by the statute.

Ralph SMITH

Charles HARD.

1. The Legislature has power to pass a retrospective Act legalizing a grand

list, which was irregular or invalid because the listers had only taken, but had not subscribed, the preliminary oath required by the statute (Rev. Laws, § 829); and such grand list was admissible as evidence in an action to recover taxes assessed on that list, both before and after its legalization.

2. The statute (Rev. Laws, § 831), requiring listers to lodge in the town clerk's office an abstract of the personal lists of all taxpayers, for their inspection, is mandatory. Such abstract is an official paper, and must be signed, verified, and authenticated by the listers in such unmistakable manner as to carry on its face fair evidence of its character; and if it is not, the grand list is invalid and not admissible as evidence.

(Bennington—Filed March 14, 1887.)

ACTION by plaintiff, as collector of taxes, to recover town taxes assessed on the grand list of the town of Arlington for the years 1881, 1882, and 1883, and State taxes for the years 1881 and 1882. Plea, general issue. Trial by jury, June Term, 1885, Bennington County, Walker, J., presiding. Verdict directed for the defendant. *Reversed.*

The case appears in the opinion.

Messrs. Batchelder & Bates, for plaintiff:

Signing the oath adds nothing to its binding force.

Cooley, Const. Lim. 88, 92; *Crosby v. School Dist.* 85 Vt. 623; *Free Press v. Nichols*, 45 Vt. 7; *Kellogg v. State Treasurer*, 44 Vt. 361.

Taking the oath is the essence of the thing to be done.

2 Desty, Tax. 115; *Ayers v. Moulton*, 51 Vt. 115; *Day v. Peasley*, 54 Vt. 310.

The statute as to signing is directory.

Mills v. Gleason, 11 Wis. 470; Cooley, Tax. 288; *State Auditor v. Jackson County*, 65 Ala. 142; *Leindecker v. People*, 98 Ill. 21; *Pittsburg v. Courson*, 74 Pa. 400.

The Act passed by the Legislature validated the taxes.

Tift v. Buffalo, 82 N. Y. 204; Cooley, Tax. 301; Cooley, Const. Lim. p. 457; 2 Desty, Tax. 607; *Mattingly v. Dist. of Col.* 97 U. S. 687 (Bk. 24, L. ed. 1098); *Vaughan v. Swayzie*, 56 Miss. 705; *Forster v. Forster*, 129 Mass. 559; *Reis v. Graff*, 51 Cal. 86; *People v. McCain*, 51 Cal. 360; *Tift v. Buffalo*, 82 N. Y. 204; *Schenley v. Commonwealth*, 36 Pa. 29; *Re Sackett*, 74 N. Y. 95; *Sinclair v. Learned*, 51 Mich. 335; *Millikin v. Bloomington*, 49 Ind. 62; *Prindle v. Campbell*, 9 Minn. 212; *Dubuque v. Wooton*, 28 Iowa, 571; *People v. Seymour*, 16 Cal. 332; *Weeks v. Milwaukee*, 10 Wis. 242; *New Orleans v. Clark*, 95 U. S. 644 (Bk. 24, L. ed. 521).

The abstract of personal lists filed by the listers in town clerk's office was sufficient.

Mills v. Gleason, 11 Wis. 470; *Torrey v. Millbury*, 21 Pick. 64; *Magee v. Commonwealth*, 46 Pa. 358.

Messrs. Burton & Munson, and J. C. Baker, for defendant:

The statute requiring the listers to take and subscribe the oath is mandatory.

Rev. Laws, § 829; *Ayers v. Moulton*, 51 Vt. 115.

The Act legalizing the lists of 1881 and 1882 did not affect the defendant's taxes, which were assessed prior to its passage.

Tunbridge v. Smith, 48 Vt. 648; *People v. Holladay*, 25 Cal. 800; 8 Denio, 594; *People v. Lynch*, 51 Cal. 15; 56 Cal. 508; 44 Ill. 278; 25 Wis. 271.

There was no error in holding that the grand list of 1883 was invalid. The abstract filed in the town clerk's office was not sufficient.

Powers, J., delivered the opinion of the court:

The plaintiff seeks to recover certain taxes assessed against the defendant on the grand lists of Arlington for the years 1881, 1882, and 1883.

To prove the assessment of such taxes for the years 1881 and 1882, the plaintiff offered in evidence the grand lists of those years; and it appeared that the preliminary oath of the listers taken for those years was not subscribed by them as required by Rev. Laws, § 329, which provides that each lister, "before entering upon the duties of his office, shall take and subscribe the following oath," etc.

It appeared that the listers in fact took the preliminary oath, and the jurat of the magistrate attesting the fact was attached to said grand lists. In connection with said grand lists the plaintiff offered in evidence Act No. 229 of the Laws of 1882, which purported to legalize said grand lists for the years 1881 and 1882. Passing the question whether the mere omission of the listers to subscribe their names to the preliminary oath which had been confessedly duly taken, was an omission of a matter of substance which would invalidate their official acts, we come to a consideration of the effect of the Act of the Legislature legalizing said lists. It is agreed that the power of taxation is exclusively a legislative power. Circumscribed only by constitutional limitations, the Legislature is the sole judge of the system and procedure proper for the assessment and collection of public taxes. For municipal purposes it has delegated the power to towns and prescribed the regulations under which it may be exercised. One of the regulations is that the listers, in making up the grand list of a town, shall take and subscribe the preliminary oath in question.

The exact question then presented is, whether the Legislature, having fixed the form and attestation of the listers' preliminary oath, can, by subsequent Act, validate a grand list made up by the listers who have omitted to verify the taking of their oath of office by subscribing their own names thereto.

It is fully established on authority that the Legislature may pass retrospective laws unless prohibited in terms by the Constitution, or unless they are violative of vested rights affecting substantial equities. *Cooley*, Const. Lim. 2d ed. 369; 2 *Desty*, Tax. 607; *Tyft v. Buffalo*, 82 N. Y. 204; *Bellows v. Weeks*, 41 Vt. 590, and many other cases cited by plaintiff.

This doctrine is everywhere extended to irregularities in the assessment of property for purposes of taxation and the levy of taxes thereon. *Bellows v. Weeks*, *supra*; *Butler v. Toledo*, 5 Ohio St. 225; *Cooley*, Const. Lim. 371.

In *Tunbridge v. Smith*, 48 Vt. 648, the judge

delivering the opinion, inadvertently no doubt, uses the expression that a healing statute does not cure the invalidity of taxes assessed upon a defective grand list before it was legalized. This proposition is in conflict with the whole line of authorities, and on principle cannot be sound. The defendant in this case has no vested right of defense based upon an informality in his assessment which does not affect his substantial equities. *Cooley*, Const. Lim. 370. He was a taxpayer in Arlington, and legally bound to contribute his ratable share towards the revenues of this town. He is not seeking to escape therefrom upon any claim that he was unduly assessed or oppressively burdened, but solely on the technical ground that the listers have failed to observe a comparatively unimportant formality in making up the grand list, not in the least prejudicial to him, and operating, if operative at all, upon the lists of all other taxpayers precisely as upon his. His grand list was in fact made by officers under oath, and any violation of that oath would make them answerable in criminal proceedings, equally well whether they subscribed their oath or not. The taxpayer has as much security in the one case as in the other.

The curative statute manifestly reaches back to taxes already assessed as well as to those thereafter to be assessed. The principle upon which this kind of legislation is upheld is that what the Legislature might properly have done before the assessment, it may, by relation, do afterwards. *Judge Cooley* formulates the doctrine as follows: "If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by a prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute." The Legislature might have dispensed with the requirement that the listers subscribe their official oath, and indeed it was never required until 1872. When, therefore, the healing Act of 1882 was passed, it cured the informality that resulted from their neglect to subscribe the preliminary oath; and thereafter the case stands as if no such subscription to the oath had ever been required. And as this oath antedates in time the assessment of the defendant's taxes, the curative statute has legal relation and effect as of the time such oath was taken. That the curative Act should apply to taxes already assessed is clearly shown by the case of *Bellows v. Weeks*, *supra*.

In *Grim v. School District*, 57 Pa. 433, it was held that a suit brought to recover taxes paid under protest on an unlawful list was defeated by a subsequent curative statute; and many other cases illustrating the doctrine that the defendant has no vested right of defense to the taxes assessed against him prior to the passage of the curative Act are referred to in all the works treating of this subject, and they all point in one direction. *Bacon v. Collender*, 6 Mass. 303; *Butler v. Palmer*, 1 Hill, 324; *Miller v. Graham*, 17 Ohio St. 1; *Watson v. Mercer*, 8 Pet. 88 (33 U. S. bk. 8, L. ed. 876); *Mather v. Chapman*, 6 Conn. 54; *People v. Supervisors*, 20 Mich. 95; *Yeaton v. United States*, 5 Cranch, 281 (5 U. S. bk. 3, L. ed. 101). It was error, therefore, to exclude the evidence offered to show the taxes

assessed against the defendant in the years 1881 and 1882.

A different question arises in respect to the taxes assessed against the defendant in 1883.

The defendant objected to his assessment for 1883 on the ground that no abstract of the personal lists of the taxpayers was lodged in the town clerk's office as required by law, and that therefore the grand list of that year was invalid.

The plaintiff's evidence tended to show that a paper containing a list of names arranged in alphabetical order, and columns for polls, personal property, and offsets, was lodged in the town clerk's office, April 25, 1883, as such abstract, and the town clerk indorsed thereon the time when he received it, and that he showed this paper to persons calling for such abstract. This paper was not signed by the listers, and contained no statement of what it purported to be.

Revised Laws, § 331, provides that "the listers of each town shall arrange in alphabetical order the personal lists of all taxpayers, and lodge the same in the town clerk's office on or before the 25th day of April of each year, for the inspection of the taxpayers of such town." The purpose to be accomplished by lodging this abstract of individual lists in the town clerk's office by April 25 is to be gleaned from other sections of the same chapter, which, with this, constitute the system on which the grand list is made.

The personal lists are compiled from the inventories of individual taxpayers which the listers accept, and the appraisals made when inventories are not returned or accepted, and cover two classes of personal property: (1) money on hand, debts due and to become due, stock in trade or manufactures; and (2) horses, cattle, sheep, watches, carriages, and all other taxable personal property.

Section 346 provides that "on or before the 1st day of May the listers shall lodge with the town clerk a written notice stating on what day and at what place they will meet to hear persons who may be aggrieved by their assessments, giving at least ten days' notice thereof; and to persons assessed for money on hand, debts due or to become due, stock in trade or manufactures, they shall, on or before the 8d day of May, give notice of a time and place of hearing, personally, or by leaving a written notice at the place of business or dwelling-house of such persons. And at the place and time appointed, and from day to day thereafter, the listers shall sit and hear until all applications are heard and decided, but not later than May 14."

The next section provides for an appeal by aggrieved persons from the decision of the listers to the selectmen.

Section 346 then gives to persons dissatisfied with their assessments the opportunity to be heard before the listers; and failing to get relief on such hearing, a right of appeal is conferred by § 347.

The assessment referred to is that shown by the personal list lodged in the town clerk's office by April 25, as required by § 331. Notice of this assessment, so far as it covers personal property generally, is found at the town clerk's office on or before May 1; and so far as it covers

money, debts due, etc., personal or written notice is to be given on or before May 3.

The object, then, of filing the abstract of personal lists, as required by § 331, is to inform taxpayers who may inspect it, definitely and officially of the assessments made against them by the listers. Taxpayers, under the statute, have no other information on this subject, and they have the right to be informed and to a hearing if dissatisfied. Without opportunity to be heard, the assessment would be invalid.

The abstract, being filed for the purpose of notice to the taxpayer, and being a judicial determination of the amount of his taxable personal estate, respecting which he is entitled to be heard and to appeal from if dissatisfied, should clearly be an official paper that does not and cannot mislead taxpayers whose rights are to rest upon it. It is too loose to say that they may inquire of the town clerk, and may examine such paper as he chooses to produce to them. The town clerk is under no official obligation to file such paper or answer any questions respecting it. The abstract is in fact an official paper; when made up, one step in the process of making a grand list has been taken; when filed, April 25, it is the grand list, so far as personal property is concerned, completed and finished, unless changed by the result of the hearing contemplated by § 346. Taxpayers inspecting it have the right to understand that the grand list, as finally executed on the 15th of May, will show their assessments for personal estate precisely as they appear on such abstract, barring inadvertent mistakes; and govern themselves accordingly. Such abstract being a judicial determination of the amount of each taxpayer's personal estate liable to taxation, and being lodged in the town clerk's office as the basis of complaint by taxpayers dissatisfied, we hold that it should be verified and authenticated by the listers in such unmistakable manner as to carry on its face fair evidence of its character. It should be signed by the listers and certified as the personal list of taxpayers for the current year, or bear otherwise equivalent evidence of authenticity.

In this case the filing by the town clerk, showing the date when the paper was left in his office, added nothing to the document. The statute does not require the town clerk to make such indorsement, and thus no official authenticity is accomplished if he volunteers to make it. The statute requires the listers to arrange in alphabetical order the personal lists of all taxpayers, and lodge the same in the town clerk's office on or before April 25, for the inspection of the taxpayers. Nobody else can discharge this duty. The listers must do it as a part of their official procedure in making up the annual grand list. The taxpayers have the right to inspect it for vital purposes affecting their interests. It subjects them to a legal liability. It is one step necessary to fasten such liability upon them. It settles a question irrevocably against them, unless they can change it on hearing. It is clearly a mandatory and not a directory statute, and for all these reasons must be, in fact and in name, the deed of the listers, complete in itself and not dependent upon the verification of other persons, strangers to it.

This statute requires the listers to lodge in

the town clerk's office a written notice stating the time and place when they will hear persons aggrieved by their assessments. Suppose the listers leave a written notice covering these points, but omit to sign it; the town clerk files it on the day it is received, but it bears no evidence that it was executed by the listers; would it be seriously contended that the taxpayer was bound to regard it as the notice required by the statute? and if the town clerk told him it was the act of the listers, would it be thus authenticated in any legal sense?

Chief Justice Shaw, in *Torrey v. Millbury*, 21 Pick. 64, states the rule respecting mandatory statutes in clear and comprehensive terms as follows: "In considering the various statutes regulating the assessment of taxes and the measures preliminary thereto, it is not always easy to distinguish which are conditions precedent to the legality and validity of the tax, and which are directory merely and do not constitute conditions. One rule is very plain and well settled, that all those measures that are intended for the security of the citizen, for insuring equality of taxation, and to enable every one to know with reasonable certainty for what polls and for what real estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent; and if they are not observed, he is not legally taxed, and he may resist it in any of the modes authorized by law for contesting the validity of the tax. But many regulations are made by statutes designed for the information of assessors and officers and intended to promote method, system, and uniformity in the modes of proceeding, a compliance or noncompliance with which does in no respect affect the rights of taxpaying citizens. These may be considered directory."

This is the doctrine laid down in all the cases, and it is directly applicable to the statute in question. There was no error in excluding the grand list of 1883.

The judgment of the county court is reversed, and the case remanded for a new trial.

S. S. BARTLETT

v.

James WILSON.

1. Where the defect in the grand list consists of something omitted by the listers which the Legislature might have dispensed with by a prior statute, such list may be legalized by a subsequent statute; but, when the list is fatally defective in matter of substance affecting the taxpayer's rights, it cannot be cured by a retrospective law: thus, the defendant's name and list were omitted in the abstract of personal lists required by the statute (Rev. Laws, § 331) to be lodged in the town clerk's office, and the abstract was not signed, or certified, or authenticated by the listers, but merely indorsed "Personal list, 1881." *Held*, that the grand list was illegal, and that it was not cured by a later Act of the Legislature declaring it valid.

2. The notice required by the statute 270

(Rev. Laws, § 346) to be given to the taxpayer, by the listers, of the time and place for hearing grievances, will not cure defects in the abstract of personal lists lodged in the town clerk's office; as the one is a mere notice, the other an assessment or judgment.

3. The statute (Rev. Laws, §§ 292, 296) requires that listers, in making a quadrennial appraisal, shall return the list, with a certificate of their doings attached thereto, signed and verified by oath, to the town clerk's office on or before the first Tuesday of July; and a person aggrieved by their action may, within three days, appeal to the board of civil authority. The list was seasonably returned, but the certificate and oath were not attached until the next September. The listers doubled their appraisal of the defendant's real estate. *Held*, that the list was illegal as to the defendant; for that—

(a) As it was made and certified, he was deprived of an opportunity of contesting it on appeal.

(b) For that the listers doubled their quadrennial appraisal of his real estate, and that it was not validated by the curative statute.

4. That section of the statute is constitutional which directs the listers, in case the taxpayer willfully omits to furnish the required inventory of his property, to ascertain the amount thereof, and double it as a basis of taxation.

(Orleans—Filed March 14, 1887.)

ACTION of assumpsit by the plaintiff as collector of taxes for the town of Brownington, to recover of the defendant taxes assessed on the grand list of said town for the years 1881 and 1882. Plea, general issue. Trial by jury, February Term, 1886, Orleans county, Ross, J., presiding. Verdict and judgment for the plaintiff. *Reversed*.

The case appears in the opinion.

Mr. L. H. Thompson, for defendant:

To the personal list should have been appended the oath named in the statute.

Rev. Laws, § 329.

The law requiring the filing of the alphabetical list of personal lists is mandatory.

Cooley, Tax, 1st ed. 267; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 555; *Marsh v. Cheenut*, 11 Ill. 223; *Billings v. Detten*, 15 Ill. 218; *Re v. Chandler*, 82 Vt. 285; *Houghton v. Hall*, 4 Vt. 333; *Brush v. Buker*, 56 Vt. 143.

The quadrennial list of 1882 is invalid for the reason that the listers did not complete the list as required by Rev. Laws, §§ 292, 296. The defendant never had an opportunity to be heard as to his real estate list, as provided by Rev. Laws, §§ 297, 298. "The law hears before it condemns."

Powers J., in *Quimby v. Hazen*, 54 Vt. 141; *Hibbard v. People*, 4 Mich. 126.

The taxes were not made valid by the Curative Act, No. 234, Acts 1883.

Exchange Bank Taxes, 21 Fed. Rep. 101.

The Curative Act could not affect those taxes assessed before its passage.

Tunbridge v. Smith, 48 Vt. 648; *Cooley, Taxn.* 227, 265.

The quadrennial list of 1882 is also invalid by reason of doubling the appraisal of defendant's real estate. The doubling clause only relates to the annual April list. The laws regulating the making of the quadrennial list do not require the taxpayer to file an inventory. The law should be construed liberally in favor of the taxpayer.

Potter's Dwar. 245, 257.

The law known as the Doubling Act (Rev. Laws, § 326) is unconstitutional and void. It is in direct conflict with the Fourteenth Amendment of the United States Constitution and Vt. Const. art. 9. By Vt. Const. chap. 2, § 2, the legislative, executive, and judicial departments must be separate, so that neither exercises the powers properly belonging to the other. By Rev. Laws, § 326, persons are subjected to penalties without the intervention of the judiciary department of the government; and power is delegated to listers to impose forfeitures and punishments. But by constitutional law one cannot be deprived of his property without "due process of law."

1 Kent, Com. 11th ed. 590; *Hoke v. Henderson*, 4 Dev. (N. C.) 15; 3 Story, Const. 661; 4 Hill, 146; Works of Daniel Webster, vol. 5, p. 486; 1 Bl. Com. 44; 2 Story, Const. 4th ed. §§ 1934, 1935, 1938-1940, 1789, 1944, 1945; *Cooley, Taxn.* 1st ed. 261, 262; *Scammon v. Chicago*, 44 Ill. 278; *Clayton v. Chicago*, 44 Ill. 281; *Wauwatosa v. Gunyon*, 25 Wis. 282; 2 McCord, 55.

The law is also unconstitutional because it provides for two unequal methods of taxation on the same class of property and persons.

Taylor v. Porter, 4 Hill. 140; *State v. Mayor*, 37 N. J. L. 39; *McCormick v. Fitch*, 14 Minn. 264; *State v. Allen*, 2 McCord, 55; *McComb v. Bel*, 2 Minn. 309; *Ryan v. State*, 5 Neb. 280; *People v. Berberich*, 11 How. Pr. 811; *Baker v. Kelley*, 11 Minn. 499; *State v. Burnett*, 6 Heisk. 189; *State v. Doherty*, 60 Me. 564; *Quinn v. Halbert*, 52 Vt. 363; *State v. Peterson*, 41 Vt. 523.

Mr. J. C. Burke, also for defendant:

The grand lists were invalid by reason of failure on the part of the listers to comply with the statute.

Sedg. Stat. & Const. L. 308, 368; *Crosby v. School District*, 35 Vt. 623; *Veazie v. China*, 50 Me. 518; *Walker v. Burlington*, 56 Vt. 181; *Ayers v. Moulton*, 51 Vt. 115; *Houghton v. Hall*, 47 Vt. 333.

A void tax cannot be revived into a legal existence by an Act of the Legislature.

1 Kent, Com. 5th ed. 455; *Tunbridge v. Smith*, 48 Vt. 648; *Coffin v. Rich*, 45 Me. 507; *Rich v. Flanders*, 39 N. H. 304.

Rev. Laws, § 326, is unconstitutional in that it allows penalties to be imposed by a ministerial officer.

Newell v. Whitingham, 53 Vt. 341; *Scammon v. Chicago*, 44 Ill. 269; *Clayton v. Chicago*, 44 Ill. 281; *Burger v. Carter*, 1 McMullen, 426; *Blackw. Tax Titles*, 30; *Cooley, Taxn.* pp. 313, 315; *Drezel v. Commonwealth*, 46 Pa. 31.

Messrs. Edwards, Dickerman & Young, for plaintiff:

The doubling clause is not in conflict with the Constitution. The principle involved received a practical construction in this State for vt.

forty-four years, from 1797 to 1841. During these years the statutes provided:

"And the said listers shall add to said list twofolds, for the whole polls, ratable estate, and property of such persons as shall not have exhibited or delivered lists as before directed, as a penalty on such persons for their neglect, who shall be liable to pay rates or taxes, according to such twofolds. * * * And the listers shall add the sum total of such twofolds to the said general list; particularly entering such total of twofolds as a separate item, agreeably to the form of the list herein before prescribed."

2 Comp. Laws 1868, pp. 166, 167, § 12; *Slade's Comp.* 1824, p. 391, § 12; *Rev. Stat.* 1839, pp. 541-543; Vt. Laws, 1841, No. 16.

During all this period this law was administered, and there is no case that intimates a doubt as to the validity of taxes assessed on lists made by twofolding, or as to the constitutionality of these statutes. This subject was twice before the court in *Henry v. Edson*, 2 Vt. 499, and in *Howard v. Shumway*, 18 Vt. 358.

This same question was passed upon by the Supreme Court of South Carolina in the year 1800, in the case of *Butler v. Bailey*, 2 Bay, 244. The statute in that case was passed in 1788, and "imposed double taxes on all persons who should refuse or neglect to make a due return, on oath, of all their taxable property."

The court says: "With respect to the double tax, this court has no right or authority to consider it as a penalty defeasible on the payment of what was originally due. * * * That this court has no right to interpose between the collectors of public revenue and the State treasury. No such power was given by the Act of 1788, nor was there any principle of public law to warrant an interference."

See *Newell v. Whitingham*, 53 Vt. 341; *State v. Appar*, 31 N. J. L. 359; *Charlestown v. Middlesex*, 101 Mass. 87; *Fox's App.* 3 Cent. Rep. 561; 112 Pa. 337, 357.

The same principle of increasing a taxpayer's list or tax for refusal to make return, or for making a false return of his taxable property, has been sustained by the circuit court of the United States in *Doll v. Evans*, 11 Am. L. Reg. 315; *Cooley, Taxn.* 261, 262; *Biddle v. Oaks*, 59 Cal. 94; *Lincoln v. Worcester*, 8 Cush. 63; *Otis County v. Inhabitants of Ware*, 8 Gray, 509; *State v. Hamilton*, 5 Ind. 310; *Boyer v. Jones*, 14 Ind. 354; *Louisville & W. A. R. R. Co. v. State*, 25 Ind. 177; *State v. Washoe County*, 7 Nev. 88; *S. C.* 5 Nev. 317; *Pomeroy Salt Co. v. Davis*, 21 Ohio St. 555; *Genins v. Auditor*, 18 Ohio St. 534; *Toll Bridge Co. v. Osborn*, 35 Conn. 7; *Weber v. Reinhard*, 78 Pa. 378.

The defendant is in no position to make the objection that his name was omitted from the personal list, without pleading except the general issue, and having received personal notice of his assessment and of the time and place for hearing grievances, after neglecting to furnish his inventory.

Wilson v. Seavey, 38 Vt. 221; *Braley v. Burnham*, 47 Vt. 717; *Howard v. Shumway*, 18 Vt. 358; *Brock v. Bruce*, 58 Vt. 261.

The Curative Act of 1882 legalized all the lists and taxes involved in this case.

Ballows v. Weeks, 41 Vt. 600; *People v.*

Mitchell, 45 Barb. 208; *Walpole v. Elliott*, 18 Ind. 258; *Lewis v. Eastford*, 44 Conn. 477; *Sturgis v. Carter*, 114 U. S. 511 (Bk. 29 L. ed. 240); *State v. Union*, 88 N. J. L. 350; *Locke v. New Orleans*, 4 Wall, 172 (71 U. S. bk. 18, L. ed. 834); *Schenley v. Commonwealth*, 36 Pa. 29, 56; *Story, J.*, in *Wilkinson v. Leland*, 2 Pet. 627 (27 U. S. bk. 7, L. ed. 542); *Watson v. Mercer*, 8 Pet. 88, 108 (33 U. S. bk. 8, L. ed. 876, 883); *Barnet v. Barnet*, 15 Serg. & R. 72; *State v. Jersey City*, 37 N. J. L. 42; *Walter v. Bacon*, 8 Mass. 472; *Locke v. Dane*, 9 Mass. 363.

Powers, J., delivered the opinion of the court:

The plaintiff, as collector of taxes for the town of Brownington, seeks to collect sundry taxes assessed against the defendant on the grand list of that town, for the years 1881 and 1882. The defendant urges sundry objections to both said grand lists, claiming that both are illegal as bases for taxation, some of which we are required to notice.

The case shows that the only attempted compliance with Rev. Laws, § 381, requiring the listers to lodge in the town clerk's office, on or before April 25, the personal lists of all taxpayers, was a paper purporting to be an alphabetical list of the personal lists of persons therein named, which was not signed, certified, or authenticated in any manner by the listers, but bore an indorsement "Personal lists, 1881," on the back thereof. The defendant's name and list were wholly omitted from this paper, but in the annual grand list of that year, completed and filed on the 15th day of May, the defendant's list was made up by doubling the listers' appraisal of his real estate, and his assessment for money on hand, debts due, etc.

On or before May 8, the listers left at the defendant's dwelling-house a written notice that he was assessed for debts due, etc., and of the time and place where they would hear persons aggrieved by their assessments.

On the 27th day of October, 1882, the Legislature passed an Act providing that the grand lists of the town of Brownington for the years 1881 and 1882, as to all taxes assessed thereon and to be assessed on said list of 1882, are declared legal and valid.

The effect of legislation of this character upon illegal grand lists was considered by this court in the case of *Smith v. Hard*, ante, p. 113, heard with this case. It was there held that if the thing omitted to be done by the listers, and which constitutes the defect in the proceedings, was a thing which the Legislature might have dispensed with by a prior statute, it might equally well dispense with it by a subsequent or retrospective statute.

The paper purporting to be the personal list in the year 1881 was not made in compliance with Rev. Laws, § 381. It was even more defective than a like document described in *Smith v. Hard*, supra. The defendant's name and list were entirely omitted; so his personal list was in fact never lodged at all in the town clerk's office.

It is argued that the written notice left at the dwelling-house of the defendant answered the requirements of the statute, but we cannot so hold. The personal list required to be lodged in the town clerk's office is an assessment judi-

cially fixed by the listers, of which all taxpayers may and must take notice. The written notice required by the statute to be given to persons assessed for money, etc., is a mere notice, not an assessment. The statute does not require the listers to inform such persons of the amount for which they have assessed them, but merely the fact that an assessment of that character has been made, and of the time and place for hearing grievances. This notice can only have the legal effect given it by the statute, and cannot, upon sound principles, be construed as an assessment in fact. The personal list is the judicial determination of the listers, of the amount of the taxpayer's personal estate that should enter into the annual grand list to be completed in May. Notice of this assessment or judgment must be given to the taxpayer, and the listers in the first instance, and the selectmen on appeal, are constituted the courts to hear his grievances. In this case no judgment fixing the defendant's personal list was ever passed by the listers in legal form, and thus he never had occasion for appearing before them to be heard.

Following the reasoning of *Smith v. Hard*, it is clear that the defendant's grand list for the year 1881 was fatally defective in a matter of substance which affected his rights, and thus the Legislature had no power to cure the defect by the Act of 1882.

No defects in the annual grand list for 1882, completed on the 15th day of May, are pointed out, and such list is to be treated as valid. But it is insisted that the quadrennial list of real estate made in 1882, and which entered into the list upon which some of the taxes of that year now sued for were assessed, was illegal, and therefore the taxes assessed upon the grand list made up in part of it are not collectible.

The law required the listers in 1882 to appraise the taxable real estate in each town, and return the list thereof to the town clerk's office on or before the first Tuesday in July, and to attach to such list so returned a certificate signed by a majority of the listers and verified by oath in the following form: "We do solemnly swear that we have set down all the real estate situated in the town of — according to the best of our information, and we have appraised the same at its just value in money."

A subsequent section provides that a person aggrieved by the appraisal of the listers may, within three days after the first Tuesday in July, appeal to the board of civil authority for relief in the premises.

In this case the certificate and oath above referred to were not attached to the quadrennial appraisal until September 14, 1882, although the evidence tended to show that such appraisal in fact was lodged in the town clerk's office as early as July 1.

This quadrennial appraisal of real estate is to stand for four years, and it is clear that the rights of taxpayers are quite as deeply concerned as in the case of their personal lists. The appraisal, as made by the listers and completed and returned to the town clerk's office, is a determination of the listers as to the value of each taxpayer's real estate, which will conclude him unless he can change it on a hearing before the civil authority. No man's property can be taken from him, under the guise of tax-

ation or otherwise, for the public use, unless he has the opportunity to be heard in the premises. In this case the defendant had no opportunity for such hearing. There was no legal appraisal in the town clerk's office that affected his rights. He was not bound to notice a document that bore no attestation of its character and no verification of its correctness.

In this particular case the quadrennial appraisal was, for a further reason, void as to the defendant, as the listers doubled their appraisal of his real estate, and thus to this extent exposed him to the payment of twice as much tax as other citizens were liable to pay. This was clearly illegal. No list can be doubled except such as the taxpayer in the first instance is called upon to make himself. He has no part in making or returning the quadrennial list, and no laches can be imputed to him in relation to it. We hold that this quadrennial list was illegal as to this defendant, for that, as made and certified, he was deprived of the opportunity of contesting it on appeal; and, secondly, because the listers appraised and set down the defendant's real estate at double the value at which other real estate in town was assessed, and that all taxes assessed upon grand lists into which it enters are illegal.

The Curative Act of 1882 does not in terms refer to the quadrennial list, and cannot be fairly said to refer to it. But if it did, the defects pointed out are so substantial that, for reasons above given, it was beyond the power of the Legislature to make it valid. The Legislature has no power by antecedent or subsequent legislation to tax one man double what it does another on the same class of property, or to assess him anything without an opportunity to be heard. In *Exchange Bank Taxes*, 21 Fed. Rep. 101, it is said: "Under the power of taxation the property of the citizens is appropriated to the public use to the extent to which he should contribute to the public revenues, and he is liable to have a demand established against him on the judgments of others regarding the sum he should justly or equitably contribute. He cannot be deprived of his property, even under the law of eminent domain, without due process of law, or, in other words, without notice and an opportunity to be heard; and this is essential to every proceeding which affects rights of property. * * * And it is stated in general terms by a text-writer of high authority that a validating Act cannot cure the illegality of an assessment made without notice to the persons interested."

The Legislature could not, on sound constitutional principles, provide in advance that a citizen's property could be taken under the form of a tax for the public use, without giving him the opportunity to be heard respecting its valuation, and for this reason could not validate such taking by a subsequent statute passed after such taking.

The case shows that the defendant neglected to return an inventory of his taxable estate in 1881 and 1882 as required by the Act of 1880, and in consequence thereof the listers doubled his grand list for purposes of taxation.

The Act of 1880 made it the duty of taxpayers to return a sworn inventory of their taxable estate, and, on refusal so to do, empowered the listers to ascertain the amount of such

estate, and set the same in the list at double its appraised value. The defendant contends that this Act is unconstitutional—that it imposes a penalty upon delinquent taxpayers without the opportunity of a jury trial—results in unequal taxation, and takes property without due process of law or contrary to the law of the land. If the Act is chargeable with any of these infirmities, the defendant's contention is sound.

The defendant is bound to contribute his equal share towards the public revenues of the town; that share is measured by the ratio which the amount of his property subject to taxation bears to all other taxable property in town. All taxation must be uniform and equal. Every taxpayer is interested in having every other taxpayer pay his proper share of taxes. Every taxpayer's taxable estate must be ascertained in some way, and the law, in providing that each person shall return his own taxable estate, takes notice of the obvious fact that he knows best what taxable estate he has, and he therefore should be obligated to return it.

The statute empowering the listers to double the appraised value of such taxable estate which they may be able to find belonging to a recalcitrant taxpayer in no sense imposes a penalty upon such taxpayer. It is merely a method of making his list. If the taxpayer refuses to return the proper taxable estate necessary to enable the listers to make an assessment that will work out equality in taxation as between him and all other taxpayers, the law declares that his taxable estate shall be double the value of what the listers may be able to find. The taxpayer has his choice between the two modes of ascertaining his taxable estate, and by refusing the mode that is certain to work equality, he cannot complain of results that follow his own obstinacy. He is not sentenced to pay a penalty, but voluntarily consents that the listers may make his list in the manner prescribed for all such cases.

There is nothing to show that on being doubled the defendant is compelled to pay more than his proper share of taxes, and in the absence of such proof we cannot presume it. Nor does the statute take the taxpayer's property contrary to the law of the land.

"Due process of law" is not necessarily process according to the course of the common law, but process according to the course of proceedings applicable to the subject-matter, and conformable to those general rules that affect all persons alike. Judge Cooley says: "Due process of law, in each particular case, means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." Cooley, Const. Lim. 356.

Government must have the public revenues, and obviously cannot postpone their collections to await the determination of a common-law trial to see if it is entitled to them. It must from necessity proceed in a summary way, not omitting, however, those safeguards that protect individual rights. Its right to levy taxes is determined the moment the individual comes under the protection of its laws, and the only question open between it and its citizens is one of method in the enforcement of such rights.

If its method is one that, in its intended and normal workings, will result in equal and uniform taxation as between all its citizens, and the right of hearing upon alleged errors is preserved, such method is due process of law. All such rights are preserved in the statute in question, and we discover nothing in its letter or spirit that contravenes any provisions of the State or Federal Constitutions, or is subversive of those fundamental principles of justice in which the "law of the land" has its root.

Judgment reversed and new trial granted.

E. A. STEWART, Admr.,

v.

J. W. and Sophia Y. FLINT.

1. When a **grantor's mental incapacity** is not permanent and continuous, but only by "spells," and the **deed** is not lacking **consideration**, nor obtained by fraud or other unfairness, and the act was reasonable and natural, the **burden of proving incapacity** at the time of the conveyance is on the party claiming that the deed is invalid.
2. And in such case, where the master found that the **grantor**, at the time of conveyance, was **neither wholly incompetent**, nor, unaided, fully competent to **understand** the nature of the transaction, but thought that, under proper advice, which it did not appear she had, she could have understood it, and have had papers drawn that would have effectuated her intentions, the **court refused to set aside the deed**, holding from all the findings of the master that it could not be said that she did not understand in a reasonable manner the nature and effect of what she was doing; and this, although the grantor intended to take back an **obligation for her support** during life, secured on the farm conveyed, but by mistake, got only a life lease.

(Taft and Rowell, JJ., dissent).

(Orleans—Filed April 5, 1887.)

BILL in chancery. Heard on the pleadings and a special master's report. February Term, 1886. Orleans County, Ross, *Chancellor*. Decree that the defendants reconvey the premises to the orator. *Reversed*.

The bill was brought to have set aside a deed executed by the plaintiff's intestate, Mrs. Emily Clark, to the defendant wife. When the suit was commenced, the plaintiff was guardian of Mrs. Clark, who has since deceased. The bill alleged the incapacity of Mrs. Clark, and that the defendants procured the deed to be executed by taking advantage of her insane condition, relationship, etc.

The farm in question was worth from \$1,200 to \$1,500. The intestate, at the time of the conveyance, was seventy-six or seventy-seven years old, and living with the defendants at their house. The master found: "The intestate and Mrs. Flint stood in very intimate confidential

relations. * * * There is no direct testimony that Mrs. Flint suggested the giving of the deed. I think and find it was the suggestion of the intestate." The other facts are sufficiently stated in the opinion.

Messrs. L. Lewis, J. C. Burke, and C. A. Prouty, for defendants:

Transactions like this have been sustained by many courts.

Howe v. Howe, 99 Mass. 83; *Hadley v. Latimer*, 8 Yerg. 587; *Nace v. Boyer*, 30 Pa. 99, 111; *Darwell v. Rowland*, 38 Ind. 342; *Harrison v. Guest*, 6 De G. M. & G. 424.

"The mere fact that a person is of weak understanding, if there be no fraud or imposition, is not an adequate cause for relief."

30 Pa. 99.

If Mrs. Clark had sufficient mind to know what property she had, what she wished to do with it, and what she in fact did with the farm when she made the conveyance, the deed should stand.

Graham v. Pancoast, 30 Pa. 89; *Aiman v. Stout*, 6 Wright, 114.

The burden of proof is upon the orator. He must make out that his intestate was incompetent when she gave the deed. The kind of insanity which, when once proved, is presumed to continue, must be of a continuing nature.

Hicks v. Whittemore, 4 Met. 545; *Hatley v. Webster*, 21 Me. 463; *Trish v. Newell*, 62 Ill. 196; *Carpenter v. Carpenter*, 8 Bush (Ky.), 264; *Redf. Wills*, § 92.

The crucial test in all these cases is the quality of the act itself. If the act be rational, then the person who has performed it will be presumed to be rational, although the contrary may be shown.

1 Jarm. Wills, 37, 69; *Cartwright v. Cartwright*, 1 Phill. 90.

Messrs. Edwards, Dickerman, & Young, for orator:

A conveyance will be set aside if it is shown that the grantor, at the time, had not sufficient understanding to know the nature and consequences of his act.

Day v. Seley, 17 Vt. 542; *Doty v. Hubbard*, 55 Vt. 278.

The contracts of persons of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, or overcome, by cunning or undue influence.

Mann v. Betterly, 21 Vt. 326; *Harding v. Handy*, 11 Wheat. 125 (24 U. S. bk. 6, L. ed. 435).

Taking an unfair advantage of another's weakness of mind is undue influence.

11 Rep. 152.

When a person from mental weakness is likely to be influenced by others, transactions entered into by such person, without independent advice, will be set aside, if there is any unfairness in them.

Field, J., in *Atore v. Jewell*, 94 U. S. 506 (bk. 24, L. ed. 262). See 2 Mason, 278.

It is said in *Story, Eq. § 323*: "On the whole, the doctrine may be generally stated that, wherever confidence is reposed, and one party has it in his power, in a secret manner, for his

own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage."

Gibson v. Jeyes, 6 Ves. Jr. 278; *Clarkson v. Hanway*, 2 P. Wms. 203; *Eaton v. Eaton*, 37 N. J. L. 108; *Beasley, Ch. J., Lozear v. Shields*, 23 N. J. 511; *Hill v. Day*, 34 N. J. Eq. 150; *Earl v. Hosiery Co.* 36 N. J. Eq. 188; *Chitty, Cont.* 130; *Shelford, Lunacy*, 266; *Dennett v. Dennett*, 44 N. H. 53; *Converse v. Converse*, 21 Vt. 168.

In the case of a contract between parent and child, the law requires the utmost good faith between the parties.

Story, Eq. §§ 218, 238; *Gallatian v. Cunningham*, 8 Cow. 207; *Conant v. Jackson*, 16 Vt. 330; 2 Phill. Ev. (C. & H. Notes) 301.

A contract consummated by any superior influences or advantage of position may be set aside as being unconscionable.

Powers, J., in Bailey v. Woodbury, 50 Vt. 169. See *Harrington v. Grant*, 54 Vt. 240; *Chitty, Cont.* 977; 2 Lead. Cas. Eq. (W. & T. Notes) 556, 583, 1193.

The burden was on the defendant to prove that the transaction was righteous, and that the donor voluntarily and deliberately did the act, knowing its nature and effect.

Todd v. Gove, 33 Md. 183; 1 Dan. Ch. 4th ed. 852; *Parker v. Parker* (N. J.), 4 Cent. Rep. 67; *Parfitt v. Lawless*, 4 Eng. Rep. (Moak, Notes) 692.

Lunacy being established, the proof is thrown upon the party alleging a lucid interval; and he must establish, beyond a mere cessation of the violent symptoms, a restoration of mind sufficient to enable the party soundly to judge of the act.

Hall v. Warren, 9 Ves. Jr. 605.

If derangement be proved at any particular period, it is presumed to continue until disproved, unless it was accidental,—caused by disease.

1 Greenl. Ev. § 42; 2 Id. § 689; *Hicks v. Whittemore*, 4 Met. 545; 8 Stark. Ev. 1709; 4 Greenl. Cruise, 412; *Judge of Probate v. Stone*, 44 N. H. 594.

Rowell, J., delivered the opinion of the court:

The deed in question was given on June 14, 1882, and it appears, among other things, that from about 1877 or 1878, the intestate had had spells of pain in her head,—probably due to a gradual softening of the brain,—when she was partially and sometimes wholly incapacitated from apprehending or doing any business; and, at her best, she was not intellectually what she used to be, but was gradually failing and losing her intellectual power. The master does not find that she was having one of her "bad spells" the day the deed was executed, nor, if the burden was on the defendants to show it, that she was not having one; but he does find that she was then neither wholly incompetent nor, unaided, fully competent to understand and comprehend the nature of the transaction she was engaged in when she gave the deed. He thinks, and it is treated that he finds, that under proper and impartial advice,—which it does not appear she had,—she could have understood it, and have had papers drawn that would have effectuated her intention, which

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was to convey the farm to Mrs. Flint, and take back an obligation for her support during life, secured on the farm; and this intention was formed because she remembered the past to the disadvantage of her sons as compared with her daughter. The giving of the deed was her suggestion, and it does not appear that either Mrs. Flint, or anyone on her behalf, ever said anything to her about it; but the master finds that she never would have conveyed the farm to Mrs. Flint and taken back a life lease of it, if she had fully comprehended what she was doing.

This deed is not regarded as unreasonable, nor as lacking consideration, nor as having been obtained by fraud or other unfairness.

It was reasonable and natural that the intestate should desire to secure her support with a daughter who had always been so kind and helpful to her, and of whom she thought so much; and had her support been secured, as the intention was, it certainly would afford sufficient and adequate consideration to uphold the deed as between the parties, and equity would probably have compelled its security as intended.

The case then comes to this: Upon the findings of the master, it is held that the intestate was mentally incapable of making the deed in question?

As to the measure of her capacity, the rule is that she must have had enough to enable her to understand and comprehend in a reasonable manner the nature and effect of the business she was doing. *Lozear v. Shields*, 23 N. J. Eq. 509; *Hill v. Day*, 34 N. J. Eq. 150; *Day v. Seeley*, 17 Vt. 542; *Core v. Gibson*, 18 Mees. & W. 623; *Story, Sales*, §§ 10, 12; 1 Benj. Sales, § 32.

Her mental incapacity not being permanent and continuous, but only by spells, and the act being reasonable and natural, the burden of proof was on the plaintiff to show incapacity at the time in question, which he has failed to do; for the intestate understood her relation to her children, was mindful of their merits and demerits, knew of what her property consisted, suggested the giving of the deed, intended to convey her farm to Mrs. Flint and have her support upon it, but, by a very natural mistake, especially among laymen, got only a "life lease," which is the current term of the common people to express what these parties intended; told what disposition she was going to make of all her other property, and looked at it that the life lease was all she was going to have for her support.

On these and the other findings it cannot be said that she did not understand and comprehend in a reasonable manner the nature and effect of what she was doing when she gave the deed; and so the deed must stand. This view renders it unnecessary to consider whether the inquest of lunacy was competent evidence or not.

Decree reversed and cause remanded, with mandate that the bill be dismissed, with costs.

Taft and Rowell, JJ., dissent, thinking the findings based on competent evidence, and that, in the circumstances, it appearing that the intestate was not fully competent without the aid of proper and impartial advice to understand the nature of the transaction she was engaged in at the time she gave the deed, it

devolved upon the defendants to show that she had such advice, and did understand the nature of the transaction. Mr. Pomeroy says that, in cases of real mental weakness, a presumption arises against the validity of the transaction, and that the burden rests upon the party claiming the benefit of the conveyance, to show its perfect fairness and the capacity of the other party. 2 Pom. Eq. § 947.

Edward W. LIDDELL,

v.

James S. WISWELL.

1. A discharge in bankruptcy is a bar to a liability of a surety for his principal, but not to the equitable liability between cosureties in an action for contribution, when the payment was subsequent to the discharge.
2. In an action by a cosurety for contribution, the share to be recovered is determined by the number of solvent cosureties in this State.

(Rutland—Filed April 5, 1887.)

ASSUMPSIT for contribution.

Plea of discharge in bankruptcy. Heard by the court on the pleadings and an agreed statement, September Term, 1886, Veazey, J., presiding. Judgment *pro forma* for the plaintiff to recover one third of the judgment paid by him.

The plaintiff, defendant, and seven others executed a joint and several promissory note for \$300, payable one day after date to D. L. Dawley or bearer, who also was one of the signers, to raise money to fit up a club-room, in which they were all interested.

Dawley received the note, advanced the money, which was used for the purposes intended, and afterwards sold the note to one Fisher, who obtained a judgment on it against the plaintiff. Fisher sold the judgment to one Davis, who obtained a second judgment against the plaintiff, which was paid by him. Before it was paid the defendant received his discharge in bankruptcy in the United States District Court from all debts and liabilities provable under the United States Bankrupt Act. Dawley removed to Colorado and died there, leaving a solvent estate; but at the time this suit was instituted, of the nine signers to the note, all that remained in this State and solvent were the plaintiff, defendant, and the estate of one other.

Messrs. Bromley & Clark, for the defendant:

The discharge is a bar to this action. The note was provable under the Bankrupt Act by the original creditor. The plaintiff, being under a direct liability to the creditor, should have proved the same.

U. S. Bankr. Act, § 19; *Swain v. Barber*, 29 Vt. 292; *Mace v. Wells*, 7 How. 272 (Bk. 12, L. ed. 698); *Dean v. Speakman*, 7 Blackf. 317; *Frentress v. Markle*, 2 Greene (Iowa), 558; *Clark v. Porter*, 25 Pa. 141.

The reason of the rule in cases of cosureties does not apply, as both parties to this action

were principals. The court erred in the rule of damages. The plaintiff can call upon the co-obligors who reside out of the State for contribution, as well as upon those residing here; and only those who are insolvent should have been excluded in determining the defendant's liability.

Mr. Henry A. Harman, for the plaintiff:

The claim of a cosurety for contribution, both by the English and American Bankrupt Acts, is not discharged.

Clements v. Langley, 5 Barn. & Ad. 372; *Wallis v. Swinburne*, 1 Exch. 203; *Alsop v. Price*, 1 Dougl. 160; *Swain v. Barber*, 29 Vt. 292; *Dunn v. Sparks*, 1 Ind. 397; *Goss v. Gibson*, 8 Humph. 187; *Dole v. Warren*, 32 Me. 94.

The plaintiff was bound to pursue only solvent cosureties that were in this State.

Jones v. Blanton, 6 Ired. Eq. 115.

Ross, J., delivered the opinion of the court: There were nine signers to the note of April 1, 1872. Between themselves, each signer was principal for the payment of one ninth of the note, was surety to each other signer for the payment of one other ninth, and cosurety for the payment of the other seven ninths. These relations the plaintiff had to each of the other signers. He had been compelled to pay the whole note with an accumulation of interest and costs. He seeks contribution from the defendant. The defendant has interposed his discharge in bankruptcy, obtained before the plaintiff was compelled to make payment. As to the ninth of the note for the payment of which the plaintiff was principal, he has no right of contribution from anyone regardless of the defendant's discharge in bankruptcy. To the ninth of the note for the payment of which the defendant was principal and the plaintiff his surety, we think the discharge in bankruptcy is a bar. It was held to be so under the bankrupt law of 1841. The plaintiff's right to indemnity arises from the contract of suretyship. The law of 1841 allowed contingent demands to be proved, and the liability of a surety for his principal was held to be such a demand; a demand arising from the contract itself. A distinction was taken between a contingent demand and a contingency, whether a demand will ever exist. The liability of a surety for his principal was held to be the former; and the equitable liability between cosureties, to sustain the burden of suretyship equally, to be the latter. Hence, while the former was held to be barred by a discharge under the law of 1841, the latter was held not to be barred when the payment was subsequent to the discharge. *Swain v. Barber*, 29 Vt. 292.

By the bankrupt law of 1867 all provable claims and demands are barred by a discharge. It provides for proving "contingent debts and liabilities contracted by the bankrupt," in two ways: First, by proving the whole claim and receiving a dividend thereon, if the contingency happen before the order for final dividend; second, by having the value of such debt or liability ascertained under an order of the court, proving and receiving a dividend on the amount so ascertained. The liability of the principal to indemnify his surety is a contract liability, — a direct liability of the surety to the creditor, in actual existence, provable under the bankrupt

law of 1841, though the surety had paid nothing thereon. *Mace v. Wells*, 7 How. 273 [48 U. S. bk. 12, L. ed. 698]. The bankrupt law of 1867 also, as we have seen, permits such liabilities to be proved. Hence, for the ninth of the note for the payment of which the plaintiff was the surety of the defendant, the defendant's discharge in bankruptcy is a bar.

The plaintiff and defendant were cosureties for the payment of the other seven ninths. When the defendant obtained his discharge, no contingent liability for contribution existed in favor of the plaintiff,—only a contingency that such a liability might thereafter arise, if the plaintiff should ultimately be obliged to bear more than his proportionate share of the common burden that might be cast upon him in the payment of that part of the note for which they were cosureties. The implied obligation of the defendant to bear his proportionate share of the common burden resting on all the cosureties is not regarded as arising from contract, but from an equitable duty which the sureties are supposed to be cognizant of and assent to at the time they enter into the contract of suretyship. *Dering v. Winchelsea*, 1 White & T. Lead. Cas. Eq. 100, note, 134, and cases there cited.

In *Mason v. Lord*, 20 Pick. 447, Shaw, J. Ch. J., says: "The action of assumpsit for contribution is founded purely upon equitable principles. It proceeds upon the broad ground that when two or more are subject to a loss or burden common to all, and one bears the whole or a disproportionate part, it lays an equitable claim for contribution from those who are thereby proportionably relieved." The doctrine thus announced has been adopted by this court in *Mills v. Hyde*, 19 Vt. 59; *Strong & Buck v. Mitchell*, 19 Vt. 644.

Not being a contingent liability contracted by the defendant, existing at the time of his discharge, it was not provable against his estate in bankruptcy, and is not barred by his discharge.

On the facts shown by the agreed case, the plaintiff is under no more duty to go into a foreign jurisdiction and attempt to secure some indemnity from the estate of D. L. Dawley than is the defendant. It may be doubtful if anything can be secured from that estate; and if there can be it will doubtless be attended with trouble and expense. From the equitable principles which control this class of liabilities, the plaintiff and defendant are in duty bound to share equally the common burden. Hence the defendant cannot be heard to claim that it is the duty of the plaintiff to go to the distant State of Colorado and endeavor to secure something from the estate of Dawley to relieve the defendant from a part of the common burden now resting wholly on the plaintiff. It is held in this State, and generally, that insolvency of one or more of the cosureties is regarded in actions at law for contribution, and that the share to be recovered by one who has paid the whole debt is determined by the number of solvent sureties; and it has been held by other courts that removal from the State is, for this purpose, equivalent to insolvency. 1 Lead. Cas. Eq. §84; *Boardman v. Paige*, 11 N. H. 431.

The *pro forma* judgment of the County Court is reversed, and judgment rendered for the plaintiff to recover one third of seven ninths of the debt

and costs paid by him August 6, 1885, with interest thereon since August 6, 1885, and his costs.

Charles C. WILLARD
v.

TOWN OF SHERBURNE.

1. In an action to recover for an injury caused by the insufficiency of a bridge while the plaintiff was walking on it at night, under a notice stating: "My back and spine were injured and made lame for the whole length thereof, including neck, and my back was badly strained and made stiff, so much so that I have not been able to raise or move my head since the injury; * * * and I have suffered, and still am suffering, great pain in my head, brain, jaw, back, spine, neck," etc., evidence of an injury to the neck was held admissible.
2. The late statutes (Rev. Laws, § 3111; Acts 1882, No. 13) have not changed the liability of towns for damages happening on bridges.

(Rutland—Filed April 15, 1887.)

ACTION on the case to recover for injuries claimed to have been received through the insufficiency of a bridge in the defendant town. Trial by jury, September Term, 1886, in Rutland County, Veazey, J., presiding. Judgment for the plaintiff. *Affirmed*.

The plaintiff's testimony tended to show that on the night of October 21, 1884, while he was walking over the defendant's bridge, he hit his foot against a log on the west end of the bridge and fell over into the river and thereby received the injuries complained of; and that the only guard on either side of the bridge was a log from eleven to thirteen inches in diameter. The defendant's evidence tended to show that the plaintiff did not fall off the bridge, but that he walked off a bank wall several feet north of the bridge; and that the night was sufficiently light so that the bridge could be seen. The defendant requested the court to charge that there could be no recovery if the bridge was sufficient as a structure to carry the plaintiff safely; that the law did not give damages to the traveler where the injury resulted by reason of his falling off a bridge through want of a railing or muniment. But the court instructed the jury that the Act of 1882, No. 13, left the obligation of the town as to the bridge as it was before that statute was passed; and that the town was bound to keep the bridge in sufficient condition as to its railings as well as its strength.

Mr. J. C. Baker, for defendant, cited—
Rev. Laws, § 3111; *Nourse v. Victory*, 51 Vt. 275; *Perry v. Putney*, 52 Vt. 533.

Messrs. A. F. Walker and M. H. Goddard, for plaintiff, cited—

Fassett v. Roxbury, 55 Vt. 552; *Pratt v. Sherburne*, 53 Vt. 370, as to the sufficiency of the notice; and as to the liability of the town, *Swift v. Neubury*, 36 Vt. 355; *Drew v. Sutton*, 55 Vt. 586; *Bagley v. Ludlow*, 41 Vt. 484; *Glidden v. Reading*, 38 Vt. 52.

Rowell, J., delivered the opinion of the court:

Testimony as to injury of plaintiff's neck was objected to because the notice did not sufficiently describe any injury to the neck. The notice says: "My back and spine were injured and made lame for the whole length thereof, including neck, and my back was badly strained and made stiff, so much so that I have not been able to raise or move my head since the injury; * * * and I have suffered, and still am suffering, great pain in my head, brain, jaw, back, spine, neck," etc. In all this the neck is designated as one place of injury, and the effect of the injury to the back, spine, and neck is described to be such that he has not been able to raise or move his head since the injury, and has suffered great pain in those parts; and the testimony incorporated into the exceptions shows that at the time of trial even, neither the part of the body injured, nor the extent and effect of the injury, could be designated and described with much if any greater certainty than they were in the notice; and the notice was sufficient to let in the testimony objected to.

It is claimed that bridges must now be insufficient structures in order to make towns liable for damages happening thereon, and that an insufficiency as a highway merely is not enough. But we discover no intention on the part of the Legislature to make any change in this respect, and think the law stands as it always has as far as bridges are concerned.

Judgment affirmed.

HACKETT *et ux.*,
v.

AMSDEN.

1. In an action by a wife to recover for her property taken on an execution by her husband's creditor, the **declarations of the husband**, made **after the taking**, in effect that he was the owner, are **not admissible to rebut** his declarations made before the taking and against his interest, which had been received in favor of the wife.
2. **Testimony was not admissible** to prove that a witness "had never heard" that the property was claimed to be the wife's.

(Windsor—Filed April 15, 1887.)

TRESPASS and trover to recover for property claimed to be the sole and separate property of the plaintiff wife, which was sold by the defendant on an execution against the plaintiff husband. Trial by jury, December Term, 1885, Windsor County, Taft, J., presiding. Verdict for the plaintiffs. *Judgment affirmed.*

Mr. S. M. Pingree, for plaintiffs.

Mr. William E. Johnson, for defendant.

Royce, Ch. J., delivered the opinion of the court:

Testimony was introduced by the plaintiffs tending to show that the property in question in this suit was the separate property of the

plaintiff wife, and that the plaintiff husband had on different occasions admitted it to be, or spoke of it as, such separate property. To rebut this the defendant offered to show that, after the taking of the property, the plaintiff husband made different statements, or declarations, as to the ownership.

The action is founded upon a claim of title to the property in question, in the plaintiff wife. As a part of the evidence of such title, admissions or declarations of the husband, made while he was living with the wife and in possession and management of the property, before any controversy had arisen, and when his interest would have been in favor of claiming the property as his own, to the effect that the property was in fact the wife's, were admitted. Having thus disclaimed ownership of the property at all times previous to its taking by the defendant, and the case disclosing nothing whatever which has any tendency to prove title or interest in him, we can conceive of no principle of law which would allow the title of the wife—which is the only material thing in issue—to be affected by declarations or statements of the husband after the property had been taken from his possession.

Further than this, the law is well settled that declarations of a party in possession of property are admissible against, but not in favor of, one claiming title under him, in a case of this character. 1 Phill. Ev. 812, and notes.

The offer to show by a witness that he resided near the plaintiffs and "had never heard" that the property was claimed to be the wife's, was clearly inadmissible. Such evidence could have no tendency whatever to prove that the title was or was not in the wife, and was properly rejected. *Crawford v. Ryan* (Pa.), 5 Cent. Rep. 900.

The judgment is affirmed.

A. T. & E. BALDWIN
v.

H. M. DOUBLEDAY.

1. A **special verdict** containing **inconsistent findings** will be **sustained**, when they are made immaterial by other findings in the same verdict.
2. When **hemlock bark** has been sold, delivered, and accepted, and the vendee has assumed control of it as owner, the **title vests** in him at once, **although** the bark **had never been measured**; and if it is destroyed by fire, the loss falls upon the vendee.
3. The **plaintiffs** sold and delivered to the defendant a large quantity of **bark**, on grounds near the depot. The greater part of it had been **loaded on the cars**, measured, and shipped, when a fire occurred and destroyed the rest. The jury found that the defendant accepted the whole of it. **Held**, that the **acceptance** operated to **pass the title** to the bark in gross to the defendant.
4. Where one, on the **taking of a deposition**, makes a **general objection** to a

**Cf. Cornell v. Clark* (N. Y.), 6 Cent. Rep. 506.

part of an interrogatory, he **cannot** on trial enlarge his objection to **include** the whole.

5. The **declarations** of an agent are **not admissible against a principal**, unless made at the very time he is doing an act that he was authorized to do, and concerning the act that he is then doing.

(Orange County—March 25, 1887.)

GENERAL ASSUMPSIT. Pleas: general issue and special pleas in bar. Trial by jury, June Term, 1884. Orange County, Rowell, J., presiding. Judgment for the plaintiffs on a special verdict to recover \$1,457.50 for 175 cords of bark burned, \$89.49 interest, and \$4.01, the balance of bark actually carried. *Affirmed.*

The action was brought to recover the balance of the purchase price of a quantity of hemlock bark bargained and sold by the plaintiffs to the defendant, under a certain written contract, of which the following is a copy:

"Wells River, Vt., August 2, 1882.

This is to certify that I have sold to H. M. Doubleday, this day, what hemlock bark now peeled, and what we may peel this season. The same being 800 cords, more or less, to be measured on the ground or in the car, as most convenient to me.

A. T. & E. Baldwin, Jr.

If measured in the car, to be shrunk one inch to foot in height, and one foot inside in length of car. Cash to be paid \$8.50 per cord; delivered at Groton Pond. Bark to be good and merchantable, and \$1,000 to be paid as soon as possible, advanced on same.

A. T. & E. Baldwin, Jr.

James B. Darling, Agent."

The jury found:

Q. 1. Did the defendant accept and assume control as owner of all the bark the plaintiffs placed upon the ground at Groton Pond?

A. Yes.

Q. 2. Did the defendant exercise any control over any bark except what he loaded into the cars, or do anything to such bark?

A. Yes.

Q. 3. Was it the intention of the parties, after the making of the contract, that the property in the bark should pass to the defendant when it was piled and lay upon the ground, and before it was loaded into the cars?

A. Yes.

Declarations of plaintiffs' agent, Harris, were admitted to impeach him; and defendant further claimed that it should be given the effect of substantive evidence to show plaintiffs' election to have the bark measured in the car. But the court charged the jury that in order to make the declarations of an agent evidence against his principal, it must appear that they were made at the very time he was doing an act he was authorized to do, and that they were concerning an act he was then doing. To the charge of the court limiting the effect of said declaration to impeaching evidence, and refusing it the further effect claimed, the defendant excepted.

The other facts appear in the opinion.

Messrs. Lamb & Tarbell and Heath & Willard, for defendant.

VT.

The court should have gathered the intent from the writing, and not submitted it to the jury to find.

1 Add. Cont. 232; *Shore v. Wilson*, 9 Clark & F. 565; *Preston v. Merceau*, 2 W. Bl. 1249; *Elgee Cotton Cases*, 22 Wall. 187 (89 U. S. bk. 22, L. ed. 863); *Terry v. Wheeler*, 25 N. Y. 525; *Stephens v. Santee*, 49 N. Y. 35.

The title of property sold does not pass to the vendee while anything remains to be done by the vendor, as weighing, measuring, etc.

Gibbs v. Benjamin, 45 Vt. 124; *Parker v. Mitchell*, 5 N. H. 165; *Ward v. Shaw*, 7 Wend. 404; *Hutchins v. Gilchrist*, 23 Vt. 83; *Hale v. Huntley*, 21 Vt. 147; 7 Am. Law Reg. 239; *Chitty*, Cont. 396; 1 Selw. N. P. 1269; 6 East, 614.

The court erred in its charge as to the statement made by the agent.

State v. Daley, 53 Vt. 442.

If a special verdict is contradictory, a new trial will be granted.

Kearney v. Chicago & St. P. R. Co. 47 Wis. 634; *Fick v. Mulholland*, 48 Wis. 310; *Cottrill v. Cramer*, 59 Wis. 231; *Ree v. Woodfall*, 5 Burr. 2661; *Stearns v. Barrett*, 1 Mason, 153.

Messrs. Smith & Sloan, for plaintiffs:

There was no error in submitting the question to the jury, whether the parties intended that the title to all the bark delivered should pass to the defendant.

Burrows v. Whitaker, 71 N. Y. 291; *Wilkinson v. Holiday*, 33 Mich. 386; *Cunningham v. Ashbrook*, 20 Mo. 553; *Kelsea v. Haines*, 41 N. H. 246; *Phillips v. Bistolls*, 2 Barn. & C. 511; *Rohde v. Thwaites*, 6 Barn. & C. 388; 102 U. S. 59 (Bk. 26, L. ed. 77); *Riddle v. Varnum*, 20 Pick. 280; 2 Benj. Sales, 351, 441; *Merchants Nat. Bank v. Bangs*, 102 Mass. 291; *Dyer v. Libby*, 61 Me. 45; *Boswell v. Green*, 25 N. J. L. 390; *Browne v. Hare*, 3 Hurls. & N. 484.

The intent of the parties is controlling; and the court properly rendered judgment for the plaintiffs, when the jury found that the intent was that the title should vest in the defendant.

Carpenter v. Brainerd, 87 Vt. 145; *Hunt v. Thurman*, 15 Vt. 336; *Newhall v. Langdon*, 39 Ohio St. 87.

There was an actual delivery.

Redington v. Roberts, 25 Vt. 686; Benj. Sales, 1182.

The declarations of an agent in order to bind a principal must be a part of the *res gesta*.

Upham v. Wheelock, 36 Vt. 27.

Powers, J., delivered the opinion of the court:

The written contract of August 2, 1882, was an executory agreement on the part of the plaintiffs to sell to the defendant 800 cords, more or less, of bark, peeled and unpeeled, delivered at Groton Pond at \$8.50 per cord, to be measured on the ground or in the car at the option of the plaintiffs.

The quality of the bark is not in dispute; but the parties differ as to the mode of measurement chosen by the plaintiffs; and a special verdict of the jury was taken in which there are manifestly inconsistent findings. But we think the finding of the jury in answer to the first, second, and third special questions submitted to them makes these inconsistent findings immaterial.

An executory agreement for the sale of goods upon special terms becomes a perfected bargain and sale, by a delivery to and acceptance of the goods by the vendee, unless fraud or imposition is practiced.

The bark was seasonably delivered at Groton Pond; and the defendant was engaged in loading it into cars when the fire occurred that destroyed the bark that had not been shipped away.

The jury found, upon competent evidence and under proper instructions, that after the bark was delivered upon the ground at Groton Pond the defendant accepted and assumed control as owner of it; and that it was the intention of the parties, after the making of the contract, that the property in the bark should pass to the defendant when it was piled and lay upon the ground, and before it was loaded into the cars.

The acceptance of the bark under the written contract must necessarily be an act subsequent in time to the date of the contract, and is the only act in this case essential to constitute a bargain and sale of the bark. By it the executory becomes an executed agreement. When the defendant accepted the bark on the ground at Groton Pond, the place of delivery, and assumed control of it as owner, the title was at once vested in him; and the measurement, whether on the ground or in the cars, was a ceremony that did not affect the question of title, but merely determined the sum due as purchase money. Under the written contract, if the defendant had elected to stand on his rights as there specified, the title would not pass to him until the plaintiff had delivered and measured the bark bargained to be sold.

When so delivered and measured the defendant was bound to accept the bark, under the contract, and pay the stipulated price.

But he elected to accept the bark in gross, and actually took control of it as owner; and this has effect as a waiver of the precedent condition of measurement specified in the writing, and operates to pass the title to the bark in gross.

In the view we take of the acceptance of the bark by the defendant, it is immaterial whether the court gave the proper effect to the declarations of Harris, though we see no error in this respect.

An interrogatory was put to McLean, plaintiff's witness, as follows: "Where was this bark to be measured? In the yard where it was delivered, or in the woods before it was delivered?"

An examination of the context in McLean's deposition discloses the patent fact that there were only two possible places of measurement referred to by the witness.

The defendant objected to all but the first sentence of this interrogatory. If the evidence was objectionable on the ground that it tended to prove a contract between other parties, and thus could not be received to prove a contract between these parties, the whole of the interrogatory should have been objected to. The first sentence calls, in fact, upon the witness to state which of two places was the place of measurement; and the questioner made the matter no more definite or suggestive, by specifying the alternative, than he had done in the first sentence.

The judgment is affirmed.

STATE of Vermont
v.

Miles A. WYMAN.

1. It is not necessary, in an indictment charging incest, to aver that the respondent had knowledge of the relationship existing between himself and the *particeps criminis*.
2. The word "brother," in the statute against incest, includes a brother of the half-blood.

(Windham—Filed April 15, 1887.)

INDICTMENT charging the respondent with incest. The respondent demurred; the demurrer was overruled, and trial had by jury, September Term, 1886, Walker, J., presiding. Verdict: guilty. The respondent also moved in arrest of judgment, on the ground that the indictment was insufficient. *Exceptions overruled.*

Messrs. Waterman & Martin, for respondent:

The indictment was insufficient because it did not charge the respondent with knowledge of the relationship.

Rea v. Harrington, 58 Vt. 181.

A half-brother is not a brother, within the meaning of the statute.

2 Bl. Com. 227.

Mr. F. A. Bolles, for the State:

The term "brother" applies to a brother of half-blood.

Bish. Mar. & Div. 3d ed. 218.

Knowledge of the relationship need not be alleged.

Bish. Stat. Cr. 797; *Commonwealth v. Goodhue*, 2 Met. 198.

Royce, Ch. J., delivered the opinion of the court:

Two points only are urged in behalf of the respondent:

1. That the indictment is fatally defective, in that it does not charge the respondent with knowledge of the relationship existing between himself and the *particeps criminis* at the time of the commission of the crime charged.

The indictment is based upon Rev. Laws, § 4246, which provides that "persons between whom marriages are prohibited by § 2306 or § 2307, who intermarry, or who commit fornication with each other, shall be punished as in case of adultery." The indictment sufficiently charges that the respondent was related to the *particeps* within the degrees of consanguinity specified in §§ 2306, 2307, and that he committed fornication with her. Fornication is only made a crime when committed by persons within certain degrees of consanguinity. It is therefore a statutory crime, purely; and its definition and the proceedings to punish persons charged with it are dependent upon the words of the statute itself. The statute is entirely silent as to any *scienter*; it does not say that a person who knowingly or wilfully commits fornication with one related to him or her within the degrees of consanguinity which prohibit marriage, shall be punished, etc. To come within the statute, therefore, it was not

necessary to allege knowledge of the relationship. *Bish. Stat. Cr. 2d ed. §§ 729, 782, 783.*

2. That the indictment is not sustained by proof that the respondent committed the offense with the daughter of his half-brother, it being claimed that the word "brother," in the statute, is not broad enough to cover a brother of the half-blood.

In support of this claim it is urged that, at common law, a brother of the half-blood is not a brother, and cannot inherit as such. It is true that by the common law a brother of the half-blood could not inherit, but this was a rule for the regulation of the descent of property, and had no broader scope. It did not undertake to affect the relations of brethren of the half-blood any further than to prescribe, for certain reasons having their origin in the ancient system of feudal tenures, that in the descent of the inheritance a brother of the half-blood should be left out. The common-law rule, therefore, would have no force in a case of this kind; but the generally-understood significance of the word "brother" as used in the common affairs of life, and as defined by the lexicographers of recognized authority, should be adopted in the construction of the statute.

In the present case, however, all question is removed by *Rev. Laws, § 2231*, which provides that "the degrees of kindred shall be computed according to the rules of the civil law;" and by these the half-blood are admitted in all respects equally with the whole blood. 2 *Kent, Com. 422.*

The respondent takes nothing by his exceptions.

William ANGUS

v.

George S. ROBINSON *et al.*, Admrs.

The principle that joint contractors must all sue upon their joint contract is not varied by the fact that one of them has been settled with, unless all the parties agree to the severance of the joint interest, and the obligor promises to pay each his several share, and the suit is based upon the new promise.

(Orleans—Filed March 25, 1887.)

ASSUMPSIT. Heard on demurrer to the fourth count in the declaration, February Term, 1885, Orleans County, Ross, J., presiding. Demurrer sustained. *Affirmed.*

The case appears in the opinion.

Messrs. Crane & Alfred, for plaintiff:

The count set out the contract as inducement only. The gist of the action is the recovery of one half of the \$14,000 due from Robinson to Angus and Goff, and one half the par value of the bonds deposited as security. The transaction between Robinson and Goff worked a severance of the contract, and by it Robinson impliedly agreed to account with Angus for his part; and hence he can maintain this action in his own name.

Swift, Ch. J., in *Beach v. Hotchkiss*, 2 *Com. 697*, says: "Where there is a joint interest, or a joint cause of action, all the parties in interest vt.

must join in a suit to recover it; but where a severance is made by the party to the claim, by paying to one or more his or their proportion of the debt or interest, there the others may bring their separate actions against him; for he has by his own act severed the cause of action."

Phelps, J., in *Ambler v. Bradley*, 6 *Vt. 119*; *Austin v. Walsh*, 2 *Mass. 401*; *Bunn v. Morris*, 3 *Cai. 54*; *Hall v. Leigh*, 8 *Cranch, 50* (12 *U. S. bk. 3, L. ed. 484*); *Stedman v. Shelton*, 1 *Ala. 86*.

Parsons, J., in *Baker v. Jewell*, 6 *Mass. 460*, says: "If one man is legally answerable in a personal action to two or more persons jointly, if he will settle and adjust the controversy with either of them, so that he has no longer an interest in the dispute, this is a severance of the cause of action as to any or all of the parties."

The law implies a promise to pay the plaintiff.

Austin v. Walsh, supra.

The defendant estate cannot suffer by the nonjoinder of Goff.

Cummings v. Blaisdell, 43 *Vt. 382*; *Smith v. Foster*, 36 *Vt. 705*; *Maynard v. Briggs*, 26 *Vt. 94*.

Messrs. Edwards, Dickerman, & Young, for defendants:

This suit is improperly brought in the name of Angus alone. Whatever promise was made by the intestate was made to the plaintiff and Goff. The consideration passed from them jointly; consequently the action should have been brought in their names.

Hall v. Huntton, 17 *Vt. 251*.

Redfield, J., in *Crampton v. Ballard's Admr.* 10 *Vt. 251*; 1 *Chitty, Pl. 10th ed. 3, 9*; *Sunapee v. Eastman*, 32 *N. H. 470*; *Hill v. Tucker*, 1 *Taunt. 7*.

Where a broker was employed to sell a ship belonging to three part-owners, having paid to two of them their shares of the proceeds of the sale, it was held that the third part-owner could not maintain an action in his own name for his share.

Hatsell v. Griffith, 2 *Cromp. & M. 678*; *Jellison v. Lafonta*, 19 *Pick. 244*; *Halliday v. Doggett*, 6 *Pick. 359*; *Lodge v. Dica*, 5 *E. C. L. 397*.

All joint covenantees who may sue must sue.

Petrie v. Bury, 10 *E. C. L. 108*.

When an instrument is jointly executed to several, one of the joint payees for obligees may sue in the name of all without their consent.

Mountstephen v. Brooke, 18 *E. C. L. 111*; *Chambers v. Donaldson*, 9 *East, 470*.

The plaintiff and Goff were connected together by unity of interest and unity of title; and one cannot bring a suit without joining the other. They had the legal interest. *Decharms v. Horwood*, 25 *E. C. L. 228*.

They never divided their interest, but held it in common; and whatever was received by Goff was to the joint interest of both.

Doolittle v. Dwight, 2 *Met. 561*.

Shaw, Ch. J., on this point says: "Although either party might receive the whole or any part of the sum thus due to both jointly, and give a discharge, yet the receipt would be on joint account, and the party receiving would be responsible to the other for half of the amount so received." If the promise on which a suit is brought is made jointly to two or more persons, they must all, if living, join in the action, or they will be nonsuited on the trial."

Gould v. Gould, 6 Wend. 263; *Wright v. Post*, 3 Conn. 142.

Joint tenants must jointly sue upon a contract relating to the estate, which is made by or enures to the benefit of all.

1 Chitty, Pl. 13, note.

The plaintiff and Goff could not so divide their claim as to entitle either of them to bring a suit in his own name.

Peters v. Davis, 7 Mass. 257; *Wetherell v. Langton*, 1 Exch. 634; 1 Rap. & Law. L. Dict. 688; *Fairlie v. Denton*, 15 E. C. L. 246; Best, J., in *Wilson v. Coupland*, 7 E. C. L. 77; Dicey, 66, 81, 100; *Read v. Young*, 1 D. Chip. 244; *Knight v. Blair*, Caledonia County, May Term, 1848 (not reported); *Roberts v. McLean*, 16 Vt. 608.

Powers, J., delivered the opinion of the court:

The fourth count demurred to sets out a contract made by the plaintiff and Goff jointly of the one part, and the defendant's intestate of the other part, whereby certain stock and bonds of the Montreal, Boston, & Portland Railway were sold to such intestate, and certain labor was to be done upon said railway as part consideration for such sale. It also avers the delivery of certain other bonds by said Angus and Goff to the intestate to ensure the performance of their contract. It further avers full performance of the contract by Angus and Goff. In this posture of things the plaintiff discloses a perfected right of action in Angus and Goff to recover the unpaid purchase money of the stock and bonds sold, and also the bonds put up as collateral, or their proceeds if converted by the intestate to his own use.

The count further avers that after performance by Angus and Goff of the contract on their part, the intestate settled with Goff for his interest in the contract and his interest in the collateral bonds; and the plaintiff's contention is that he may now maintain an action in his own name to recover one half the unpaid purchase money and half the proceeds of the collateral bonds. We think such action cannot be maintained.

The sale of the stock and bonds with the collateral undertaking to put the railway in running condition was the consideration of the intestate's promise. The delivery of the collateral bonds was a mere incident of such sale—a mere security for the performance of the principal contract by Angus and Goff.

If Robinson had contracted with Angus and Goff severally for the share of each in the stock and bonds, and promised them severally to pay for such shares, it would be quite another thing. But, however, as between themselves, the ownership of the stock and bonds in truth was, the declaration states their interest to be "joint and equal" and sets them out as joint contractors; and the principle that joint contractors must all sue upon their joint contract is too elementary to require the citation of authorities.

Robinson's settlement, then, with Goff for his interest was in substance a satisfaction of the joint indebtedness *pro tanto*. What Goff received belonged to Angus and Goff, and the balance due from Robinson belongs to them jointly. It is not the case of the novation of a contract.

If Angus, Goff, and Robinson had mutually agreed upon a disintegration of the demand, and Robinson had promised to pay Angus his share, the case would be different. But here Angus was no party to the severance made by Goff and Robinson, and was not bound by it; and if it did not bind him, it did not bind them in respect to him. The cases cited by the learned counsel for the plaintiff are not in conflict with this holding.

In *Hall v. Leigh*, 8 Cranch, 50 (12 U. S. bk. 3, L. ed. 484), a consignee sold merchandise for two owners. But each owned one half severally, which fact was disclosed in the consignment, and separate instructions for the sale were made.

In *Beach v. Hotchkiss*, 2 Conn. 697, defendant had paid one of several joint contractors his share of the common debt, but had not liquidated the account with the others. Assumpsit cannot be maintained by the others severally for their share. Some language is used by the court giving support to the plaintiff's contention in the case at bar, but the result of the case is inconsistent with it.

In *Austin v. Walsh*, 2 Mass. 401, A and B jointly ship goods consigned to C, to sell. After shipment, A and B sever their interest in the adventure, and A gives B written instructions to C to pay B his moiety. B shows this direction to C, who refuses to account to B, but says he will pay B if proceeds belong to him. It was held that the agreement between A and B to sever their interest would not entitle them to sue C severally unless, after notice, C had consented to it and to account to each for his share. But, as the action was not on the original contract, but on C's promise to pay B if he was entitled, and he had shown he was entitled, he might recover.

Without further review, the true rule appears to be, that where all the parties in interest in the joint contract agree to a severance of the joint interest, and the obligor promises to pay each his several share, each may sue therefor, the suit being based upon the promise to pay each severally, and not on the original joint promise.

Here the count is clearly in assumpsit, and the right of recovery is based upon the original undertaking.

The act of bringing the suit cannot in law be effectual to work a severance of the joint interest of Angus and Goff, and thus, by way of a ratification of the unwarranted severance made by Goff and Robinson, give Angus a several action. The severance must first be made, and a new promise must appear as the basis of the new right of action springing from the severance.

The judgment of the county court, sustaining the demurrer and adjudging the plaintiff's new fourth count insufficient, is affirmed, and the case remanded.

Hiram HATHAWAY

v.

Daniel HAGAN.

1. An oral submission, and not a written award, governs as to what was submitted.

2. When the **payor of a mortgage** note, in a foreclosure proceeding in **accounting** before a master, is **allowed**, without objection or exception to the report, to **prove an oral agreement** relating to the note and made at the time of its execution,—in effect, that the payor protested that he did not owe it, and that the payee promised that if on settlement it was not found all right, he would make it so,—such agreement is as operative as though a part of the note itself; and compels the payee to show consideration *aliunde*.
3. **Interest paid by mistake** on a note, designedly written without interest, is recoverable.
4. **Money paid above the legal rate** for forbearance of an existing debt is usury.
5. **Usury cannot be covered by the subterfuge of a sale**, or of an unfounded claim for damages to hired property.
6. In a **foreclosure** proceeding, where the master reports an **overpayment** of the mortgage, the defendant, under an answer, is not entitled to **affirmative relief**; but the case, on motion, will be remanded, that a cross-bill may be filed.

(Washington—Filed April 5, 1887.)

PILL to foreclose a mortgage.

D Heard on the report of a special master, March Term, 1886, Washington County, Powers, *Chancellor*.

It was decreed that the award made by W. B. Porter, arbitrator, was not conclusive, as it was upon other differences than those now involved; that the burden was on the orator to show a consideration of the \$361 note, and that he had failed to do so; that defendant is entitled to the interest, paid by mistake on the note, written without interest; that the \$120.50 claim is without consideration, save the \$6 due for rent of cow, and \$5 actual value of a sleigh; and that if, on the above holdings, there was anything due the orator, he was entitled to the usual decree.

The case appears in the opinion.

Mr. T. J. Deavitt, for orator:

There is the ordinary presumption of consideration in the \$361 note.

Harrington v. Lee, 33 Vt. 249.

As the note was given prior to the statute of 1887, which changed the common law, the defendant cannot set up a partial failure of consideration.

Thrall v. Horton, 44 Vt. 386; *Orough v. Patrick*, 37 Vt. 421; *Cragin v. Fowler*, 34 Vt. 326.

Extension of time is a good consideration.
2 Am. Lead. Cas. 184.

Messrs. Heath & Willard, for defendant:
The submission, and not the award, determines what was submitted.

Davis v. Vass, 15 East, 97; *Buccleuch v. Board of Works*, L. R. 5 Exch. 221; *Blackwell v. Goss*, 116 Mass. 394; *Cald. Arb.* 289; *Price v. Popkin*, 10 Ad. & El. 139.

Upon a bill brought for an accounting, the party against whom the balance is found will be decreed to pay it.

1 Dan. Ch. Pr. 285; *Columbian Gov. v. Roth-*

vt.

N. E. R., v. VI.

child, 1 Sim. 94; *Wells v. Strange*, 5 Ga. 32; *Campbell v. Campbell*, 4 Halst. Ch. 740; *Clarke v. Tipping*, 4 Beav. 588. See *Harrington v. Bacon*, 57 Vt. 644; *Dwinell v. Bliss*, 58 Vt. 353.

The burden was on the orator to show consideration of the note.

Delano v. Bartlett, 6 Cuah. 364; *Small v. Clewley*, 62 Me. 155; *Search v. Miller*, 9 Neb. 26.

Rowell, J., delivered the opinion of the court:

The award is not binding as to the matters in dispute here, for they were not submitted, but only the matter as to the three months and a half's interest. And the fact that the award recites that all matters in difference were submitted is not controlling, for it is the submission that governs as to what was submitted, and not the award.

The master finds, on testimony admitted without objection, that the defendant signed the \$361 note, protesting that he did not owe it, and under the orator's oral agreement that if, on looking over and settling, it was not found to be all right he would make it right. The report is not excepted to, and this branch of the case stands for disposition on the facts reported. The oral agreement being proved without objection, it is as fully operative as though it had been reduced to writing as a part of the note itself, and takes away the otherwise *prima facie* effect of the note as evidence, of consideration, and compels the orator to show consideration *aliunde*,—which he has failed to do, and therefore cannot recover the note. Nor can he retain the interest mistakenly paid upon it, as it was designedly written without interest.

As to the \$50 for damage on the cow, parcel of said sum of \$120.50, the master finds that the orator had no valid claim for such damage, but that he took advantage of the defendant's necessity for extension of time on his notes, and compelled him to allow it, which he would not have done, and which the orator knew he would not have done, but for his necessity. A similar finding in *Sartwell v. Horton*, 28 Vt. 870, was regarded as a distinct finding that the claim was false to the knowledge of the party making it; and we regard this finding as amounting to that. This being so, the orator is not entitled to receive, nor to retain if he has received, that \$50. *Sartwell v. Horton* is full authority for this, in which the rule is laid down to be that, if there is a want of good faith in making a claim, and the party making it is exacting that which he does not believe to be a right, and there be, among other things, any undue advantage taken of the other party's situation and he pays money, it may be recovered. *Hoyt v. Dewey*, 50 Vt. 465, is to the same effect. And see *Bellows v. Soules*, 55 Vt. 891.

Besides, this transaction was clearly usurious. It was nothing but an agreement on the one hand for receiving, and on the other for paying, interest above the legal rate, for granting further time; and money paid above the legal rate for the forbearance of an existing debt is usurious, as well as money thus paid at the time of the loan or the creation of the debt. *Carlis v. McLaughlin*, 1 D. Chip. 111; *Hawkins v. Nat. L. Ins. Co.* 57 Vt. 591.

As to the purchase price of the sleigh, other parcel of said sum of \$120.50, the defendant did not want the sleigh, and had no use for it; but the orator took advantage of his situation and compelled him to buy it, at fifteen times its value, in order to get extension on his notes, which were then in the hands of an attorney for collection. These circumstances make that transaction usurious also, notwithstanding the subterfuge of a sale resorted to to cover it; for the law is quick to discern the intents of men, and piercing even to the dividing of the joints and marrow of sham and pretense. *Austin v. Harrington*, 28 Vt. 130; *Low v. Mussey's Estate*, 36 Vt. 183; *Poland, Ch. J.*, in *Williams v. Wilder*, 37 Vt. 618, 619.

It resulting from this holding that the defendant has largely overpaid his mortgage, he asks for affirmative relief in respect thereof, under his answer, claiming that this is a bill to account, and that in such cases the party against whom the balance is found will be decreed to pay it. But although an accounting is incident to a bill to foreclose, yet such a bill is not a proper bill to account; for what are called bills to account are brought only when there are mutual accounts between the parties; that is, when each party has received and paid for the other, or when the accounts are all on one side; but there are circumstances of great complication and difficulty in the way of adequate relief at law; or when a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account to the orator. 8 Pom. Eq. § 1421.

And now, the defendant asking for liberty to apply for leave to file a cross-bill, *the cause is remanded for that purpose, with mandate.*

Byron TULLAR

v.

Henry BAXTER, H. Horskins, J. Hirneth,
William and Lucy Keyes.

1. The equitable principle that when several persons enjoy a common benefit all must contribute ratably to the discharge of the burdens incident to the existence of the benefit does not apply where the deeds of conveyance establish the rights of each of several mill-owners and define their liabilities as to contribution in maintaining a reservoir dam in which all have a common interest.
2. Nor will contribution be decreed against one whose mill privilege is not used, and there is no probability that it ever will be.
3. Where several millowners, having derived their titles from a common grantor, have an interest in a reservoir dam, and for many years have given a practical construction to their deeds,—in that some have contributed towards the maintenance of the dam and others have not,—the court will consider such construction in defining the deeds.
4. Where one, by representing a majori-

ty interest, is authorized to determine as to repairs of the dam, he is under the duty of deciding fairly and conducting the work prudently.

5. A bill is multifarious which seeks relief of one kind against one defendant, and another on different grounds against the other defendants. But this objection must be raised before final hearing.

(Franklin—Filed March 25, 1887.)

BILL in Chancery. Heard on the pleadings, proofs, and motion to suppress, September Term, 1885, Franklin County, Royce, Chancellor. Bill *pro forma* dismissed. *Affirmed.*

Messrs. C. G. Austin and Burt, Hall, & Burt, for orator:

The orator is entitled to relief in a court of equity.

Ang. Watercourses, §§ 444, 457; Gould, Waters, § 540; *Lyon v. McLaughlin*, 32 Vt. 423; *Sanborn v. Bralley*, 47 Vt. 170.

The parties are under a common duty to maintain the dam.

Gould, Waters, §§ 307, 540; *Bradfield v. De-well*, 48 Mich. 9; *Denman v. Prince*, 40 Barb. 213; *Clark v. Plummer*, 31 Wis. 442; *Campbell v. Meier*, 4 Johns. Ch. 384.

Each party has a common right and interest in the dam.

Gould, Waters, § 307.

Messrs. Cross & Start, and *Farrington & Post*, for defendants, argued that the bill was multifarious; and that the liabilities of the parties were determined by the deeds, and hence no occasion for equitable relief.

Powers, J., delivered the opinion of the court:

This is a bill in equity asking the court, among other things, to fix and declare the relative liabilities of the parties hereto to share in the expense of rebuilding and maintaining the dam across the Missisquoi River at Keyes' Falls in Highgate.

It appears from the pleadings that the Missisquoi river, in the locality in question, runs northwesterly and then westerly past the mills and shops of the orator and the defendants, particularly described in the pleadings; and that the water-power supplying said mills and shops is furnished by means of a dam across said river. All said mills are located on the southerly and westerly bank of the river in the following order: The orator's sawmill just below said dam; the defendant Baxter's gristmill—called in the pleadings the "old gristmill"—next below; the defendant Baxter owns the foundations of what is called the "new mill" next below the old gristmill; and the defendants Horskins and Hirneth own the foundry property next below. The defendants Baxter and Keyes also own a mill privilege below the foundry property, which has never been used, and also own a privilege on the north side of the river just below said dam and nearly opposite the orator's sawmill, which was formerly used, but has not been utilized for more than twenty-five years last past. All the owners of the mills and shops on the southerly bank of the river, now in use, have certain rights in the use of water which

are particularly expressed in their title deeds; and we think the liabilities of the parties to expense necessary to the maintenance of said dam are also clearly defined in said deeds.

August 25, 1857, Stephen S. Keyes was the owner of said dam and all the mills, shops, water privileges, and land on both sides of said river, and on that day conveyed the property called the foundry property to one Norval D. Wait by warranty deed. The foundry property so conveyed has come down by regular conveyances to the defendants Horskins and Himeth. At that time, as now, the sawmill took its water by means of a bulkhead in said dam, and thence by a flume to said mill. The gristmill took its water from said dam by a flume running from the dam to said gristmill; and the foundry property took its water by means of a trunk or aqueduct leading from the gristmill flume to said property.

The deed aforesaid from said Keyes to said Wait was the first conveyance in time, and the first severance of the water rights made by the common owner of the whole; and, after describing the granted premises, recites that on the granted premises are a foundry, machine shop, and other buildings, and that "said Wait is to have the machinery in, as well as all the privileges and appurtenances connected with, the buildings upon said premises, together with the right to himself, his heirs and assigns, of taking water from the new gristmill building to the premises hereby conveyed by means of a trunk, as the water is now conveyed to said premises; and the water privilege hereby granted is to be upon an equality, as to the rights of using the water, with any privilege now used, or which may be hereafter granted and used at said Keyes' Falls,—excepting the old gristmill, which is to have priority as to the use of the water as hereinafter mentioned; and should said Keyes, his heirs or assigns, discontinue or fail to support a flume to said gristmill buildings, said Wait, his heirs and assigns, are to have the privilege of taking water, and by the same means as above described, from the old gristmill, to be taken from the old gristmill flume at the same point that it is now taken from said flume, and conveyed in the same place as it is now conveyed to and past said gristmill building; and should said Keyes or his heirs or assigns discontinue or fail to maintain a flume from the dam to the old gristmill, then said Wait, his heirs and assigns, are to have the privilege of taking water in the manner above described from the dam, to be taken and conveyed in the same places where it is now taken and conveyed; but so long as said flumes are continued and maintained by said Keyes and his heirs and assigns where they now are, said Wait and his heirs and assigns are to take water, as aforesaid, from said gristmill building as it is now taken."

The deed then gives Wait free ingress to said gristmill building to repair his gate, and makes certain reservations and conditions, and then continues: "And this grant is made upon this other express condition, and with this other express reservation, that the old gristmill, with the machinery now in the same or which may be hereafter put into the same, is to enjoy priority of privilege and water; and whenever the operation of said mill with its present machin-

ery, or such as may hereafter be put into the same, shall require it to be done, the said Wait, his heirs and assigns, are to shut down their gate or gates upon request of said Keyes, his heirs or assigns. And said Wait, his heirs or assigns, are so to use said privilege as not to cause any unnecessary waste of water, and the said Keyes, his heirs and assigns, are to support a flume to the new gristmill building until said building shall, as above deemed, be as unfit for use as it now is."

Stephen S. Keyes retained the title to all said property not conveyed to said Wait until his death in 1867, after which the same passed to the widow, Deborah S. Keyes, who, on November 7, 1867, conveyed the premises now owned by the orator by warranty deed to one Lorenzo Olds.

As the orator now holds the title and rights then conveyed to Olds, it is necessary to look into that deed. After describing the granted premises the deed recites that "the said Olds and his heirs and assigns are to have the privilege, and the same is hereby conveyed to them, of using and taking water from the pond into his flume or flumes through headgates of like dimensions with them now used for said sawmill; but in no case are said headgates to be set lower or cut wider than those now used, except as hereafter mentioned; and the said Olds, his heirs and assigns, are to have the privilege, and the same is hereby conveyed to them, of drawing and using water from their flume or flumes at any point not more than three feet below the bottom of the present flume to said mill; and in no case are they to draw water through an opening or openings which in the aggregate shall exceed one thousand square inches; * * * and it is expressly stipulated that the water privilege hereby conveyed shall be on an equality, in the use of water, with privileges now existing or hereafter to be granted from this pond, except said gristmill; and it is expressly understood that said gristmill shall at all times have a priority in the use of water from the pond, and that the same priority in the use of water shall extend to any other gristmill erected instead of the present one, and using no more water; and whenever the operation of said gristmill shall require it, the said Olds and his heirs and assigns shall shut down said sawgate or gates upon the request of said Keyes, her heirs and assigns; and it is expressly understood that in case the gristmill flume and headgate are made lower at the dam than they now are, then the said sawmill flume and headgate at the dam may be lowered the same distance; and in case any other flume and headgate shall be built lower at the dam than the said sawmill flume and headgate, then said sawmill flume and headgate may be lowered the same distance; and * * * the said Olds, for himself, his heirs, and assigns agree at all times to be at one half as much expense in the building and repairing the dam as the gristmill may be. * * * It is expressly understood that all questions in regard to rebuilding or repairing the dam shall be decided by a majority interest for said dam; * * * and it is expressly understood that nothing in this deed is intended to convey more or greater water power or privilege than one thousand square inches, meaning that the water shall be taken through an aper-

ture or apertures of not more than the size of one thousand square inches at the point herein described for its measurement; and it is not intended to guarantee or secure any amount of water to said Olds, his heirs or assigns, but only to permit him to take water in common with other privileges, except the gristmill as before described, which have been, or may hereafter be, granted; and the privileges herein granted shall be subject to water privileges granted from the pond heretofore.

The defendant Baxter has succeeded to the title of Mrs. Keyes to said gristmill and its water privileges and rights, as against the orator standing on the deed to Olds, and Horskins & Hirneth standing on the deed to Wait. And said Baxter jointly with said defendant Lucy Keyes owns all the balance of said property originally owned by the common grantor, Stephen S. Keyes.

In 1888 it became necessary to rebuild the dam, and Dr. Baxter, representing the majority interest and with the approval of the orator, undertook the work and carried it forward to practical completion.

The orator does not urge that the work ought not to have been done, but avers that the defendant Baxter was himself incompetent, and his employees disqualified for work of this character. It is true, as claimed, that the defendant, though representing the majority interest and therefore authorized to determine all questions respecting contemplated repairs, must respect the minority interest so far as to decide fairly and conduct the work prudently for the common advantage of the entire interest; and the proofs in the case do not show a contrary practice on his behalf.

The orator insists that, although as between him and the owner of the gristmill the ratio of expense for repairs is fixed and determined, the question is open as to defendants Horskins & Hirneth in respect to the foundry property, and as to defendants Baxter and Lucy Keyes in respect to the unused privilege below the foundry property and the unused power opposite the sawmill on the north side of the river; and presses the familiar equitable principle that, when several persons are in the enjoyment of a common benefit, all must contribute ratably to the discharge of those burdens that are incidental to the existence of such benefit.

But the case is not one for the application of this doctrine. It is true that the orator and Horskins & Hirneth are on an equality in the use of the water; and if nothing more appeared, they should equally share in the expense necessary to preserve such use. But although they stand on the same level so far as the use of water is concerned, they are placed on an inequality so far as the burden of expense in the preservation of that use is concerned; and this inequality inheres in the very title to such use of water which they have respectively accepted and now stand upon. If their rights are legally fixed by their deeds, there is no room for the application of the equitable rule above referred to.

In the first place the deed to Wait, under which Horskins & Hirneth hold their title, imposes no burden for repairs upon the dam; while the deed to Olds, under which the orator holds, imposes the burden of repairs at one half

what the owner of the gristmill must pay. Whatever may be or whatever ought to be the amount to be paid by the gristmill property, either as established by title deeds or equitable principles, the orator must pay one half thereof. If the gristmill has a legal right for contribution by the foundry property or other ownership, the half chargeable to the orator is correspondingly reduced. But if the gristmill property has no legal right to such contribution, the orator must abide the ratio fixed by his deed.

As to the unused privileges, the gristmill property clearly has no claim for contribution. No such right by deed is claimed. None in equity can exist, because equitable contribution flows from community of enjoyment,—the common benefit. The lower privilege has never been used, and the one on the north side has not been enjoyed since Olds took his title; and the proofs show that no probability exists that either will be used hereafter. Equity cannot fasten contribution upon a mere possibility of benefit; it can act only upon its actual existence. The orator can stand no better in this behalf than the owner of the gristmill. If the orator could thus get relieved, no reason is apparent why he could not charge every riparian owner below him with the unwilling proprietorship of a water privilege, the use of which he never contemplated, and the existence of which he may never have suspected. If the orator can enforce contribution upon the foundry property, it cannot enure wholly to his benefit, because that would destroy the ratio of expense which he has assumed by his deed to the owner of the gristmill. He can share in it, if enforceable, with the gristmill, only in the ratio of one to two.

But Wait took his deed clear of any obligation to repair the dam. Keyes even contracted to keep the new gristmill flume in repair so long as that building remained fit for use; and only permitted Wait to take water at points higher up, towards and at the dam, upon the contingency that Keyes, his heirs and assigns, should fail to keep up and maintain the flumes below the dam, from which Wait was to take water.

Although Keyes does not in express terms obligate himself to keep the dam in repair for Wait's benefit, still the expressions in his deed to Wait,—“should the said Keyes, his heirs and assigns, discontinue or fail to support a flume to said gristmill building,” then Wait may take water from the old gristmill flume, and “should said Keyes, his heirs or assigns, discontinue or fail to maintain a flume from the dam to the old gristmill,” then said Wait may draw from the dam,—clearly imply that Keyes understood that the duty to maintain the flume rested upon him, and that Wait was to use the instrumentalities that Keyes had provided to conduct water to his own mills, as the source of supply to the foundry property, so long as Keyes kept them in operation. The evidence shows that so long as Keyes lived, he, and not the owners of the foundry property, kept the dam in repair, thus giving a practical construction to the deed, harmonizing with the expressions above quoted, and both carrying a strong implication that the duty to repair the dam was wholly upon Keyes and his successors.

And after the death of Keyes and the sale of the sawmill to Olds, down to 1888, the owners of the gristmill have made all such repairs without protest, and without pretense of claim that such duty ought to be shared in by others.

In the deed to Wait he is placed on an equality in the right to use water with other privileges that may be granted. This does not put him on an equality as to the quantity to be used. In his deed the quantity of water he may use is not measured or restricted further than it shall be subordinate to the gristmill right.

In the deed to Olds, he is restricted to one thousand square inches. The deed to Wait imposes no duty, in terms, upon him to repair the dam. The deed to Olds expressly obligates him to make such repairs and fixes his relative share of the expense. The deed to Wait was made when Keyes had the whole ownership of all the powers, and had the whole duty of maintaining the dam. Under such circumstances, if he expected Wait to contribute to the expense of repairs upon the dam, he would naturally have so stipulated in his deed. On the contrary, however, he assumes himself the duty of maintaining the flumes which furnish his own supply, and without which his own supply would be cut off, and gives Wait the mere right to take water in subordination to him from his flumes. In view of all these features of the case, we are clearly of opinion that the fair construction of Wait's deed exempted him from any duty to contribute with Keyes to the expense of repairing the dam. And this exemption certainly must continue so long as the gristmill supply is maintained as it now is. And his exemption arising from the deed under which he takes the water, there is no room for the application of the doctrine of equitable contribution.

Some formal objections were made in argument which are of minor importance in the view we have taken of the merits of the case. It is urged that the bill is multifarious, in that it seeks relief of one kind, and on special grounds, against Baxter alone; another, on different grounds against the other defendants. This objection is well founded, but is taken too late. The court will not entertain such an objection first taken at the final hearing, if it can make a decree disposing of the case on its merits. *Wade v. Pulsifer*, 54 Vt. 45.

Some immaterial evidence was put in by both parties, but it is largely of trivial importance and hardly sufficient to warrant any restriction upon costs.

The pro forma decree of the Court of Chancery dismissing the orator's bill is affirmed, with costs, and the cause remanded.

William R. DURKEE

v.

Samuel P. DURKEE.

1. The orator brought his bill for specific performance of a contract, by which it was claimed that the defendant agreed to adopt him as his heir-at-law, and that thereby he was fraudulently induced to work several years for him; and, failing to prove both the contract

and the fraud, it was held that he could not recover for his services on the ground that he acted in ignorance of the facts, as he was guilty of culpable negligence in not knowing that the defendant had not adopted him, when, by due diligence and inquiry, he could easily have learned that fact.

2. Nor can the orator recover on the claims arising out of the lease of the farm, as he had an ample remedy at law.

(Washington—Filed March 25, 1887.)

BILL IN CHANCERY. Heard on the pleadings and the report of a special master, March Term, 1886, Washington County. Powers, *Chancellor*. Bill dismissed. *Affirmed*.

The bill alleged that the orator, when between five and six years of age, with his young sister, who afterwards deceased, went, about the year 1860, to reside with the defendant and his wife as their children, under an agreement that they would adopt them as heirs-at-law; that defendant had no children of his own; that in 1862 the defendant procured an Act of the Legislature, changing the names of the orator and his sister from Robinson to Durkee, and making them heirs-at-law of himself and his wife, by which name the orator has ever since been known and called; that said Act of adoption was not to take effect until assented to in writing by the defendant and his wife, Lurancy Durkee, which writing was to be recorded in the town clerk's office; that said Lurancy died in 1880, possessed in her own right of about \$2,000; that the orator was obedient to the defendant, and the value of his services exceeded the expense of his maintenance by several hundred dollars; that the orator believed, until long after he was twenty-one years of age, that he was defendant's heir; that defendant purposely omitted to assent to said Act of the Legislature, and that orator believes that he never intended to adopt him; that, if the defendant had complied with the Act of the Legislature, the said \$2,000 owned by said Lurancy would have gone to the orator; that orator went into possession of defendant's farm under a contract which was very beneficial to the orator, which the defendant broke, and compelled the orator to abandon, in July, 1881. The prayer was that the court order the defendant to perform his said contract, and make the petitioner the heir-at-law of defendant and his wife; that the defendant be restrained by injunction from alienating or incumbering his property, so that at his death it will come to the petitioner, or, that an accounting may be taken of the services of the petitioner under the contract; that the defendant pay to the petitioner such portion out of the estate of said Lurancy as would have belonged to him if he had been legally adopted.

The master found that the defendant in 1861 took the orator, who was at that time about six years old, and his sister; that the defendant requested Hon. L. G. Hinckley, during the session of the Legislature of 1862, to procure the passage of a law changing the names of the orator and his sister, and constituting them heirs-at-law of the defendant and his wife. An Act was passed, and approved by the governor in November, 1862. The first

section of the Act changed the names of the two children from Robinson to Durkee, and constituted them heirs-at-law of the defendant and his wife Lurancy. The second section provided that the Act should not take effect until the defendant and his wife "shall make their assent to the same in writing under their own hands, in the presence of two witnesses, and same acknowledged before a justice of the peace, and cause the same to be recorded in the town clerk's office in said Chelsea."

The section requiring the assent of the defendant and his wife was incorporated into the bill by Mr. Hinckly as a matter of form only. The master failed to find that the defendant or his wife ever signed any paper giving their assent to the said Act of the Legislature; but found that the orator continued to live with the defendant, and was treated as a son; that he gave defendant and his wife the respect and affection of a son, supposing that he was their adopted son until long after he was twenty-one. It was also found that the orator saw the Act of the Legislature in 1872; that in October, 1880, he moved on to the defendant's farm, under an arrangement that he should carry it on and have all he could make, and board the defendant; that this arrangement continued till July, 1881, when the orator was compelled to leave the farm by reason of defendant's actions,—violation of the contract; that said Lurancy held, at the time of her death, in her own right, property to the amount of about \$1,000; "that the orator was induced to and did believe until June, 1881, that he was the adopted son and heir-at-law of the defendant and his wife, Lurancy, and that their treatment and actions towards him warranted that belief."

It was further found that the defendant, after he was twenty-one, worked to a considerable amount in value for the defendant, for which he has never received pay, but worked like other children without expectation of pay; but would not have done so if he had not supposed he was defendant's adopted son.

Messrs. E. W. Bisbee and J. A. Wing, for orator:

The orator could not sustain an action at law—the defendant standing *in loco parentis*—without proving an agreement to pay.

Sprague v. Waldo, 38 Vt. 141; *Davis v. Goode-nov*, 27 Vt. 715; *Lunay v. Vantyne*, 40 Vt. 501; *Andrus v. Foster*, 17 Vt. 558.

The court, on the facts found, has jurisdiction, and should decree specific performance. But if the court will not so decree, it should retain the case to save the expense of further litigation.

Dana v. Nelson, 1 Aik. 252; *Beardsley v. Knight*, 10 Vt. 185; *Sanborn v. Kittredge*, 20 Vt. 632; *Balls v. Shepard*, Wash. Co. Sup. Ct. May Term, 1883 (not reported).

Messrs. Heath & Willard, for defendant: No contract is found to be enforced. But if there had been a contract of this kind, the court would not decree specific performance.

Sainsbury v. Jones, 2 Beav. 462.

As to the farm trade, the orator had an adequate remedy at law.

Currier v. Rosebrooks, 48 Vt. 84; *Cilley v. Tenny*, 31 Vt. 401; *Aiken v. Smith*, 21 Vt. 172; *La Point v. Scott*, 36 Vt. 603.

There can be no recovery on the ground of mistake.

McDaniels v. Bank, 29 Vt. 230; Story, Eq. Jur. § 146.

Taft, J., delivered the opinion of the court:

The contract alleged in the bill is not shown by the master's report to have been made, consequently there can be no decree for a specific performance; neither does the report show that the conduct of the defendant was fraudulent. The master states that the "orator was induced to and did believe until June, 1881, that he was the adopted son and heir-at-law of the defendant and his wife," but by whom he was so induced to believe the report does not show; the master, not finding that fact upon the evidence, the court cannot say, as matter of law, that it was by the defendant. No contract by the defendant being shown, and no fraud on his part proven, the orator still insists that he is entitled to relief upon the ground that he remained with the defendant and labored for him several years, in ignorance of the fact that he was not his adopted son and heir-at-law. Whether he was such son and heir-at-law was a fact he could easily have ascertained. He knew of the Act of the Legislature as early as the year 1872, and he could at any time have learned by inquiry at the town clerk's office whether the defendant had ever assented thereto, which was the requisite to its validity. When a party has acted in ignorance of facts merely, courts of equity will never afford relief, where actual knowledge could have been obtained by the exercise of due diligence and inquiry. To relieve a party under such circumstances would be to encourage culpable negligence. *Willard*, Eq. Jur. 70; Story, Eq. Jur. § 146 and note; *McDaniels v. Bank*, 29 Vt. 230; *Smith*, Eq. Man. chap. 2, § 1. By this rule he is not entitled to relief. No question of evidence was reserved. If the orator has any claims against the defendant arising out of the lease of the farm, he has an ample remedy at law.

Decree affirmed and cause remanded.

Calvin STOWELL,

v.

William HASTINGS, Exr. of Joseph Stowell's Will.

1. The will, after disposing of a part of the estate, gave to the testator's wife the residue, "for her benefit and support, to use and dispose of as she may think proper," and then provided that if any of the estate should be left at her death in her possession, it should be equally divided between the testator's brothers and sisters. *Held*, that the wife took an absolute estate, and the remainder over was void for repugnancy.
2. The decree of the probate court, unappealed from, ordering the executor to pay the residue to the residuary legatee, "in accordance with the will," did not settle the question whether she took an absolute estate, or one for life.

(Windham—Filed April 15, 1887.)

APPEAL from a decree of the Probate Court allowing the account of William Hastings, executor of Joseph Stowell's will. Heard on a commissioner's report, March Term, 1885, Windham County, Walker, J., presiding. Judgment affirming the decree of the probate court, allowing the executor's account. *Affirmed.*

It appeared from the report that the defendant, Hastings, was appointed executor, served as such, and on the 2d day of October, 1872, on due notice, settled his account in the probate court; that at the same time the court ordered him to pay to Ella J. Cheney, the testator's grand-daughter, now Mrs. Robinson, the sum of \$3,000, and the balance of the estate to "the widow of said deceased in accordance with said will;" that he paid the \$3,000 legacy, and in November, 1872, he paid to the widow the remainder of the estate, which consisted of money, bonds, notes, etc. Mrs. Stowell, the widow, died in July, 1883. The defendant, Hastings, was her brother, and was employed by her to transact her business. He had in his possession about \$4,000 of her money and bonds, derived from her husband's estate. Just before her death she directed him to deposit in some bank \$400 for one party, \$150 for another party, and to deliver the rest—\$3,500, in bond—to Mrs. Robinson. He did as directed; but in his accounting he did not credit the estate with those sums. The contention was whether the widow could dispose of said property. The clause of the will in question is stated in the opinion. The testator's heirs were his wife and grand-daughter, Mrs. Robinson.

Messrs. A. E. Cudworth, and Martin & Eddy, for plaintiff:

The widow took only a life estate. The testator did not devise to her absolutely the residue whereby she could dispose of it, for he provided that what was left at her death should be divided between his brothers, etc.

McCloskey v. Gleason, 56 Vt. 264; *Richardson v. Paige*, 54 Vt. 373; *Smith v. Bell*, 6 Pet. 68 [31 U. S. bk. 8, L. ed. 322]; *Hixon v. Oliver*, 13 Ves. 111; *Dawes v. Swan*, 4 Mass. 208; *Parsons v. Winslow*, 6 Mass. 169, 175; *Hibbard v. Hurlburt*, 10 Vt. 178; 8 De G. & S. 411; *Henderson v. Blackburn*, 104 Ill. 227; *Upwell v. Halsey*, 1 P. Wms. 651.

The widow could use the money in any way beneficial to her support; but she could not be benefited, nor her support assured, by giving it to a relative, at the point of death.

Messrs. E. L. Waterman and C. B. Eddy, for defendant:

The decree of the probate court is conclusive as to all parties interested, and protects the executor in obeying it.

Probate Court v. Marriam, 8 Vt. 234; *Stone v. Griffin*, 3 Vt. 400; *Lencham v. Spaulding*, 57 Vt. 115; *Boyden v. Ward*, 38 Vt. 628; *Richardson v. Merrill*, 32 Vt. 27; *Stone v. Peasley's Estate*, 28 Vt. 716; *Lawrence v. Englesby*, 24 Vt. 42.

The effect of the decree was to vest the property in Mrs. Stowell, and the executor's control and liability for it ceased.

Riz v. Smith's Heirs, 8 Vt. 365; *Grice v. Randall*, 23 Vt. 239.

The gift to the wife was absolute.

Vt.

1 Redf. Wills, 432; *Parsons v. Winslow*, 6 Mass. 169; *Malcolm v. Malcolm*, 3 Cush. 472; 4 Mass. 208; *Jarm. Wills*, 762; *Areson v. Areson*, 8 Denio, 458.

Taft, J., delivered the opinion of the court:

The important question in this case is whether Mrs. Stowell took an absolute estate in the property which passed to her under the residuary clause in her husband's will; it reads as follows:

"I give to my beloved wife, Hepzibah H. Stowell, the residue and remainder of all my estate, both real and personal, for her benefit and support, to use and dispose of as she may think proper. If any of the estate should be left in my wife's possession at her death, it is my will that the same should be equally divided between eight of my brothers and sisters", etc.

The decree of the probate court in 1872 settled no question involved in this case.

The testator gives his wife the residue of his estate for her benefit and support, with an absolute power of disposition; no conditions annexed to the gift, no words limiting the use of the property, and giving the words used their usual signification, she is put in the place of the testator, as to the title and all rights to the property. If an estate be given to a person generally or indefinitely, with an absolute power of disposition, it carries a fee, and a remainder over is void for repugnancy. 1 Eq. Cas. Abr. 176; 4 Kent, Com. 2d ed. 535; *Smith v. Van Ostrand*, 64 N. Y. 278; *Campbell v. Beaumont*, 91 N. Y. 464; *Seibert v. Wise*, 70 Pa. 147; *Ramsdell v. Ramsdell*, 21 Me. 288.

"In general, however, a limitation over after a fee, is held to be repugnant to the estate first granted, and is itself rejected." 2 Jarm. Wills, 44, note 1. "It is a settled rule of American as well as English law." 2 Redf. Wills, 278.

Where the *jus disponendi* is conditional, as in those cases where the property is given for support only, with power over the principal for that purpose; or the estate given the first taker is one for life only,—a different rule may prevail and the gift in remainder be valid; for, in such cases, no absolute estate is given the first taker. In determining what estate is given the first taker, the whole will should be considered and all the clauses construed together. Even in those cases where an absolute estate is in terms given, if subsequent passages unequivocally show that testator meant the legatee to take a life interest only, the prior gift is restricted accordingly. Jarm. Wills, chap. 15. Such are the cases in this State of *Richardson v. Paige*, 54 Vt. 373; *McCloskey v. Gleason*, 56 Vt. 264; and such construction was given the will in *Smith v. Bell*, 6 Pet. 68 [31 U. S. bk. 8, L. ed. 322].

If we could construe the will in question as giving the residue to Mrs. Stowell for her support only, which is the construction the appellants insist should be given it, their claim might be upheld; it was given for her support, but not for that alone; it was for her benefit, and using the synonyms of the word it was for her advantage, her profit, her gain, her account, her interest. The word "benefit" and its synonyms mean more than simply support; they

mean any purpose to which the absolute owner of property can devote it; and, given for that purpose, they mean that Mrs. Stowell had unlimited power to dispose of it at her pleasure. If we held that Mrs. Stowell had no right to dispose of the estate, save only for her support, we think it would be a clear violation of the intention of her husband, and a substitution of the will of the court for that of the testator. A will should be construed as a whole, and effect given to each and every part of it if possible; but it must be conceded that the two intents of the testator, as expressed in repugnant provisions, cannot both be carried out. There is a gift to the first taker and another in remainder. The clauses should be construed together, and effect given to both if consistent with the rules of law. Where it is clear, considering the language used, that the testator intended a life estate in the first taker, or a use of the bequest for support only, or any other limited purpose, there is no difficulty in carrying out the full intent of the testator by giv-

ing force, after the first estate is ended, to the clause creating the estate in remainder; but where it is clear, judging from both clauses, that by the gift in remainder the testator did not intend to limit the use of the property in the hands of the first taker in any respect, and, in the bequest to the first taker, gives an absolute estate, using words which admit of no other construction, the rule as to repugnancy must apply. We do not think that Mr. Stowell intended by the gift in remainder to limit the use which his wife might make of the residue. We think he intended she should take his own place in respect to it, and use it in an unlimited manner; and his intent in that respect should be carried out. We see no difference in the meaning of the words if transposed so as to read "to use and dispose as she may think proper for her benefit and support."

This holding renders it unnecessary to pass upon any other question.

Judgment affirmed. Cause ordered certified to the Probate Court.

MAINE.
SUPREME JUDICIAL COURT.

Charles E. WHITE
v.

Weston THOMPSON, Admr.

1. A note, given by one in his capacity as administrator to take up a note given by the intestate in his lifetime, binds the administrator personally and not the estate.
2. An indorser upon such a note who is compelled to pay it, becomes the creditor of the administrator and not of the estate, though he was also an indorser on the original note.
3. A statute giving creditor of an estate a remedy in equity, in certain instances, when he had failed to seasonably present and prosecute his claim, affords no remedy to such an indorser.

(Penobscot—Decided March 1, 1887.)

ON report of an equity suit. *Bill dismissed.*
The facts are stated in the opinion.

Mr. A. N. Williams, for plaintiff:

It seems that a promise of an administrator to pay or to become responsible for the debt of his decedent, to render him personally liable thereon, must not only be in writing, but must also be founded on a sufficient consideration.

Schouler, Exrs. & Adms. 255; Wms. Exrs. 1776; *Davis v. French*, 20 Me. 21; *Walker v. Paterson*, 36 Me. 278.

But in this case the administrator did not undertake to become responsible individually to plaintiff for his claim for reimbursement from the estate; and, if he had, he would not be held, it being a bare promise without consideration.

Ten Eyck v. Vanderpoel, 8 Johns. 120; *Davis v. French*, *supra*.

That being so, all the other notes given in renewal to the First National Bank were in the same category, as between plaintiff and H. P. Thompson.

Nutter v. Stover, 48 Me. 168.

But assuming that there was a sufficient consideration for H. P. Thompson's signing the notes in renewal, and that he was holden thereon to plaintiff, that would not extinguish plaintiff's claim against the estate.

Schouler, Exrs. & Adms. 441; *Davis v. French*, 20 Me. 21.

Mr. Weston Thompson, for defendant:

The probate decree was only that the estate was "apparently" insolvent. The fact depended on the extent of the liabilities thereafter to be ascertained, by virtue of the same decree.

Hunt v. Whitney, 4 Mass. 620.

This defendant is not bound by the first administrator's contract, for there is no privity between them.

Taylor v. Sewall, 69 Me. 148; *Alsop v. Mather*, 8 Conn. 584.

The Statute of Limitations, § 12 of the same chapter, was not made for the mere benefit of the administrator. It was made to serve and protect all the beneficiaries of the estate. Hence, the administrator could not waive the Statute of Limitations.

ME.

Littlefield v. Eaton, 74 Me. 516; *Davies v. Shed*, 15 Mass. 6; *Fowler v. True*, 76 Me. 48.

If a judgment rendered on the claim during the period of limitation would not extend its lifetime, much less would a note have that effect.

McLellan v. Lunt, 14 Me. 254; *Thurston v. Louder*, 47 Me. 72.

The claim of the plaintiff is barred.

Heard v. Meader, 1 Me. 156; *Whittier v. Woodward*, 71 Me. 161.

The debt which Chas. W. Thompson left behind him has been paid; and the plaintiff's claim for reimbursement of what he paid Dennett is against H. P. Thompson, and not against this defendant in any capacity.

Davis v. French, 20 Me. 21; *Baker v. Moor*, 68 Me. 448; *McEldery v. McKenzie*, 2 Port. (Ala.) 83; *S. C.* 27 Am. Dec. 648; *Harding v. Evans*, 3 Port. 221; *S. C.* 29 Am. Dec. 255; *Fitzhugh's Est. v. Fitzhugh*, 11 Gratt. (Va.) 300; *S. C.* 62 Am. Dec. 658; *Luscomb v. Ballard*, 5 Gray, 408; *Kingman v. Soule*, 182 Mass. 288; *Merchant's Bank v. Week's Estate*, 58 Vt. 118; *May v. May*, 7 Fla. 207; *S. C.* 68 Am. Dec. 481; *Shepherd v. Young*, 8 Gray, 152; 50 Ala. 585; *Lucht v. Behrens*, 28 Ohio St. 231; *S. C.* 22 Am. Rep. 378; *Sumner v. Williams*, 8 Mass. 199, 200; *Farhall v. Farhall*, L. R. 7 Ch. App. Cas. 123; *Dowse v. Coxe*, 3 Bing. 20.

Peters, Ch. J., delivered the opinion of the court:

The complainant seeks to obtain, under Rev. Stat. chap. 87, § 19, an allowance and payment of his claim against the estate of Charles W. Thompson, deceased.

Shortly before Thompson's death the petitioner indorsed a note for him, upon which Thompson obtained money at a bank, Thompson, the maker, dying before the note matured. After his death, his administrator, H. W. Thompson, renewed the note to the bank, signing it as maker in his capacity as administrator, and the petitioner renewed his indorsement, the new note being given for the old one. This note was in turn renewed once or twice in the same way, when the bank refused to continue the renewals longer. A new note was then made of the same tenor as before, upon which the money was procured elsewhere, the bank receiving payment of its note from the proceeds.

This last note became due on March 7, 1884, and, the administrator failing to pay it, the complainant paid it in October, afterwards. The first note in the series was made on April 5, 1880. In June, 1884, the administrator resigned, and the present administrator *de bonis non* was appointed in his place. In December, 1884, the estate was represented insolvent, and commissioners were appointed before whom the complainant submitted his claim. But the claim was rejected as barred by the special limitation Act of 2 years and 6 months. Not having any legal remedy, the complainant asks equity to lend her helping hand. We think equity cannot afford the necessary relief.

The design of the statute was not to create the relation of creditor and debtor where not already existing, but to assist, in certain emergencies, those who are already creditors, but who have failed to seasonably present or prose-

cute their claims, without culpable negligence on their part.

Here the petitioner is not to be considered a creditor of the estate. He may be a creditor of its former administrator whose note he indorsed. A note given by an administrator, although worded as the promise of the estate, binds the administrator only. The original note given by the intestate was long since paid. The note paid by the petitioner cannot be regarded other than a different and independent transaction.

What claim the former administrator may have against the estate, and whether now available or not, we cannot consider. *Kingman v. Soule*, 132 Mass. 285.

Bill dismissed, with costs.

Danforth, Virgin, Libbey, Foster, and Haskell, JJ., concurred.

James P. WENTWORTH

v.

Edward H. WOODSIDE.

An action may be maintained to recover a sum agreed to be paid by the defendant in an exchange of horses made on the Lord's Day, the defendant not returning nor offering to return the horse which he received from the plaintiff.

(Cumberland—Decided February 24, 1887.)

ON exceptions by the defendant. *Overruled.*

Mr. Weston Thompson, for defendant: The exchange of animals was proposed, assented to, and effected on the "Lord's Day," in violation of Rev. Stat. chap. 124, §§ 20, 22; and because the plaintiff was a party to that violation, and does not come into court with clean hands, he cannot recover in this action. There was no legal contract on which to maintain assumpsit. The declaration is false, and the plea is true.

26 Me. 464; 50 Me. 83; 63 Me. 576; 71 Me. 238; 15 Gray, 433.

Against these reasons and authorities, the plaintiff hopes to prevail by Rev. Stat. 1880, chap. 82, § 116.

The loss falls on that party who is unable to maintain himself in court without showing his own fault.

Broom, Leg. Max. 574-579.

The prohibition which this late Act relaxes, is part of the iron creed of the Puritan, and as old as the Laws of Athelstan; and is also founded on the secular considerations which Blackstone says the law much regards.

4 Bl. Com. 63.

If ever a statute should have a narrow construction and a restricted application, it is one which puts the law at the service of a plaintiff who claims to recover damages on the proof and strength of his own crime. The question is, What did the Legislature mean? The distinction which we make between sale and barter is not suggested in the language of the Act; but words are not the only evidence of its intent, and are not necessarily the controlling evidence of it. Where the effect would be needless mischief, it is more reasonable and more

respectful, and more in accord with public policy, to say the Legislature was unskillful in the choice of words, than that it meant to make the law a thief. Such an imputation should not be put upon those who forbore to repeal the laws against arson, robbery, larceny, embezzlement, and malicious mischief.

Landers v. Smith, 78 Me. 212, 1 New Eng. Rep. 896; *Holmes v. Paris*, 75 Me. 561; *Somerset v. Dighton*, 12 Mass. 384; *Gibson v. Jenney*, 15 Mass. 205; *Commonwealth v. Loring*, 8 Pick. 370; *Commonwealth v. Kimball*, 24 Pick. 370; *Brown v. Pendergast*, 7 Allen, 429; *Winslow v. Kimball*, 25 Me. 493; *People v. Utica Ins. Co.* 15 Johns. 858; *Blakeney v. Blakeney*, 6 Porter, 109; *People v. Lambier*, 5 Den. 9; *Rogers v. Brent*, 5 Gilm. 573.

In such cases, the tender is excused, when the party to whom it was due has voluntarily parted with power to do what would be his duty if the tender were made.

2 Allen, 440; 6 Allen, 273; 112 Mass. 509; 9 Cush. 215; 17 N. H. 578; 30 B. Mon. 517; 17 Me. 296.

Mr. F. V. Chase, for plaintiff:

The defendant's counsel asks in this connection: "What did the Legislature mean?" In the late case of *Berry v. Clary*, 77 Me. 483, the court says: "What was the object to be accomplished by this statute? Undoubtedly to make a party defendant, to a Sunday contract, do equity."

This statute relates to the practice of courts, and in positive terms prohibits anyone from defending certain suits on a given ground, without first complying with certain conditions. It is imperative; and can no more be waived by the plaintiff than could the question of want of jurisdiction in a given case be waived by the parties, so as to give the court jurisdiction in a case where it has no jurisdiction, by consenting.

State v. Bonney, 34 Me. 223.

Peters, Ch. J., delivered the opinion of the court:

The plaintiff and defendant exchanged horses on the Lord's Day, the defendant agreeing to pay \$50 for the difference in value between the animals. The action is to recover the \$50, the defendant not returning nor offering to return the horse which he received from the plaintiff. The action may be sustained. The statute seems to be completely applicable, which declares that "no person who receives a valuable consideration for a contract, express or implied, made on the Lord's Day, shall defend any action upon such contract on the ground that it was so made, until he restores such consideration."

The whole consideration received by the defendant is still in his hands. He cannot retain it and avoid his contract. It is urged that he cannot safely make restoration,—that by doing so he might lose the horse which the plaintiff received from him. But the statute is exacting, unconditional. It matters not that the defendant cannot restore, or profitably or safely restore. If he does not in fact restore, he cannot defend. There may be many cases where a defendant cannot restore the consideration received. It may have passed into other hands; or gone into other form; or been consumed or lost. And cases may often arise, as in this case,

where a defendant is unwilling to take the risk to restore. But for all such cases was the statutory requirement intended. The statute is broad and remedial, and should be liberally construed to prevent fraud or injustice.

The argument of counsel would seem to imply that the law was enacted to protect a defendant. It is for the public protection, treating parties fairly, alike. It must be borne in mind, looking at the just and equitable view of the transaction, that the worst which can befall a defendant who fails to make the restoration required of him will be to perform his contract, which, though made on Sunday, is presumed to have been as carefully made as if on any other day.

Exceptions overruled.

Walton, Virgin, Libbey, Emery, and Haskell, JJ., concurred.

Miller MATHERSON *et al.*

v.

John W. WILKINSON.

1. One of the surviving partners of a firm, to whom an account was assigned during the lifetime of all the partners, may maintain an action thereon for his own benefit in the name of the surviving partners.
2. The provisions of a statute relating to the settlement of the estate of deceased partners do not apply to such an account.

(Cumberland—Decided February 24, 1887.)

ON exceptions by the plaintiff to the rulings of the court sustaining the defendant's demurrer. *Sustained.*

Mr. David W. Snow, for plaintiff:

An account annexed is part of the declaration.

Bennett v. Davis, 62 Me. 544.

The demurrer admits the assignment, and the presumption is that it was a valid assignment. If the defendant would have questioned its validity or sufficiency, he should have done so by plea or brief statement.

Wood v. Deoster, 66 Me. 545; *Lawrence v. Chase*, 54 Me. 196.

The assignee of a chose in action is entitled to sue and recover in the name of the assignor.

Lunt v. Stevens, 24 Me. 584; *Pollard v. Somerset M. F. Ins. Co.* 42 Me. 227; *Simpson v. Bibber*, 50 Me. 199.

And this is also true when the assignee is a member of a partnership and brings his action in the name of all the copartners.

Lunt v. Stevens, 24 Me. 584.

Appleton, J., in *Cook v. Lewis*, 86 Me. 844, says: "The object and intent of the statute was that ample security should be given for the protection of all interested, as preliminary to granting administration on the partnership estate, whether its affairs were to be closed up by one of its surviving members or by the administrator on the estate of the deceased partner."

A plea in abatement requires certainty "to a certain intent in every particular."

3 Gould, Pl. 57, 58; *Burnham v. Howard*, 31 Me.

Me. 569; *Adams v. Hodson*, 88 Me. 225; *Tweed v. Libbey*, 87 Me. 49.

The granting, or refusing to grant, amendments in matters legally amendable is within the discretion of the court of common pleas, and does not furnish ground for exceptions.

Wyman v. Dorr, 3 Me. 183; *Clapp v. Balch*, 3 Me. 216; *Gooch v. Bryant*, 13 Me. 386.

Mr. C. W. Goddard, for defendant:

The statute requires: (1) that the executor or administrator of the deceased partner shall retain and administer the property of the partnership equal to the share of said partner (Rev. Stat. chap. 69, § 1); or (2) that the surviving partner shall give bond to the probate judge (§ 2); and (3) that if the survivor does not give the bond, it shall be given by the executor or administrator, who shall take possession of the property (§ 3).

The imperative provisions of chap. 69, §§ 1-4, were incorporated into our law more than half a century ago by 1835, chap. 191, but they first received a judicial construction in 1858. In *Cook v. Lewis*, 86 Me. 843, their importance and value are clearly set forth by Shepley, *Ch. J.*

In *Putnam v. Parker*, 55 Me. 286, it was decided that "the actual possession of the property of the partnership falls to the administrator, unless the surviving partner gives the requisite bond. * * * The goods and effects in possession are held by the surviving partner and the representatives of the deceased, as tenants in common. * * * No valid attachment of such property could be made in a suit against the survivor, as upon a demand due from the late firm." The law has provided a different and specific mode of disposing of them in such cases, viz.: through the agency of an administrator or the survivor of the firm, acting under the securities of a bond and subject to the supervision of the court of probate.

See also *Bass v. Emery*, 74 Me. 839.

It is true that the objection that the declaration does not allege that plaintiffs have given the bond cannot be raised by demurrer (*Platt v. Jones*, 59 Me. 243), for the objection must be taken, as it has been taken in this case, by plea in abatement.

Strang v. Hirst, 61 Me. 17; *Pope v. Jackson*, 65 Me. 165.

If in New York, or anywhere else, the law allows greater laxity in such proceedings as have been attempted by these plaintiffs, than is allowed by our statutes, they should have proved to the court what those laws were; otherwise they cannot avail them.

Hagood v. Needham, 59 Me. 444.

No such proof was offered. "It is a well-settled principle that the laws of other States can be recognized by our courts only when proved as matter of fact. In the absence of such proof the law will be assumed to be the same as our own."

McKenzie v. Wardwell, 61 Me. 139.

Peters, Ch. J., delivered the opinion of the court:

The amended pleadings admit these facts: The two plaintiffs, nonresidents of this State, surviving partners of a third person, sue the defendant, also a nonresident, on an account annexed to the writ. The suit is prosecuted for the benefit of one of the plaintiffs, who owns

the claim in suit by an assignment from the partnership during the lifetime of all the partners.

It is objected that the suit is forbidden by our statutes applicable to the settlement of partnership estates after the death of one of the partners.

It may be, as responded to this objection by the plaintiff, that such statutes do not apply to the concerns of a partnership existing and carried on out of the State. We pass that point, as not necessary to the decision of the present case.

The other point relied on by the plaintiff in justification of the suit, we think, must prevail; that is, that the action may be maintained because the account does not belong to the firm, but to an assignee. There is no reason, as between a partnership and its debtors, why the partners may not assign their claim to one of themselves. It is a common thing for one partner to purchase of his associates. The partners could sell an account as well as any other assets. This account could have been sued in the name of the assignee, by observing the requirement imposed on assignees in such cases. Rev. Stat. chap. 69, § 1, makes a provision for the settlement of "the property of the partnership." This debt is not now the property of the partnership, though sued in its name. The partners do not own the claim after selling and assigning it.

The defendant objects that the writ does not disclose that the suit is for the benefit of an assignee. We think it does, but it need not. The fact was pleaded when it became necessary, and the defendant was at liberty to admit or deny it. His demurrer admits it.

Exceptions sustained.

Walton, Virgin, Libbey, Emery, and Haskell, JJ., concurred.

John L. THOMPSON

v.

Frank SMITH.

1. Under a statute giving trial justices by complaint original and concurrent jurisdiction with the supreme judicial court, the magistrate would have no authority to bind the respondent over to court.
2. Such proceedings, when the magistrate thus bound the respondent over, do not constitute a bar to an action of debt to recover penalties under a statute providing that such penalties might be recovered by indictment or action of debt.
3. When the writ alleges the illegal possession of a certain number of lobsters, the verdict may be for the penalties for any number less than the whole number alleged.
4. Where the statute prohibits the catching of young lobsters under 9 inches long,* the complainant is not bound to prove that the lobsters were

actually young, the word "young" being used in the statute in a presumptive sense.

5. If the measurement of the lobster at the time of the catching is 9 inches or more in length, the statute is not violated.

(Lincoln—Decided February 24, 1897.)

ON motion and exceptions by defendant. *Overruled.*

Messrs. William H. Hilton and Joel P. Huston, for defendant:

In *Burnham v. Webster*, 5 Mass. 268, the court says: Where the plaintiff declared in one count for several penalties, that is, "for each and every of said offenses the sum of \$15, amounting in all to \$60," had the jury returned a verdict for more than one penalty, viz., \$15, it would have been irregular. Upon like principle the jury in this case, had they found young lobsters unlawfully in the defendant's possession, less than 9 inches in length, should not have returned a verdict for more than \$1.

If the magistrate erred, it is no fault of the defendant, nor should he be made to suffer for it. Even should the proceedings before the magistrate prove no bar to another criminal prosecution, it should bar this action of debt. This is a civil action and inconsistent with the criminal process instituted before the magistrate.

Canfield v. Mitchell, 43 Conn. 169.

The plaintiff, having elected to recover these penalties by complaint and warrant, in the name of the State, irrevocably waived the remedy by action of debt.

York v. Goodwin, 67 Me. 280; *Wile v. Brownstein*, 85 Hun (N. Y.), 68.

In *Allen v. Young*, 76 Me. 80, the court says: "It has been repeatedly asserted, in both ancient and modern cases, that judges may in some cases decide upon a statute in direct contravention of its terms,—that they may depart from the letter in order to reach the spirit and intent of the Act;" and cites with approval *Holmes v. Paris*, 75 Me. 559, and cases there cited.

There is no evidence in the case that the lobsters were young. Every essential part of the description must be proved. Allegations of matter of substance must be substantially proved, but allegation of description must be literally proved.

Ackley v. Dennison, 23 Me. 168.

Mr. True P. Pierce, for plaintiff:

The statute provides concurrent remedies for violation of chap. 40, § 21, as amended. We prosecute under that section. One remedy is by criminal proceeding, to be enforced by indictment or complaint; the other is civil, to be enforced by action of debt. Chap. 40, § 22; Pub. L. 1886, chap. 258.

The remedy by complaint, first sought, failed through a misconception of the law by the trial justice, and his whole action is void *ab initio*. The offense not having been punished, proceedings may be entered upon *de novo*, by complaint, by indictment, or by action of debt. No election of remedies was made which could conclude the prosecution.

Bizby v. Whitney, 5 Me. 192; *Stevens v. Fas-*

*See *State v. Trefethen* (Me.), 8 New Eng. Rep. 842; *Commonwealth v. Barber* (Mass.), Id. 901.

sett, 27 Me. 282; *York v. Goodwin*, 87 Me. 260; 1 Bish. Cr. L. §§ 1013, 1014, 1021.

The true doctrine in this class of cases is developed in *Stevens v. Fassett*, 27 Me. 282; *Commonwealth v. Loud*, 3 Met. 328.

Peters, Ch. J., delivered the opinion of the court:

This action is instituted to recover penalties incurred for infractions of the lobster law. Several questions are presented under the exceptions and motion.

A question arose, preliminarily, whether this action is barred by a previous criminal prosecution. It appears that, before this action was commenced, the defendant was arraigned, for the same offense before a trial justice, who bound him over to a higher court, although the trial justice had plenary jurisdiction to try the complaint himself. Those proceedings were a nullity, and cannot operate to discharge this action brought for the same offense. They were an attempted but not a real prosecution. The defendant has not been, in the constitutional sense, twice tried for the same offense. *Coleman v. Tennessee*, 97 U. S. 520 (bk. 24, L. ed. 1118); *Stevens v. Fassett*, 27 Me. 282. In *Commonwealth v. Hamilton*, 129 Mass. 479, a magistrate made precisely the same mistake that was made here, and with the same result.

The defendant contends that it was not competent for the jury to find a verdict for a less number of lobsters than the whole number declared for. We think a verdict may be for any number, from one to the whole number in the declaration, indictment, or complaint, and that the fine is to be proportionate to the finding.

The defendant takes the position that there should be no recovery for taking a lobster under 9 inches long, unless it be a "young" lobster, contending that there are old "dwarf" lobsters less than that length, which can be legally taken. We think the word "young" in the statute is used in a presumptive or assumptive sense merely; that the Legislature meant to declare that any lobsters under 9 inches long should be regarded as young lobsters. The inhibition is against taking any under the prescribed length.

It is contended that it was not illegal to have in one's possession a dead lobster measuring less than 9 inches in length, if the same lobster was 9 inches or more long when taken alive. We concur in that position. The object of the law is to prevent the taking of small lobsters out of the sea. It requires a restoration into the sea when innocently taken out. In order to carry the primary design more effectually into execution, it is declared to be an offense to have in possession any lobster under the legal length, without indicating whether the lobster may be dead or alive. It must mean this: That it is illegal for any person to have in his possession a live lobster less than 9 inches long, or a dead lobster (no matter what the length) which was less than 9 inches long when alive,—that is when taken from the sea. No person can have a lobster in his possession which when alive was less than 9 inches long. But if a person has in his possession a boiled lobster less than 9 inches long, and the same lobster was 9 inches long or more when alive, in such

case no offense is committed by the possession.

It would be a strange result if a person could legally take a lobster alive and legally keep him as long as alive, and be guilty of an offense for possessing the same lobster after it is dead; if a legal catch can thus become illegal.

Evidence of the length of boiled lobsters is no doubt admissible as indicating the length of the same lobsters before they were boiled. And the distinction above made becomes immaterial, of course, if boiling a lobster does not in any case diminish its length,—does not reduce him from the legal to the illegal length.

Most of the testimony at the trial of this cause tended to show that there was no appreciable difference between lobsters when alive and when boiled. The jury, however, made some deduction, evidently for a supposed difference. Some of the witnesses maintained that, instead of shrinking by boiling, the length of the lobster is increased.

Exceptions and motion overruled.

Walton, Virgin, Libbey, Emery, and Haskell, JJ., concurred.

Benjamin LINCOLN

v.

Daniel GALLAGHER.

1. When a vessel is sold to be delivered at a certain port the seller should deliver at any reasonable and suitable place,—at wharf or dock indicated by the purchaser.
2. If the purchaser refuse to provide such place, delivery may be tendered at safe and usual anchorage in the harbor.
3. The seller is obliged to afford the purchaser an opportunity to examine the vessel before acceptance; but he is not obliged, at his own expense, to place her in a dry dock for that purpose.

(Washington—Decided February 23, 1887.)

On exceptions by the defendant. *Overruled.*

This was an action of assumpsit for damages on a breach of contract for the purchase and sale of thirty-five sixty-fourths of the schooner Annie Gus of Dennysville, Maine.

The defense was that the schooner was not delivered by plaintiff to defendant in a reasonable time, and that the defendant had no opportunity to examine the vessel in order to see that she was in good order, as stipulated in the contract.

The verdict was for the plaintiff.

Mr. John F. Lynch, for defendant:

The plaintiff was bound to give the defendant an opportunity to examine the vessel so that the defendant could satisfy himself whether she was in good order and condition in accordance with the terms of sale. No valid delivery could be made until such opportunity was given.

See Benj. Sales, p. 650, §695.

There can be no acceptance and actual receipt of goods, within the statute, unless the

vendee has had an opportunity of judging whether the goods sent correspond with the order.

Hunt v. Hecht, 8 Wels. H. & G. 814.

Mr. Thomas L. Talbot, for plaintiff:

A bill of exceptions will be overruled, unless it contains a sufficient statement of the case to show the ruling complained of was erroneous and prejudicial to the excepting party.

Allen v. Lawrence, 64 Me. 175; *Holbrook v. Knight*, 87 Me. 244.

The court considers only the testimony in the bill of exceptions.

Webster v. Folsom, 58 Me. 230; *Maxwell v. Mitchell*, 61 Me. 106; *Holbrook v. Knight*, *supra*.

It must affirmatively appear that the excepting party is prejudiced by the rulings complained of.

Copeland v. Copeland, 28 Me. 525; *Beeman v. Lawton*, 87 Me. 543; *Russell v. Turner*, 59 Me. 256; *Bean v. Dolliff*, 87 Me. 228; *Merrill v. Merrill*, *Id.* 70.

Vendor must give vendee an opportunity to examine goods to satisfy himself they are in accordance with the contract (*Benj. Sales*, 2d Am. ed. § 695; *Ishervood v. Whitmore*, 11 Mees. & W. 347); but the vendor is not obliged to make or pay the expenses of such examination.

A good tender may be made without telling the money. *Co. Litt.* 208 a.

Peters, Ch. J., delivered the opinion of the court:

It was said in *Howard v. Miner*, 20 Me. 380, that on a contract for the delivery of specific articles which are ponderous or cumbersome, when it is not designated in the contract, and there is nothing in the condition and situation of the parties to determine the place of delivery, it is the privilege of the creditor to name a reasonable and suitable one; that the debtor should request the creditor to select the place; and, if the creditor fails to do so, the debtor may appoint the place.

In the case at bar a vessel was purchased on the eastern coast somewhere, to be delivered to the buyer in Portland. Had the defendant provided a suitable place at some dock or wharf, which could have been reached by the use of reasonable exertion, the delivery should have been made there. The purchaser, after notice, failing to provide a place, we think the seller would be justified in tendering a delivery at safe anchorage in the harbor. He should not be required to go to special expenses to himself to obtain a place at the wharf or upon the shore.

By the bill of exceptions, examined with the judge's charge, we find that a controversy arose between the parties, over the requirement of the purchaser, that the seller should go to the expense himself of placing the vessel in a dry dock in order that the purchaser could there examine her. There was some reason to expect that the vessel had been ashore on her voyage to Portland, and the purchaser desired an inspection to see whether she had escaped injury or not.

There can be no doubt that, in offering delivery, the seller was under obligation to afford an opportunity to the purchaser to make the examination. But any expenses to be incurred

thereby, beyond what would be necessary in putting the vessel in a proper place for delivery, would fall upon the buyer, and not upon him. The seller was under no obligation to incur any unusual expense. He could not be called upon to place the vessel in a dry dock. He tenders the property as sound, according to the agreement under which he acted. The buyer must accept or reject it at his risk. *Benj. Sales*, § 695; *Croninger v. Crocker*, 62 N. Y. 151.

Exceptions overruled.

Walton, Danforth, Emery, Foster, and Haskell, JJ., concurred.

Herbert F. SHAW

v.

Jacob S. GRAVES et ux.

1. Where two persons give bond to other persons for the support of a third person, there is no implied authority in such third party to obtain assistance from others, at the expense of the obligors, if they fail to perform their bond.
2. If a physician is called with the knowledge of one of the obligors, and is forbidden by the other, on his arrival, to perform any services at the expense of the obligors, and still renders his services and makes his charges therefor to the third party, he cannot maintain an action against the obligors for the services thus rendered.

(Kennebec—Decided February 24, 1887.)

ON motion of the defendants to set aside the verdict. *Sustained.*

Assumpsit by a physician to recover for professional services rendered to one Sarah J. Coffen. The verdict was for the plaintiff in the sum of \$10.42.

The opinion states the material facts.

Messrs. Bean & Beane, for defendants:

That no action of assumpsit upon an account annexed can be sustained excepting upon a promise, either express or implied, is abundantly settled in the following and many other cases:

Wyman v. Hook, 2 Me. 387; *Porter v. Hooper*, 11 Me. 170; *Howe v. Russell*, 41 Me. 446; *Jewett v. Somerset*, 1 Me. 125; *Wyman v. Banton*, 66 Me. 171; *Moody v. Moody*, 14 Me. 807; *Winchester v. Howard*, 97 Mass. 305; *Earle v. Coburn*, 180 Mass. 596; *Whiting v. Sullivan*, 7 Mass. 107; *Boston Ice Co. v. Potter*, 123 Mass. 28; *Hills v. Snell*, 104 Mass. 173; *Mass. Gen. Hospital v. Fairbanks*, 129 Mass. 78; *Mellen v. Whipple*, 1 Gray, 317; *Hennessey v. Deland*, 110 Mass. 145; *Dow v. Clark*, 7 Gray, 198.

Mr. H. M. Heath, also for defendants:

The law will not imply a contract where an express contract is proven (*Simpson v. Bowden*, 83 Me. 549); nor against the protestation of the party attempted to be charged with it (*Jewett v. Somerset*, 1 Me. 125).

A joint promise must be shown to maintain assumpsit against two defendants; proof that goods were delivered on credit of one as origi-

nal promisor negatives inference of joint purchase.

Fuller v. Miller, 57 Me. 168.

An express contract while in force cannot be abandoned, and a recovery had on an implied one.

Holden Steam Mill Co. v. Westervelt, 67 Me. 446.

There being no evidence tending to establish a contract on the part of the defendants, express or implied, it was the duty of the court to instruct the jury to find for the defendants.

Cooper v. Waldron, 50 Me. 80.

If admitted, and the plaintiff having testified that he rendered the services on the credit of the old lady, a verdict should have been ordered upon the ground that the law will never imply a promise where an express promise is proven.

See *Whiting v. Sullivan*, 7 Mass. 107; *Earle v. Coburn*, 180 Mass. 596; *Boston Ice Co. v. Potter*, 123 Mass. 28; *Hills v. Snell*, 104 Mass. 178; *Mass. Gen. Hospital v. Fairbanks*, 129 Mass. 78; *Walker v. Moore*, 125 Mass. 352.

Mr. J. H. Potter, for plaintiff:

The jury by special verdicts decided that the patient stood in need of the medical treatment, and that the treatment rendered was suitable and proper. And this court will not disturb these verdicts.

Enfield v. Brunwell, 62 Me. 128; *Hunter v. Heath*, 67 Me. 507; *Staples v. Wellington*, 58 Me. 453.

Peters, Ch. J., delivered the opinion of the court:

The merits of this very elaborate case lie within quite narrow limits.

A physician was called to visit a Mrs. Cofren who lived with the defendants. She had the bond of her sons that they would support her, and the sons had the obligation of the defendants to render the support. In rendering this support they might have to make contracts with physicians or other persons, but the person to be supported could not make contracts in their name without their consent. The plaintiff, a physician, performed medical services for Mrs. Cofren, and made the charges to her therefor.

An action for those services cannot be maintained against the defendants on an implied promise. Such an implication does not arise from the situation of the parties.

Moody v. Moody, 14 Me. 307.

No express promise was made by either of the defendants (husband and wife), nor can any promise be fairly inferred from circumstances. The most that can be pretended, to fix any liability on the wife, is that she knew that the plaintiff had been sent for, not directly by her, but without any objection on her part. But the case shows that, when the plaintiff first came to the house, he was met by the husband, who forbade him rendering any services on their account.

The utmost claim that could have been in any view possibly recoverable would be for so much of the first visit of the plaintiff as consisted in going to the house, before he was met by the husband in a hostile attitude almost at the door. But this the plaintiff cannot recover, if for no other reason, because at that interview he elected not to divide the charge rendering

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the services on the credit of Mrs. Cofren, against whom he charged all subsequent visits, and against whom and whose estate he has since endeavored, until this suit was brought for the same services, to make a collection of his bill. The verdict is unsupported by the evidence.

Motion sustained.

Danforth, Virgin, Libbey, Foster, and Haskell, JJ., concurred.

William H. LIBBEY

v.

Daniel C. ROBINSON.

The creditor of a partnership cannot maintain an action for money had and received against one partner, on the ground that the partnership matters have been settled between the members, and in such settlement such partner represented to the other member of the firm that he had settled and paid the claim of such creditor, and was allowed for the same in settlement. Nor would it make any difference if the creditor's claim against the firm had become barred by the Statute of Limitations.

(Kennebec—Decided February 24, 1887.)

ON exceptions by the defendant. *Sustained.* The opinion states the question presented by the bill of exceptions.

Mr. D. C. Robinson, for defendant:

A partner who undertakes on dissolution to pay the debts of the copartnership cannot be sued alone.

*Pars. Partn. *398.*

The fact that in settlement between the partners the defendant was allowed plaintiff's bill, as having already been paid, squarely negatives the assumption that he promised to pay it in the future.

The cases when a stranger, such as the plaintiff, can obtain an action for his own benefit for matters arising *inter alios*, are very few and limited.

Mellen v. Whipple, 1 Gray, 320.

Mr. H. M. Heath, for plaintiff:

If one of the partners is constituted agent for the firm, and power is delegated to him to wind up the partnership business, such power ceases when the business of the firm is closed up.

Story, Partn. pp. 512-570.

After the final settlement, the partnership was absolutely concluded, except that it remained liable for the mistakes and wrongs committed by their agent in settling up the company business; and in case of such mistake or wrong an action would lie against the agent when the agent was a partner of the firm whose business he was settling up, or against the firm, at the election of the injured party.

Averill v. Lyman, 18 Pick. 346.

Every person is a trustee who receives money to be paid to another or to be applied to a particular purpose to which he does not apply it.

Finney v. Cochran, 1 Watts & S. 112.

It makes no difference that the defendant

received this sum of money as money already paid to plaintiff, when in fact it was not paid, or that he did not receive it as money to be paid to plaintiff; neither was it necessary for defendant to promise the firm to pay over such money to plaintiff; the law will presume that he promised to pay over such sum of money to the party to whom it actually belongs.

Wiseman v. Lyman, 7 Mass. 286; *Calais v. Whidden*, 64 Me. 249; *Mason v. Waite*, 17 Mass. 558; 4 Wait, Act. & Def. p. 469.

If, then, at the commencement of this action, the defendant had in his possession money which *ex æquo et bono* he ought not to have retained from the plaintiff, plaintiff is entitled to recover. This must depend upon the facts appearing in the evidence produced at the trial and referred to by the presiding justice in his decision.

Hall v. Marston, 17 Mass. 575, and cases cited; *Williams v. Everett*, 14 East, 582; 4 Wait, Act. & Def. 469; Chitty, Cont. 673, with note f; 2 Greenl. Ev. § 117.

When the fact is proved that the defendant has the money of the plaintiff, if he cannot show that he has a legal and equitable ground for retaining it, the law creates the privity and the promise, although the party so holding or receiving such money has never seen or heard of the party to whom it belongs.

Mason v. Waite, 17 Mass. 560; *Williams v. Everett*, 14 East, 582; *Hall v. Marston*, 17 Mass. 574; *Lewis v. Sawyer*, 44 Me. 332; *Keene v. Sage*, 75 Me. 138; *Calais v. Whidden*, 64 Me. 249; *Shepherd v. McEvers*, 8 Am. Dec. 561; *Cumberland v. Codrington*, 8 Johns. Ch. 261.

Peters, Ch. J., delivered the opinion of the court:

The defendant and another, law partners, were indebted to the plaintiff, a deputy sheriff, for official services performed by him for their firm. The bill became barred by the Statute of Limitations. The bar is attempted to be avoided by the plaintiff upon the following finding of facts: At some time during six years prior to the date of the writ in this case, the defendant and his partner had a settlement of their partnership accounts, when the defendant represented to his partner that he had paid the plaintiff's bill, and they made a settlement on the basis of such payment. The ruling of the judge was that that act was equivalent to placing in the defendant's hands at that time an amount of money for the plaintiff, which he can recover in this action of money had and received. We are unable to concur in the ruling.

It would be pushing the principle of implied promise too far to give it such application. The cases cited fall short of supporting the conclusion contended for. They are instances where money was paid by one person to another, to be paid over to a third party. In the present case there was no assertion by the defendant that he would in the future pay the plaintiff, nor was any money placed in his hands for such purpose. He did not assume a new debt; he asserted that he had paid an old one, when he had not. He merely paid less to or received more from his partner by reason of the misrepresentation, and he is still liable to his partner on account of it. He cannot be

liable to pay the reserved sum to his partner and to the plaintiff also. Nor would the firm be released from the plaintiff's claim, were the limitation question eliminated from the facts.

The case against the defendant cannot be stronger than it would have been had he given to his partner a bond of indemnity against the plaintiff's claim; and that would establish no new liability to the plaintiff. We think that the settlement created no new contract or privity of contract between the parties.

Exceptions sustained.

Danforth, Virgin, Foster, and Haskell, JJ., concurred; **Libby, J.**, did not sit.

John Winslow JONES

v.

FIRST NATIONAL BANK of Portland
et al.

1. Prior to 1885 the statute required a merchant or trader to keep "a cash book and other proper books of account," after the enactment of the insolvent law, in order to entitle him to a discharge.
2. The presumption is conclusive that the intent is to defraud, when the insolvent swears falsely in a material matter before the court of insolvency.

(Cumberland—Decided March 1, 1887.)

ON motion of the plaintiff to set aside the verdict of the jury. *Overruled.*

The case is stated in the opinion.

Mr. Harvey D. Hadlock, for plaintiff:

Keeping proper books of account, within the meaning of the bankrupt law, consists in keeping and preserving an intelligent record of the merchant's or tradesman's affairs, with such reasonable accuracy and care as may properly be expected from a man in that business. An accidental failure to make a proper entry will not vitiate.

Re Winsor, 16 Nat. Bankr. Reg. 152.

The requirement that the bankrupt shall keep proper books of account is satisfied if his creditors can gather from the book, as kept, a correct understanding of his business and financial condition.

Re Antisdel, 18 Nat. Bankr. Reg. 289.

A business connection with a corporation, as stockholders and officers, will not constitute one a merchant or trader, where such corporation is not itself in bankruptcy.

Re Stickney, 17 Nat. Bankr. Reg. 305.

The word "trader" should not be deemed to extend to a person whose principal and proper vocation is that of a farmer, though he has sometimes bought stock, produce, etc., to sell again. This provision, being penal, should be limited to the persons clearly within its object and policy,—those who are habitually in business of buying and selling to such an extent that by usage they may be expected to keep systematic books of account.

Re Cote, 14 Nat. Bankr. Reg. 503.

Occasional buying and selling will not necessarily make one a trader under bankrupt and

insolvent laws; to make one such he must buy and sell as a business.

Groves v. Kilgore, 72 Me. 489.

A person who sells his own products is not a trader.

Sylvester v. Edgecomb, 76 Me. 500.

A bankrupt must have his discharge unless some of the grounds of the opposition specified can be established.

Re Clark, 2 Biss. 78.

A specification of opposition to the discharge of a bankrupt, alleging that he has destroyed, mutilated, and falsified his documents and papers showing his business and financial transactions, but not averring that the acts were done with intent to defraud his creditors, is defective.

Re Morston, 5 Ben. 318; *Re Freeman*, 4 Ben. 245.

Specifications in opposition to a discharge must be precise and definite; as precise, even, as a charge in an indictment.

Re Butterfield, 5 Biss. 120; 14 Nat. Bankr. Reg. 147.

Discharge can be refused only on the ground specified in this section.

Rev. Stat. chap. 70, § 46.

In order to bar a discharge on the ground that the bankrupt swore falsely in the affidavit accompanying his schedule, that he was indebted to a creditor named therein, or that he did not disclose to the assignee that the claim was false and fictitious, it must appear that he knew that the claim was false and fictitious.

Re Blumenthal, 18 Nat. Bankr. Reg. 555.

Messrs. Symonds & Libby, for defendant:

The evidence shows that Mr. Jones was a merchant and trader, within the lines laid down in *Groves v. Kilgore*, 72 Me. 489; *Sylvester v. Edgecomb*, 76 Me. 499.

Peters, Ch. J., delivered the opinion of the court:

This case is before us on a motion to set aside the verdict of a jury upon certain issues submitted to them, and which have been found adversely to the appellant, and in substance deny him a discharge in insolvency. It was brought up by appeal from the judge of insolvency, Cumberland County, refusing the appellant a discharge, under the provisions of the Insolvent Act, for the reasons set forth in the decree. The proceedings in the insolvent court were begun by creditors' petition filed May 17, 1884.

The issues found by the jury in this court against the appellant are shown in questions seven, nine, and ten, as follows:

7. "Did said insolvent, being a merchant and trader at said Portland from the 1st day of January, A. D. 1888, to the 16th day of May, A. D. 1884, fail during said period, or any part thereof, to keep a cash book or other books of account?—A. Yes."

9. "Did said insolvent knowingly and falsely swear in his said examination in a material matter that he had no private business of his own from the time of the failure of said J. Winslow Jones Co., limited, namely, on or about the 1st day of January, A. D. 1882, to the time of the commencement of these proceedings, namely, on the 16th day of May, A. D. 1884?—A. Yes."

10. "Did said insolvent falsely and know-

ingly swear, in a material matter in the course of said examination, that during the years 1882 and 1883, and that part of the year 1884 which was prior to the commencement of said proceedings in insolvency, he had no letter books in which he kept letter-press copies written by him, or copies of such letters?—A. Yes."

The case is not affected by chap. 326* of the Act approved March 4, 1885, amending Rev. Stat. chap. 70, § 46, by which a merchant or trader is required to keep "a cash book or other proper books of account." It is provided by the second section of the Amendatory Act that it shall not apply to pending proceedings.

These issues passed upon by the jury relate to the nature and extent of the insolvent's business transactions, and were material matters of investigation by his assignee and creditors, for the proper administration of the estate. The failure by a merchant or trader to keep a cash book, or other proper books of account, and false swearing, are made by the statute (Rev. Stat. chap. 70, § 46) causes for refusing an insolvent's discharge. The right of an insolvent debtor to a discharge from his debts depends on whether or not he "has in all things conformed to his duty under this chapter" (Rev. Stat. chap. 70).

We have carefully examined and considered the testimony adduced at the trial before the jury, on the issues submitted to them, and are of the opinion that it is not a case where evidence will permit of our interference.

Appellant on his examination, and at the jury trial testified that he had carried on no private business, and admitted that he kept no cash book,—no books whatever,—and this is a sufficient ground for refusing him a discharge. Appellant's counsel claims in his argument that he was not then doing business on his own account, and therefore, not being a merchant or trader, that he is not amenable to the statute interdiction. To this it is sufficient to say that the finding is otherwise.

Nor do we think the case one of an accidental failure to make proper entries, which courts have not considered fatal to a discharge. Appellant's counsel contends that there must be a finding that the commissions and omissions, charged against the insolvent, were perpetrated by him "for the purpose of defrauding creditors," before he can be convicted of any wrong which will prevent his discharge under Rev. Stat. chap. 70, § 46. That phrase in that section applies to matters different from these. If an insolvent swears falsely in material matters, the presumption is conclusive that the intent is to defraud. Nor does it make any difference what the motive may be in not keeping books. Books must be kept,—the requirement is absolute.

A failure to keep a cash book or other proper books of account at any time "since March 23, 1878," is within the statute. "Since" means any time after the passage of the Act, though the neglect may not cover the whole period. *Re Rosenfield*, 1 Nat. Bankr. Reg. 575.

Motion overruled.

Walton, Virgin, Libbey, and Emery, JJ., concurred.

*Changing the requirement to "proper books of account." [Reporter].

Wayland KNOWLTON

v.

COUNTY COMMISSIONERS of Waldo County.

A trial justice can not be allowed eighty cents for the trial of an issue in a criminal case under Rev. Stat. chap. 116, § 2.

(Waldo—Decided February 24, 1887.)

ON exceptions by plaintiff to the ruling of the court in refusing to grant *mandamus* on plaintiff's petition. *Overruled.*

The facts are stated in the opinion.

Mr. Wayland Knowlton, for plaintiff.*Messrs. Thompson & Dunton*, for defendants.

Foster, J., delivered the opinion of the court:

The petitioner seeks for *mandamus* to compel the County Commissioners of Waldo County to audit and allow, in three criminal bills of costs, certain items to which he claims to be entitled as the magistrate before whom the proceedings originated.

The case comes before this court upon exceptions to the decision of the presiding justice in denying the writ.

The only question involved is whether the magistrate in criminal prosecutions originating before him is entitled to eighty cents for the trial of an issue, as in civil actions, and twenty-five cents for taxation of costs.

The fees to which trial justices are entitled by law in criminal prosecutions are provided for in Rev. Stat. chap. 116, § 2. Those fees to which they are entitled in civil actions and other matters, other than those of a criminal nature, are specified in the first part of the section named. After that there follows a statement of those fees to which they are entitled in criminal prosecutions.

The allowance of eighty cents for the trial of an issue was evidently intended by the framers of the law to apply only to civil proceedings. This is more apparent when we come to examine the earliest statute upon this subject, establishing and regulating the fees of justices and other officers, passed February 13, 1796 (2 Mass. Laws, 699), afterwards incorporated into Stat. 1821, chap. 105, § 1, and amended in 1835, chap. 178, § 7. It will be found upon examination that in those early statutes the express authority by which magistrates were allowed for "the trial of an issue" was contained in the paragraph relating to civil causes, which was in these words: "For the entry of an action, or filing a complaint in civil causes, including filing of papers, swearing of witnesses, examining, allowing, and taxing the bill of costs, and entering up the judgment, and recording the same, sixty-one cents. The trial of an issue, fifty cents."

Following that were the several paragraphs substantially the same as in the present statutes.

Matters relating to criminal prosecutions were,—as they still are,—grouped together in those several paragraphs which form a different and distinct portion of the section referred to, and where the specific items of fees in all the

proceedings relating to criminal prosecutions are definitely stated.

Had it been the intention of the framers of this statute to allow, in criminal proceedings, any additional fee to what is so clearly and specifically stated, we cannot help believing that they would have so expressed it.

As it is, we have no doubt of the correctness of the decision of the court in denying the writ under the law as it then stood.

Since the plaintiff's claim originated, Rev. Stat. chap. 116, § 2, has been amended by chap. 845 of the Laws of 1885, so that the allowance of eighty cents for an issue is now limited by express enactment to civil cases.

*Exceptions overruled.**Peters, Ch. J., Walton, Danforth, Emery, & Haskell, JJ.*, concurred.

George L. SNOW

v.

Leander WEEKS.

A verdict will be set aside and new trial granted where the damages allowed are excessive, unless the plaintiff remits so much as is excessive.

(Knox—Decided February 16, 1887.)

ON motion of defendant to set aside the verdict. *Granted, if a remittitur is not filed.*
Mr. True P. Pierce, for defendant.
Mr. J. O. Robinson, for plaintiff.

Per Curiam:

This verdict is so enormously large that the court, after a mature consideration of the testimony, feels it its duty to set it aside as being excessive, unless the plaintiff will remit all of it above \$300. If such *remittitur* is made the plaintiff is to have judgment for that sum; otherwise, verdict set aside and a new trial granted.

Willis M. FOGG

v.

Edwin O. STINSON.

A new trial will not be granted when it does not appear that the verdict is unreasonable in amount.

(Penobscot—Decided February 16, 1887.)

ON motion of defendant to set aside the verdict and for new trial. *Overruled.*

This was an action of assumpsit on account. The verdict was for plaintiff in the sum of \$73.15.

Mr. A. H. Weatherbee, for defendant.*Mr. W. C. Clark*, for plaintiff.**Per Curiam:**

This case was submitted without argument. We do not see that the verdict was wrong. The plaintiff overpaid the defendant for some logs through the mistake of a scaler who testified to the scale, and also, virtually, to the mistake in the scale. The jury made not an unreasonable allowance for the deficiency.

Motion overruled.

George E. WALLACE

v.

Robert HAWES *et al.*

A testatrix first devised her whole estate, consisting of a farm, to her husband, then she provided that her husband should have a life support on the farm, and that another man should receive his support from the farm "in accord with a former agreement," when there was no such agreement; she then attempted to make some provision for gravestones for herself and husband, and finally she ordered that still another person have the residue upon a certain contingency. Held, that the husband took the estate in fee, subject only to the debts and last expenses of testatrix.

(Waldo—Decided February 28, 1887.)

BILL in equity by the administrator with the will annexed of the estate of Jane H. Hawes, brought to obtain a construction of the following will:

"I, Jane H. Hawes, of Searsmont, in the County of Waldo, and State of Maine, being weak in body, but of sound mind and memory (blessed be Almighty God for the same), do make, publish, and declare this my last will and testament in manner and form following, viz.:

"1. I give and devise to my beloved husband, Robert Hawes, the farm on which I now live, it being the same as deeded to me by Sulley B. Muzzy, on Feb. 22, 18—, and recorded at the register's office in book No. 141, page 404, for a full description of said premises.

"2. And I further declare that the said Robert Hawes, my husband, is to have his support out of said property, being provided with clothing and food, good and sufficient as heretofore, and all nursing and medical attendance needful in sickness, so long as he may live.

"3. I also declare that Ebenezer Robbins shall have his support out of said property, in being provided with food and clothing as heretofore, so long as he may live, in accord unto former agreement.

"4. I also order that after paying all my just debts and burial expenses of Robert, my husband, and of myself, and erecting suitable white marble gravestones, to the value of about \$25 for each of us.

"5. I also order that John Frank Wood, that now lives with us, if he proves faithful and remains on the farm above described, and works to carry on the same until the death of the above-named persons, the residue of my estate shall fall to him, as the legal heir; but if he, the said John, leaves and goes away from said premises to look out for himself, then this last provision is null and void, and the residue as above named, whatever it may be, shall go, one half to John E. Hart, and the other half to Ward Butler and his wife Lucinda.

"6. And I also make choice of Nathan P. Bean, of Searsmont, my sole executor of this my last will and testament, whose duty it shall be to see that the provisions of this instrument be faithfully carried out, so far as to have a

watchful care over my husband, Robert Hawes, and Ebenezer Robbins, to see that they are provided with all the above-named benefits as described.

"7. In witness whereof I have hereunto set my hand this 30th day of August, eighteen hundred and eighty-one."

(Duly executed.)

Mr. George E. Wallace, for plaintiff.

Mr. L. M. Staples, for Robert Hawes.

Mr. William H. Fogler, for John Frank Wood.

Peters, Ch. J., delivered the opinion of the court:

The instrument which calls for an interpretation under this bill is an illustration of the confusion of ideas which prevails among unskillful persons who write their own or their neighbor's wills. While the idea of this testatrix might be conjectured to be one thing, the language used so clearly and absolutely expresses a different thing that we can only follow the general rules of construction which appertain to such cases.

In the first clause of the will she gives to her husband an absolute estate in her farm, valued at \$600, her principal or only property. By Rev. Stat. chap. 74, § 18, a devise of land conveys all the estate of the devisor therein, unless it appears by the will that he intended to convey a less estate. If the other portions of the will had the effect to prevent a fee passing to the husband, he would take no estate at all, but only a life support.

In the second clause the testatrix does not cut the fee down to a life estate or otherwise qualify it, but "declares" the husband is to have his support out of the farm as long as he lives. In the next item she also declares that another person shall receive his support out of the same farm, "in accord unto former agreement," when, as the case finds, there never was any agreement about such a matter.

In the next item she undertook to provide for the erection of gravestones for her husband and herself, but fails to make a sensible provision.

She then, in the next item, "orders" that still another person, "if he proves faithful and remains on the farm" until the death of the before-named persons, shall have the residue of her estate, and that, if he does not so behave himself, the sum shall be divided among several other persons.

The wife having first given the whole estate to her husband, and using afterwards no appropriate language to cut it down or take it away from him, the interpretation of the will must be that he takes a fee in the farm, subject to her debts and last expenses. *Mitchell v. Morse*, 77 Me. 428.

Decree accordingly.

Walton, Danforth, Virgin, Emery, Foster, and Haskell, JJ., concurred.

John A. KNAPP, Jr.,

v.

Charles A. BAILEY.

1. The grantor is a competent witness against his grantee, to show that his

- (grantor's) title was only that of an equitable mortgagee.
2. A deed absolute on its face may be construed to be a mortgage.
 3. Actual notice, as applicable to conveyances, does not necessarily mean actual knowledge.
 4. The defendant's grantor was out of possession at the time of the conveyance; the defendant knew that others controlled the property for many years; he examined the registry, where he must have seen evidence inconsistent with the validity of grantor's deed; he gave an insignificant price, and took a quitclaim deed; he made no inquiries of grantor as to the circumstances of his title; on the other hand he contended with grantor that he had no valuable title. Held, that these facts amounted to proof of actual notice.

(Penobscot—Decided March 1, 1887.)

ON appeal by defendant from the decision of a single judge. *Judgment affirmed.*

The opinion states the case.

Messrs. D. F. Davis and Charles A. Bailey, for defendant:

In 1 Perry, Tr. § 352, it is stated: "If the estate was originally conveyed to trustees for some particular purpose,—as by way of security or indemnity, or to raise an annuity or portion, or for any other purpose,—as soon as the purpose is accomplished, the trustees become mere dry trustees, and it is their duty to convey the estate to the beneficial owners. When, from lapse of time joined with other circumstances, there is a moral certainty that the purposes of the trust have all been accomplished, the court will act upon the certainty, and presume a reconveyance, although there is no direct proof of the fact."

"A conveyance may be presumed where the estate has been dealt with by the beneficial owner in a manner in which reasonable men do not deal with their estates unless they are legal as well as beneficial owners." 1 Perry, Tr. § 354.

It is open to respondent, upon this appeal, to claim that, upon the allegations in the bill, the plaintiff, as matter of law, is not entitled to the relief awarded, even though the objection appearing upon the face of the pleadings might have been taken by demurrer to the bill.

Smith v. Townsend, 109 Mass. 500.

In *Flagg v. Mann*, 2 Sumner, 560, 561, Judge Story fully expresses the character and effect of a deed like this. "If," he says, "the language of the deed had been that Mann merely released to Fuller all his right, title, and interest in the premises, there might perhaps have been more difficulty to found the defense; for then it might under some circumstances be construed to convey no more than Mann could rightfully convey, and that the purchaser should take at his peril, subject to all the rights and equities of third parties. But here the language of the deed is that Mann, in consideration of \$40,000, does remise, release, and forever quitclaim unto the said Elisha Fuller, his heirs and assigns, one undivided half of a certain tract of land, etc. (describing it), to have and to hold to Fuller, so that neither Mann nor his heirs, nor any other

person claiming from or under them, shall have claim, or demand any right or title to the premises. We all know that this is a common mode of conveyance in Massachusetts; and that when it is for a valuable consideration, * * * a deed of release has been construed a bargain or sale or other lawful conveyance by which the estate might pass."

And our own court says, in *Farrar v. Eastman*, 10 Me. 196: "The possession being, by construction of law, in the true owner, the terms of the deed, although they contained no covenants, and although the consideration may have been merely nominal, were sufficient to transfer and convey the land."

"By this deed one third of the land is conveyed absolutely, and the grantor cannot be heard to aver the contrary."

Weld v. Madden, 2 Cliff. 588.

In *Gilmer v. Poindexter*, 10 How. 267 (51 U. S. bk. 13, L. ed. 415), it is said: "When certain and specific land is conveyed, so that a precise or definite legal estate or right is transferred by a solemn assurance, the grantor will not be permitted to vary or deny it."

In *Van Rensselaer v. Kearney*, 11 How. 32 (52 U. S. bk. 13, L. ed. 713), the same court says: "If the deed bears on its face evidence that the grantor intended to convey and the grantee expected to become invested with an estate of a particular description or quality, or that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the law, still, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him * * * as if a formal covenant to that effect had been inserted, * * * so far as to estop him from ever afterwards denying that he was seized of the particular estate at the time of the conveyance."

McIldowny v. Williams, 28 Pa. 492, held that a grantor in a deed will not be heard as a witness to impeach the title conveyed by it.

"A man is estopped by his deed to deny that he granted or that he had a good title to the estate conveyed."

Wilkinson v. Scott, 17 Mass. 256. See also 3 Washb. Real Prop. 4th ed. 97.

Davenport v. Mason, 15 Mass. 90, held: "An evidence repugnant to the deed is inadmissible."

The acts and admissions of a grantor, after the execution of his deed, cannot be received in disparagement of the title already vested in his grantee.

Farwell v. Rogers, 99 Mass. 35; *Padgett v. Lawrence*, 10 Paige, 170; *Jackson v. Gilchrist*, 15 Johns. 106.

The principle upon which testimony is admissible between the parties to the transaction to prove a conveyance absolute on its face mortgage, goes upon the ground that it is an element of the consideration upon which the deed is given.

Campbell v. Dearborn, 109 Mass. 180, 142.

But it is at once apparent that this doctrine has no application to a case of this kind, where one for a stated sum, with no qualification whatever entering into the transaction, conveys a definite estate by absolute deed unfettered by any latent obligation. He may convey what he has, but he is estopped by his deed as to

same. *Currier v. Earl*, 13 Me. 224. The question here presented was raised in the case of *Taylor v. Luther*, 2 Sumner, 284.

In *Cole v. Lee*, 80 Me. 897, the court says: "The defendant did not intend to convey a title which would be indefeasible against all, nor did he so agree; but only against claims and titles caused by him or those claiming under him. The latter must be understood to refer as well to claims created by him then existing,—to incumbrances upon the title which he had previously made,—as to those which might thereafter be derived from himself."

Upon both principle and authority, he is estopped from giving evidence, the very effect of which must be to make him liable on his covenants (*Williamson v. Williamson*, 71 Me. 442), unless it shall be held that this trust here set up is nothing for which he is any way responsible, or for which he can be made responsible, if he becomes the efficient agent in making it effectual against his own deed.

It has been held in a suit in equity that a deed absolute on its face, which purports to be given for a good and valuable consideration, carries with it the presumption that the grantee holds the land conveyed, to his own use; and this presumption cannot be rebutted by parol evidence.

Philbrook v. Delano, 29 Me. 410.

If the deposition had been offered for the purpose of showing that the grantor, at the time of his conveyance, informed the grantee of the state of title he now testifies to, so that its effect would be to charge respondent with knowledge of what deponent now says respecting it, it might perhaps be admissible.

2 Pom. Eq. Jur. § 602.

"If the consideration be valuable, it need not be adequate; mere inadequacy of consideration will not defeat a purchase for a valuable consideration without notice."

1 Perry, Tr. § 220; *Bassett v. Newcorthy*, 2 Lead. Cas. Eq. 103, part 1.

The change of Stat. 1821, chap. 86, § 1, by Rev. Stat. of 1841, gave rise to a series of decisions, of which perhaps that in *Spofford v. Weston*, 29 Me. 140, is as comprehensive as any, as a judicial declaration of the rights and obligations of parties under this statute as amended; and it refers to and quotes from a similar decision in Massachusetts, the case of *Pouroy v. Serens*, 11 Met. 244.

In the case of *Spofford v. Weston*, *supra*, the court says (page 144): "The implied or constructive notice of a prior, unregistered deed, which would avoid a subsequent one from the same grantor, is abrogated by the statute. The grantee must have actual notice of the prior one; otherwise his title is valid. The language of the statute is clear and explicit, and leaves no room to doubt as to the intention of the Legislature."

It has been held in a series of decisions that the "actual notice" of the statute is actual knowledge that a deed has been executed, not merely that a sale has been made.

Lamb v. Pierce, 113 Mass. 72, and cases cited.

Observe that the two sections of the old revision are condensed into one, and the words, "shall be considered to be actual notice," are now made to appear as "that is to be regarded as such notice," the two expressions represent-

ing the same legislative idea, unless the purpose to change the statute is made clearly to appear.

Hughes v. Farrar, 45 Me. 72.

In *Flagg v. Mann*, 2 Sumner, 554, Judge Story says. "Indeed, the American courts seem indisposed to give effect to this doctrine of constructive notice from possession, in its most limited form. Thus in *Scott v. Gallagher*, 14 Serg. & R. 833, the court held that a possession of a *cestui que trust*, and the exercise by him of acts of ownership, were not constructive notice to a purchaser of the legal title from the trustee; but there should be direct, express, and positive notice of the trust. This doctrine was probably enforced by considerations growing out of our registration Acts, which are designed, with great justice, to protect purchasers against latent equities."

This subject is also extensively discussed in *Harris v. Arnold*, 1 R. I. 139.

It is contended by respondent that there can be no possession of such land as this that will in any case afford constructive notice.

Patten v. Moore, 32 N. H. 338; *Holmes v. Strout*, 10 N. J. Eq. 419; *Coleman v. Barkden*, 3 Dutch. 357.

In *McMechan v. Griffing*, 3 Pick. 149, it was held that the possession in such cases must be such as, without a deed, would amount to a disseisin, and nothing short of this would amount to implied notice.

"The character of the possession," says the court in *Lrown v. Volkering*, 64 N. Y. 82, "which is sufficient to put a person upon inquiry, and which will be equivalent to actual notice of rights or equities in persons other than those who have title of record, is very well established by an unbroken current of authority. The possession and occupation must be actual, open, and visible; it must not be equivocal, occasional, or for a temporary purpose; neither must it be consistent with the title of the apparent owner by the record."

And to the same effect is *Pope v. Allen*, 90 N. Y. 298. In *Grimstone v. Carter*, 3 Paige, 425, the Vice-Chancellor remarks: "The only fact of which these defendants had notice was the possession of the complainant. As evidence of title, that possession was in its nature equivocal, being equally consistent with an ownership in fee, with the equitable rights of a vendee under a contract to purchase, and the relation of landlord and tenant."

Possession must be open, manifest, unequivocal, and apparently by virtue of an unrecorded deed, to be equivalent to registry (*Atwood v. Beares*, 47 Mich. 72); must be open, notorious and exclusive (*Stafford Nat. Bank v. Sprague*, 17 Fed. Rep. 784); should be inconsistent with the title upon which the plaintiff relies (*Staples v. Fenton*, 5 Hun, 172; *Cook v. Travis*, 20 N. Y. 400).

Where the occupant has record title sufficient to account for his possession, no one is bound to speculate on the existence of some other claim.

Lincoln v. Thompson, 73 Mo. 613.

"Implied notice arising from possession is, at most, evidence to prove the intent of the second purchaser to defeat a prior right, and may be rebutted by any proof which negatives the intent; and it may be by showing either that

the notice of the possession was such as was consistent with a tenancy, or under a title consistent with that evidenced by the registry, or any facts which show the possession consistent with the title of the grantor."

Harris v. Arnold, 1 R. I. 139.

"No occupation of the premises in common or in connection with a third person, and no exercise of acts of ownership equivocal in their nature, over the land, will suffice."

2 Pom. Eq. Jurisp. § 620, and note; Hill. Vendors, 412.

It is a settled doctrine that a record is only constructive notice to subsequent purchasers deriving title from the same grantor.

Tilton v. Hunter, 24 Me. 29; *Bates v. Norcross*, 14 Pick. 224; *Harris v. Arnold*, 1 R. I. 135; 2 Pom. Eq. Jurisp. § 658.

The notice that is to break in upon the Registry Acts must be such as will, with the attending circumstances, affect the party with fraud. *Day v. Dunham*, 2 Johns. Ch. 190.

A floating rumor, a vague suspicion of a conveyance, is insufficient. The law has provided a registry for deeds in order that persons having occasion to know what conveyances have been made may ascertain by inquiry, and may in general rely upon what they find there.

Bell v. Twilight, 18 N. H. 164.

And as to the insufficiency of information of this character, see discussion of the subject in *Fort v. Burch*, 6 Barb. 78; also 2 Pom. Eq. Jurisp. § 602.

It is claimed that respondent, being tenant in common with the orator at the time of the purchase of the Chapin and Gleason one third, is precluded from setting it up against him. But this principle is not applicable to cases like this. This rule is generally applied either where the cotenants derived title from a common source, as in *Van Horne v. Fonda*, 5 Johns. Ch. 407, or where the incumbency is one in which all are alike interested in its removal; as, for example, a tax title upon the entire common property.

1 Washb. Real Prop. 4th ed. 687.

But persons acquiring unconnected interests in the same subject, by distinct purchases, are not bound to any greater protection of one another's interests than would be required between strangers.

See note to *Keech v. Sandford*, 1 Lead. Cas. Eq. 44, 45.

Mr. A. W. Paine, for plaintiff:

The grantor in a deed of general warranty is estopped to deny the truth of what he by his deed asserts, but the principle does not apply to deeds of quitclaim such as is the one at bar.

Ham v. Ham, 14 Me. 351; *Hains v. Gardner*, 1 Fairf. 383.

The principle of estoppel does not apply to such cases as the one here (*Fox v. Widgery*, 4 Glf. 214, 219); and 1 Greenl. Ev. § 25, gives expression or illustration of the doctrine and its extent, and in the remarks gives just such a case as this as one to which the doctrine does not apply.

In Massachusetts the principle is recognized, as indeed it is everywhere, as a principle of the common law.

Nourse v. Nourse, 116 Mass. 101; *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554; *Sanford v. Sanford*, 135 Mass. 314

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Mr. Chas. P. Stetson, also for plaintiff:

This court recognizes equitable mortgages.

Reed v. Reed, 75 Me. 265.

If one receives a conveyance of land or other property, absolute in form, but really as security for a debt, he will hold the legal title in trust for the grantor, after the payment of the debt, and before a reconveyance.

Perry, Tr. § 243.

Rev. Stat. chap. 73, § 12, was not intended to change the law established in this country and England, that a purchaser of a trust estate cannot hold as against the *cestui que trust*, if he buys under such circumstances as give him notice of the trust, and are sufficient to put him on his inquiry; it was not intended to require actual notice to affect him with the trust.

4 Kent, Com. § 179; *Patten v. Moore*, 33 N. H. 385; *Woods v. Farmere*, 7 Watts, 382; *Brush v. Ware*, 15 Pet. 93 (40 U. S. bk. 10 L. ed. 673); *Kent v. Plummer*, 7 Greenl. 464; *Evans v. Chism*, 18 Me. 220; *Daniels v. Darison*, 17 Ves. 433; *Hanly v. Sprague*, 20 Me. 431; Hill, Trustees, §§ 510, 515, 516; *Perry*, Tr. 219-223; *Faxon v. Foley*, 110 Mass. 395; *George v. Kent*, 7 Allen, 16; *Van Horne v. Fonda*, 5 Johns. Ch. 407.

Peters, Ch. J., delivered the opinion of the court:

This bill seeks to remove a cloud overhanging the complainant's title to an undivided parcel of land,—in effect, to redeem the land from an equitable mortgage, the allegation being that the debt has been paid. We can have no reasonable doubt of the facts thus far alleged.

The defendant's grantor was called as a witness by the complainant. The defendant contends that his testimony was inadmissible, and cites cases which sustain the ordinary principle that a grantor cannot dispute with his grantee the title which he has assumed to convey. The objection goes to the testimony, and not to the witness personally. The principle of estoppel which is invoked is aimed, not against the witness because he is a grantor, but against any oral testimony to contradict the terms of a deed. As said by Judge Curtis, in answer to the same objection: "The facts to be proved were *dehors* the record, and one witness was as competent, in point of law (to prove them), as another." Where a grantor is allowed to prove a fact by another, he may do so by himself. *Holbrook v. Worcester Bank*, 2 Curtis, 244.

It is true, as a general rule, that the effect of a deed cannot be controlled by oral evidence. But among the exceptions to the rule is that, in equity, where the proof is clear and convincing, a deed absolute on its face may be construed to be an equitable mortgage. In *Rowell v. Jewett*, 69 Me. 293, this exceptional doctrine was first allowed to have operation in this State. It was fully accepted in *Stinchfield v. Milliken*, 71 Me. 567, where the opinion says: "But the transaction was in equity a mortgage, an equitable mortgage. The criterion is the intention of the parties. In equity this intention may be ascertained from all pertinent facts, either within or without the written parts of the transaction. Where the intention is clear that an absolute conveyance is taken as a security for a debt, it is in equity a mortgage. The real intention governs." In *Lewis v. Small*, 71 Me. 553, the

same doctrine is admitted. It has since been affirmed in other cases, receiving an able discussion in the late case of *Reed v. Reed*, 75 Me. 264. The effect of many of the older cases in this State has been swept away by this new principle in our legal system,—a product of the growth of the law, very greatly promoted by legislative stimulation. The present case must be governed by the equitable rule declared in the later decisions.

Another question presented by the case is whether the statutory provision (Rev. Stat. chap. 73, § 12) which declares that a title of a purchaser for a valuable consideration cannot be defeated by a trust unless the purchaser had notice thereof means actual or constructive notice. Section 8 of the same chapter requires "actual notice" of an unrecorded deed, to defeat a subsequent purchaser's title from the same grantor. The two sections were incorporated in our statutory system at the same time,—in the Revision of 1841. One requires "notice," the other "actual notice."

We think the difference in phraseology may be accounted for partly on the idea that § 8 would be applicable more to law cases, and § 12 more to questions in equity. We can have no doubt that there may be cases of constructive trusts where § 12 would apply. At the same time, where the facts present questions analogous to those ordinarily arising under the other section, we think actual notice would be required; that under either section, in cases generally, actual notice, as we understand the meaning of the term, would be the rule; and that actual notice applies in the present case.

There is a conflict in the cases and among writers as to what is actual notice. Much of the difference is said to be verbal only, more apparent than real. Certain propositions, however, are quite well agreed upon by a majority of the authorities.

Notice does not mean knowledge,—actual knowledge is not required. Mr. Wade describes the modes of proving actual notice as of two kinds. One he denominates express notice, and the other implied. "Implied, which imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them. In other words, where he chooses to remain voluntarily ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest." Wade, Notice, 2d ed. § 5. Some writers use the word "implied" as meaning constructive; and would regard what is here described to be implied actual notice as constructive notice merely. As applicable to actual notice, such as is required by the sections of the statute under consideration, we think the classification of the author whom we quote is satisfactory.

The author further explains the distinction by adding: "Notice by implication differs from constructive notice, with which it is frequently confounded and which it greatly resembles, with respect to the character of the inference upon which it rests; constructive notice being the creature of positive law, or resting upon strictly legal inference, while implied notice arises from inference of fact."

It amounts substantially to this: That actual notice may be proved by direct evidence, or it

may be inferred or implied (that is, proved) as a fact from indirect evidence—by circumstantial evidence. A man may have notice or its legal equivalent. He may be so situated as to be estopped to deny that he had actual notice. We are speaking of the statutory notice required under the Conveyances Act. A higher grade of evidence may be necessary to prove actual notice appertaining to commercial paper. *Kellogg v. Curtis*, 69 Me. 212.

The same facts may sometimes be such as to prove both constructive and actual notice; that is, a court might infer constructive notice, and a jury infer actual notice, from the facts. There may be cases where the facts show actual, when they do not warrant the inference of constructive, notice; as where a deed is not regularly recorded, and not giving constructive notice, but a second purchaser sees it on the records, thereby receiving actual notice. *Hastings v. Cutler*, 24 N. H. 481.

Mr. Pomeroy (2 Eq. Jurisp. 596, note) summarizes the effect of the American cases on the point under discussion in the following words: "In a few of the States the courts have interpreted the intention of the Legislature as demanding that the personal information of the unrecorded instrument should be proved by the direct evidence, and as excluding all instances of actual notice established by circumstantial evidence. In most of the States, however, where this statutory clause is found, the courts have defined the actual notice required by the Legislature as embracing all instances of that species—in contradistinction from constructive notice—that is, all kinds of actual notice, whether proved by direct evidence, or inferred as a legitimate conclusion from circumstances."

The doctrine of actual notice implied by circumstances (actual notice in the second degree) necessarily involves the rule that a purchaser before buying should clear up the doubts which apparently hang upon the title, by making due inquiry and investigation. If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which, by ordinary diligence, he would have ascertained. He has no right to shut his eyes against the light before him. He does a wrong not to heed the "signs and signals" seen by him. It may be well concluded that he is avoiding notice of that which he in reality believes or knows. Actual notice of facts which to the mind of a prudent man indicate notice is proof of notice. 3 Washb. Real Prop. 3d ed. 335.

It must be admitted that our present views are not fully supported by the case of *Spofford v. Weston*, 29 Me. 140, a decision made forty years ago. But the doctrine has grown liberally since that day, and the correctness of some things pronounced in that opinion is virtually denied in subsequent cases. *Porter v. Sevey*, 43 Me. 519; *Hull v. Noble*, 40 Me. 459; *Jones v. McNarrin*, 63 Me. 334. Many cases which affirm the doctrine contended for by the complainant, as well as many opposing cases, are cited by the text writers. Wade, Notice, §§ 10, 11 *et seq.*, and cases in notes; 2 Pom. Eq. Jurisp. § 608, and notes. The decided

preponderance of authority supports the position that the statutory actual notice is a conclusion of fact capable of being established by all grades of legitimate evidence.

As to what would be a sufficiency of facts to excite inquiry, no rule can very well establish; each case depends upon its own facts. There is a great inconsistency in the cases upon this point. But we are satisfied that in the case before us the defendant must be charged with notice that his grantor held title by what equity must declare to be an invalid deed. He saw that the grantor was out of possession. He could have easily ascertained that he never had possession. He knew that others had controlled the property in many ways for many years. He examined the registry, where he discovered the deed in question; and there must have seen evidence of other conveyances inconsistent with its full validity. He purchased the property for \$40, while worth, had the title been perfect, nearer \$1,000. He took a quitclaim deed, and it is held by some courts that such an instrument of conveyance does not make him a *bona fide* purchaser without notice (*Baker v. Humphrey*, 101 U. S. 494 [Bk. 25, L. ed. 1065]); although in our system it is a circumstance only, bearing on the question (*Manfield v. Dyer*, 181 Mass. 200). More than all else, perhaps, the defendant made no inquiry of the grantor whether he had any real title or not, asking no explanations, but insisting to him that he had no valuable title. It is impossible for us to say, in the light of these impressive, illuminating proofs, that the defendant purchased without notice. He purchased on the basis of a merely nominal title.

We would not say that he did not believe he could legally purchase, encouraged as he was by the doctrine of the earlier cases, now abrogated; nor do we impute more than a want of caution and of diligence. Men's interests spur their judgments to one-sided conclusions oftentimes. The great dramatist makes a character reluctant to acknowledge the situation say: "I cannot dare to know that which I know;" while another more quick-sighted, because anxious to believe, exclaiming, "Seems, Madam! nay, it is. I know not seems." One rejects proof on the clearest facts; the other accepts it on the slightest.

Judgment affirmed.

Walton, Danforth, Emery, Foster, and Haskell, JJ., concurred.

Inhabitants of MONMOUTH

v.

Inhabitants of LEEDS.

1. A proceeding to discover and establish the dividing line between towns is not an action, and costs are not allowed to either side.
2. The court has such control over the proceeding as to prevent a report being final, unless satisfied of its freedom from fraud and its legal correctness.

(Kennebec—Decided February 24, 1887.)

ON exceptions by plaintiffs to the ruling of the court in overruling plaintiffs' motion to be allowed costs. *Overruled.*

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The facts are stated in the opinion.

Mr. J. H. Potter, for plaintiffs:

The petitioners only ask for the costs that accrued prior to interlocutory judgment. The costs that accrued afterwards are provided for by Rev. Stat. chap. 3, § 68.

But should the court hold that the proceeding was not strictly an action at law, still, in the light of several decisions in this State, we are entitled to costs up to the time when commissioners were appointed.

Moore v. Mann, 29 Me. 559; *Ham v. Ham*, 48 Me. 285; *Thornton v. York Bank*, 45 Me. 158.

Mr. F. M. Drew, for defendants:

Proceedings in the court of law may be instituted by petition, complaint, and libel, as well as by writ.

Spaulding, Pr. chap. 5, p. 45.

In the case of *Hopkins v. Benson*, 21 Me. 399, the court, Tenney, J., says: "A petition is not an action within the meaning of Rev. Stat. 508, chap. 115, § 56, which allows costs to the prevailing party."

In the case of *Moore v. Mann*, 29 Me. 559, the question was as to cost on a petition for partition. The court, Shepley, Ch. J., said: "The question presented is whether this case comes within the provisions of chap. 115, §§ 55, 56. It cannot rightfully be said that this is an action, and § 56 speaks only of actions."

In the late case of *Counce v. Persons Unknown*, 76 Me. 548, the court, Libbey, J., says: "A petition for partition is not an action within the meaning of the statute which provides that in all actions the prevailing party shall recover costs."

In the case of *Stetson v. County Commissioners*, 72 Me. 17, which was petition for *certiorari*, the court, Peters, J., says: "The statute which gives costs 'in all actions' to the prevailing party does not apply to this case. *Certiorari* is not an action at law."

Peters, Ch. J., delivered the opinion of the court:

Costs are claimed in a statutory proceeding in which commissioners were asked for to establish the boundary line between two towns.

We think costs are not allowable. The proceeding is not an action nor of the nature of one. The towns do not come into court as parties to a litigation. No pleadings bring them to an issue in court. A line becomes obscured or lost, and the petition seeks its discovery.

At the same time it may be well to say that the court has more powers of decision in such proceedings than sometimes have been ascribed to it. It is contended by counsel on one side that our own decisions determine that the court has no power to pass judgment on the work of the commissioners. It may be a limited authority. Still some authority exists. It seems to have been overlooked in some of the cases that the report of the commissioners was required by the earlier statutes to be accepted by the court. The laws of 1832, chap. 560, expressly required it. Rev. Stat. 1841, chap. 5, § 27, required it. Rev. Stat. 1857, chap. 5, § 30, with no legislative change, for the sake of brevity, omits the words relating to acceptance, the revisers of the laws supposing, evidently, that the power to accept or reject would be implied. Why should it not be so? What

object is there in making a return to court if the return is not to be acted upon? In *Bremen v. Bristol*, 66 Me. 354, the court settled some legal questions, and recommitted the case to the commissioners. We do not see why the court should not so far control the proceeding that it may, as in cases before referees, prevent a report being final, until satisfied of its freedom from fraud and of its legal correctness.

No costs allowed.

Danforth, Virgin, Libbey, Foster, and Haskell, JJ., concurred.

City of BATH

v.

Parker M. WHITMORE.

1. **When a taxable inhabitant in Maine is assessed upon property for which he is not taxable, his remedy is by petition to the assessors for abatement. He can not set that fact up in defense to a suit against him for the taxes.**

2. **Nor can he defeat such suit by showing that the recorded lists of assessments have not been signed by the assessors; or that the assessors have not certified to the assessment of the State tax as required by statute; or that they inserted an unauthorized mandate in the warrant to the collector to collect interest, there being no attempt to collect interest.**

(Sagadahoc—Decided February 23, 1887.)

ON exceptions by the defendant. *Overruled.* An action for taxes under provisions of Me. Rev. Stat. chap. 6, § 175, which appear in brief of defendant's counsel.

Messrs. C. W. Larrabee and J. W. Spaulding, for defendant:

There can be no doubt that the bills of sale from Hagar to Whitmore, Libby, and Theobald, and the agreement back on the same day as part of the same transaction, constituted a mortgage.

Tilcomb v. McAllister, 71 Me. 353.

"When personal property is mortgaged or pledged, it shall, for the purpose of taxation, be deemed the property of the party who has it in possession, and it may be distrained for the tax thereon."

Rev. Stat. chap. 6, § 23.

The action is under Rev. Stat. chap. 6, § 175, which in its amended form reads: "In addition to the other provisions for the collection of taxes legally assessed, the mayor and treasurer of any city, the selectmen of any town, and the assessors of any plantation to which a tax is due, may in writing direct an action of debt to be commenced in the name of such city or of the inhabitants of such town or plantation, against the party liable." This statute was originally enacted in 1874.

It is claimed that the language "taxes legally assessed" relates only to matters of form or of record in the assessment and commitment of the taxes, and in the election and qualification of assessors, as in *Dresden v. Goud*, 75 Me. 298.

It is said that the question here presented

has never been considered by the court. If that is so, it is difficult to understand how the court could have made the order of "plaintiff's nonsuit" in *Bucksport v. Woodman*, 68 Me. 33. That case was under this same statute, and the tax sought to be recovered was assessed upon a judgment of the first court of commissioners of Alabama Claims; the defense was that such an award or judgment was not taxable, and the court sustained that defense, in that action.

In *Inhab. of Camden v. Camden Village*, 77 Me. 530, the tax sought to be recovered was upon a building containing the lockup, offices, etc., of the village corporation. The action was under this same statute. The defense was that the property was not taxable, and the court sustained that defense, in that action.

It seems to us that those two actions were decided exactly right, and in compliance with the statute under which they were brought; that the "condition precedent to the maintenance of the action, that the tax should be legally assessed," was not fulfilled if the property was not taxable. A tax cannot be legally assessed when it is assessed upon property which is not taxable.

What was the purpose of the Legislature in the Act of 1874? At that time there was in vogue the following methods of collecting taxes,—for convenience we cite present statutes: (1) distraining the goods and chattels (Rev. Stat. chap. 6, § 132); (2) arrest of the taxpayer on the warrant (Id. § 134); (3) sale of real estate (Id. § 193 *et seq.*); (4) an action of debt in the name of the collector (Id. § 141). In no one of these methods could the party assessed successfully defend, or interfere and stop proceedings, on the ground sustained in *Bucksport v. Woodman*, *supra*.

"Pay your tax," the law said, as construed by the court, "and if you are injured, bring an action to recover it back." And it was specifically held in *Waite v. Princeton*, 66 Me. 226, in an action in the name of the collector, that the remedy of the defendant in an action like the one at bar was by application for abatement.

But there is an important difference between the statute authorizing an action in the name of the collector and the statute authorizing this action.

Prior to 1874, if a person was improperly taxed, as was this defendant by the city of Bath, he must apply to the assessors for abatement, (§ 95); if their decision was adverse he must apply to the county commissioners, (§ 96); if their decision was adverse he must appeal to this court; and he thus in that roundabout way, after the expense and trouble to all parties of two hearings, gets before a competent tribunal to hear and determine questions of law.

The Legislature undoubtedly considered all that circumlocution unnecessary and burdensome to both parties. And they enacted this short cut to the court of last resort, that towns and cities could adopt in cases like the present, where there was an honest difference of opinion.

In order that the taxes shall be legally assessed, the list of assessments must be signed by the assessors.

Norridgewock v. Walker, 71 Me. 181.

The warrant in so many words required the collector to collect interest, when no interest could be collected.

Snow v. Weeks, 77 Me. 429.

We are told that these provisions are directory only, *et ergo* of no consequence. And *Shaw, Ch. J.*, in *Torrey v. Millbury*, 21 Pick. 87, is cited to sustain this point. We submit that the opinion of the learned jurist has been unjustly treated before now, and that the paragraph preceding the one quoted by plaintiff's counsel contains the rule for distinguishing between conditions and directions only. "All those measures which are intended for the security of the citizen * * * are conditions precedent, and if they are not observed he is not legally taxed."

In *Thurston v. Little*, 3 Mass. 429, which is the first case we find where the point was specially discussed, the court says: "The statute expressly requires assessors to make and lodge in the clerk's office, or in their own, if they have one, an invoice of valuation from which the rates of assessment shall have been made."

If the opinion of the court in *Thurston v. Little*, *supra*, is good law and worthy of consideration, then apply the rule given by *Shaw, Ch. J.*, in *Torrey v. Millbury*, *supra*, and the point is settled.

"Statutes are to be construed in reference to the principles of the common law."

1 Kent, Com. 463.

Messrs. W. Gilbert and W. E. Hogan, for plaintiff:

The collector's book was a certificate of commitment, under the hands of the assessors, specifically referring to said lists.

Norridgehook v. Walker, 71 Me. 181; *Lowe v. Weld*, 52 Me. 588.

It was held in *Lowe v. Weld*, *supra*, that the commitment subscribed by the assessors, prefixed to and incorporated with lists in the collector's book, and specifically referring to them, was a sufficient authentication, etc.

In *Johnson v. Goodridge*, 15 Me. 29, the court gave effect to a much more informal writing as a due authentication.

Touching all the objections raised by defendant, we quote the language of *Shaw, Ch. J.*, in 21 Pick. 87. "Many regulations made by statute designed for the information of assessors and officers, and intended to promote method, system, and uniformity in the mode of proceeding, the compliance or noncompliance with which does in no respect affect the rights of the taxpaying citizen * * * their observance is not a condition precedent to the validity of the tax." We also cite here the opinion of *Barrows, J.*, in *Boothbay v. Race*, 68 Me. 357.

Counsel cite *Titcomb v. McAllister*, 77 Me. 358, to prove the transaction a mortgage; whatever the effect of the whole transaction as between the parties thereto, such a defense to this action cannot stand the test either of law or common sense.

"A deed absolute in form, though defeasible by bond, will not be defeated unless the bond is recorded."

Tomlinson v. Monmouth Mut. F. Ins. Co. 47 Me. 232; *Bailey v. Myrick*, 50 Me. 178.

Peters, Ch. J., delivered the opinion of the court:

The defendant, having a taxable residence in Bath, and being assessed there for a supposed 382

ownership in several vessels, the taxes upon which he refused to pay, is sued for the taxes by the collector in the name of the city, by virtue of authority given in Rev. Stat. chap. 6, § 175.

The branch of defense most strongly urged against the suit is that the defendant was only a mortgagee of the vessels and not assessable therefor. If he had not been, at the time of the assessment, an inhabitant of Bath, and thereby not subject to the jurisdiction of its assessors, the defense would be open to him. *Ware v. Percival*, 61 Me. 391; *McCrillis v. Mansfield*, 64 Me. 198. As it is, he cannot urge such defense to the suit. If vessels which he did not own were taxed to him, it was merely an overvaluation of his property; a hardship which could be avoided in only one way, and that would be by petition to the assessors for an abatement, and, if unsuccessful before them, by an appeal to the county commissioners. An over-valuation may consist in assessing to a person property which he does not own, as well as in estimating too highly that which he does own. In neither class of over-valuation is an excess of jurisdiction assumed by the assessors, and in each case the remedy can be only by appeal from the assessors to the commissioners. *Stickney v. Bangor*, 30 Me. 404; *Hemingway v. Machias*, 33 Me. 445; *Gilpatrick v. Saco*, 57 Me. 277; *Waite v. Princeton*, 66 Me. 225.

We do not mean to say that assessors have an unlimited discretion in assessing taxes. Fraudulent action on their part may be corrected in equity; and there may possibly be other remedy for fraudulent valuation. *Cooley, Tax.* 2d ed. 784-792.

In behalf of the defendant it is contended that, while a taxpayer may be shut off from all redress for over-valuation, except by petition to the assessors and appeal from them to county commissioners, in cases where the body is arrested or chattels are distrained by the collector, the rule does not prevail when a suit is instituted to collect taxes. We do not feel any force in the distinction. Public policy invokes the rule as strongly in one case as in any other. Juries are not the most competent tribunal for such questions. Assessors and commissioners have better judgments on values, more opportunities to make comparisons between properties, and act much more speedily than courts can.

Stress is placed on the language of the statute that the remedy by an action is allowed for the collection of taxes legally assessed. But this requirement applies just as much in the remedy by arrest or by seizure, as in a remedy by suit. In either case there must be a legal assessment. The answer is, so far as the point of overvaluation affects the question, that the assessment is presumed to be legal, and that the defendant is not permitted to deny its legality except in the way pointed out by statute for that purpose. It would seem to be unreasonable and inconsistent to allow the defendant greater opportunities to escape taxation when sued than when arrested by the collector. It has been held, in cases above cited, that an over-rated taxpayer cannot pay the tax under protest, and afterwards recover it of the town or its collector. The principle must be the same whether he be plaintiff or defendant in the litigation. In *Inhabs. of Camden v. Camden*

Village, 77 Me. 580, and *Bucksport v. Woodman*, 68 Me. 33, cases relied on by the defendant, the point now made did not appear. Those were cases of facts agreed to by the parties for the purpose of presenting certain questions of law to the court.

It does not strike us, as contended by counsel, that there would be any dilemma in the possible chance, if this doctrine be established, that a collector might be prosecuting a suit and the defendant be at the same time prosecuting a petition, the one to collect and the other to abate the same tax. It would be like any suit on a judgment, where there can be no defense against the suit until the judgment be somehow annulled or reversed.

Other points of alleged illegality in the proceedings are relied upon by the defense, where the principle of estoppel cannot apply, and the most important one is that the recorded list of assessments is not signed by the assessors. How much force the objection would possess if it were sought to produce the forfeiture of an entire estate for the nonpayment of an ordinary tax upon it, would be another question. As was said in *Cressey v. Parks*, 76 Me. 534, where a marked distinction is made between collecting taxes by suit and proceeding to create a forfeiture: "To prevent forfeitures, strict constructions are not unreasonable. But where forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally."

The papers committed to the collector are complete in themselves, and are original papers. The law requires the assessors to make a record of their assessment, more for the general convenience than for the establishment of any individual right. It is for the perpetuation of proof more than all else. From these recorded proofs, the assessors can furnish a new commitment to the collector, if his be lost or destroyed. Rev. Stat. chap. 6, § 124. The records are useful as a test in case the collector's list need be confirmed in any way, and are necessary to make settlements by, with the collector. The absence of a perfected record cannot excuse the defendant's resistance against paying his taxes which are clearly and regularly inscribed upon official papers possessed by the collector. The necessary proof, if not upon record, is in the hands of the collector. *Norridgewock v. Walker*, 71 Me. 181.

The defense, however, goes to the extent of assailing the regularity of the warrant in the collector's hands, because it contains a demand to collect interest on the assessments after a prescribed date. There has been no attempt to enforce this admittedly unauthorized mandate in the warrant, and it is independent of and separable from all other parts of the instrument which contains it. Not fusing with the other requirements of the warrant, it does not corrupt them. If it destroys the legality of the tax against the defendant, it must for the same reason destroy all the assessments on the list; and none are collectible. That cannot be.

It is a general rule that an illegal provision in a warrant, separable from its other provisions, will not vitiate the instrument, nor become material, unless the direction is acted upon. No objection can be raised thereto by the person against whom there is no attempt to enforce it.

Barnard v. Graves, 13 Met. 85; *Walker v. Miner*, 32 Vt. 769. See also numerous cases cited in Cooley, Tax. 426, in support of the principle approved by the author in his text.

Finally, it is submitted in behalf of the defense that the case omits to show that the assessors made the certificate of the assessment of the State tax as required by Rev. Stat. chap. 6, § 122. This is a mere irregularity—if it be as much as that—which very little concerns the individual taxpayer; a neglect to obey, for the time being, a directory order of the law. This the law easily overlooks. The omission may be supplied by an amendment. The certificate may be added. Blackw. Tax Titles, 397; Cooley, Tax. 314 *et seq.*, and cases.

Exceptions overruled.

Danforth, Virgin, Emery, Foster, and Haskell, JJ., concurred.

Elisha W. SHAW *et al.*

v.

George WATERHOUSE.

Where the defendant in an action upon a written contract dated on Monday sets up the defense that the contract was actually executed and delivered on Sunday, the burden is upon him to prove it.

(Penobscot—Decided February 23, 1887.)

ON exceptions by the plaintiffs. *Sustained.* An action of debt on a bond.

The opinion states the question presented by the exceptions.

Messrs. Powers & Sanborn and Davis & Bailey, for plaintiffs:

The bond was drafted on the day it was dated, and its date was *prima facie* evidence that it was executed on that day. "This rule is commonly recognized as useful, and observed with care."

10 Gray, 68.

"A party is of course presumed to know the date of an instrument which he has signed."

10 Cush. 374.

In *Powers v. Russell*, 13 Pick. 77, the court says: "To illustrate this, *prima facie* evidence is given of the execution and delivery of a deed; contrary evidence is given on the other side, tending to negative such fact of delivery; this latter is met by other evidence, and so on through a long inquiry. The burden of proof has not shifted, though the weight of evidence may have shifted frequently; but it rests on the party who originally took it. But if the adverse party offers proof, not directly to negative the fact of delivery, but to show that the deed was delivered as an escrow, this admits the truth of the former proposition, and proposes to obviate the effect of it by showing another fact, namely, that it was delivered as an escrow. Here the burden of proof is on the latter."

See also *Davis v. Jenney*, 1 Met. 224.

A defendant who would avail himself of a statute as a defense has the burden of proof upon him.

See *Bayley v. Taber*, 6 Mass. 451.

Messrs. F. H. Appleton and John Varney, for defendant:

Upon the instruction especially excepted to, we cite as conclusive—

Small v. Clewley, 62 Me. 159; *Heinemann v. Heard*, 62 N. Y. 448.

Plaintiffs cite *Pullen v. Hutchinson*, 25 Me. 249, and 5 Gray, 400. An examination of both cases will disclose them to be favorable to the position of the court in this case. In the first case *Shepley, J.*, expressly says: "If the instrument be the foundation of the party's claim, or if he be privy to it, or if it purports to be executed by his adversary, there may be good reason for holding him to strict proof of its execution."

Hilton v. Smith, 5 Gray, 400, was not a suit between the original parties, and recognizes the distinction between it and *Burnham v. Allen*, 1 Gray, 496, where the contracting parties were the parties litigant.

The instruction complained of relates rather to the weight of evidence than to the burden of proof, but, as a proposition of law, is clearly correct.

Small v. Clewley, 62 Me. 155; *Burnham v. Allen*, 1 Gray, 496.

In 6 Mass. 452, and 25 Me. 241, cited by the plaintiffs, there was neither a denial of the execution of the instrument declared on, nor any brief statement filed, as in this case.

Peters, Ch. J., delivered the opinion of the court:

The defendant is sued upon a written contract bearing date on a week day; the defense is that it was really signed and delivered on Sunday; the ruling was that, while the plaintiffs are aided by the presumption arising from the date of the paper, there being evidence on both sides of the issue, the burden of proof was upon them to show that the instrument was delivered on some lawful day for business, and not on Sunday. This was not correct. The burden of proving the illegal transaction rested on the defendant.

The general rule is that the burden of proof lies upon the party who takes an affirmative. Here the defendant affirms the illegality. It was not necessary that the plaintiffs declare that the contract was not made on Sunday, or that it was not illegal. This rule affects defenses generally where fraud or illegality is set up. Where a transaction is not on its face unfair or illegal, the burden is on the party who assails its fairness or legality to substantiate his objection. *Whart. Ev.* § 366, and cases cited; *Blaisdell v. Cowell*, 14 Me. 870; *Winslow v. Gilbreth*, 50 Me. 90.

The usual test employed to determine on which side the burden of proof lies meets the present case. Which party would be entitled to a verdict if no evidence be offered on either

side of the issue? Here the plaintiffs assert a contract and produce it. Nothing unlawful appears on its face. The defendant alleges that it was unlawfully made. If no proof be exhibited either way, the defense fails.

The case of *Small v. Clewley*, 62 Me. 155, relied on by the defendant, does not sustain the defendant's position. It was there held that the burden of proof was on the plaintiff to show that a note sued by him was given for consideration. It was necessary for him to allege consideration. He did allege it. An independent defense was not relied on. The defendant merely denied one of the substantive averments which the plaintiff made. It is argued, however, that when a plaintiff comes into court he necessarily affirms that he is presenting a legal contract. It may be implied that he does so. And that is the difference between this case and the case cited. Affirmations merely implied, not expressed, do not require proof. When a note or other contract is declared upon, there may be some sort of implied or silent affirmation by the plaintiff that the instrument produced in evidence was not fraudulently obtained; or that it was not an usurious contract; or given for an illegal consideration; or that the maker was not a minor or insane; or laboring under other disqualification. Still, if any one of such defenses be alleged, it is to be proved by the defendant, and is not to be disproved by the plaintiff. In the case before us, date is not an essential matter of allegation or proof, except to correctly identify the paper declared upon.

In *Pullen v. Hutchinson*, 25 Me. 249, it is said: "The party producing it (a written contract) is not required to proceed further upon a mere suggestion of a false date, where there are no indications of falsity found upon the paper, and prove that it was actually made on the day of its date."

In *Bayley v. Taber*, 6 Mass. 451, certain notes declared upon were valid if issued before a certain date, and invalid if issued after such date. They were dated before. "When," said Parsons, Ch. J., "the defendants would avoid their promise by availing themselves of the statute, it is incumbent on them to prove that the notes are within the statute; and the plaintiffs are not obliged to show that the notes are without statute."

In *Nason v. Dinsmore*, 84 Me. 391, where the defense was that a bond was made on the Lord's Day, the court said: "The defendants allege an infirmity in the bond, which does not appear on its face, and the burden of proof is on them to show its existence."

Exceptions sustained.

Walton, Danforth, Emery, Foster, and Haskell, JJ., concurred.

NEW HAMPSHIRE.

SUPREME COURT.

Sarah F. TASKER

v.

Harrison D. LORD *et al.*

1. A bill in equity may be maintained where the same is a reasonably necessary process and convenient procedure for speedily and economically establishing the plaintiff's rights.
2. A declaration in trespass may be filed as an amendment to a bill in equity.

(Hillsborough—Decided March 11, 1887.)

ON defendants' exceptions. *Overruled.*

Bill in equity alleging that, before February 27, 1885, one Slack made several successive mortgages of certain goods to different persons,—among whom was the plaintiff,—some of said mortgages being prior to that of the plaintiff; that on the above day the defendant Lord, a deputy sheriff, attached the mortgaged goods on three writs against Slack, and on March 14, 1885, sold the same in small lots to a great number of different purchasers for sums amounting in all to \$1,427.48; that the sale was made without consent of parties, and without a certificate of examiners, as required by law; that Lord paid to Welch, one of the prior mortgagees, \$428.92, and to Carpenter, another of the prior mortgagees, \$300, as the amount due them on their several mortgage debts, and the balance, \$698.51, derived from the sale, is now in his hands; and he refuses, though requested, to pay the same over to the plaintiff. Praying that Lord may account for all the mortgaged property attached by him at its full value, and that his fees and charges be disallowed; that an account be taken of the amount due to the mortgagees; that Lord pay to the mortgagees the sums, if any, which shall be found due upon the several mortgages, in the order of their priority, and that the sums so paid may be held discharged of all said mortgages and attachments; and for further relief.

To this there was a demurrer, assigning for cause that the plaintiff has a plain and adequate remedy at law. Demurrer overruled, and exceptions by the defendants.

Messrs. Sulloway, Topliff, & O'Conner, and Osgood & Prescott, for defendants.

Messrs. Burnham & Brown, for plaintiff:

I. Here are such mutual demands as may well form the basis of equitable jurisdiction in the matter of account. But more than this, a discovery is wanted in aid of the account, and "is required by the frame of the bill." In such cases equity takes jurisdiction.

Walker v. Cheever, 35 N. H. 339, 347; 1 Wait, Act. & Def. 175, 176, 1 Story, Eq. Jur. § 459; Bisph. Prin. Eq. § 1484; Adams, Eq. 220 *et seq.*

A bill may be maintained upon any complicated account.

Ludlow v. Simond, 2 Caines' Cas. 1; *S. C.* 2 Am. Dec. 291, 298, 307.

II. The Statute of July 4, 1834, embodied in the General Laws, confers full equity powers N. H.

upon this court in the matter "of the redemption and foreclosure of mortgages."

Gen. Laws, chap. 209, § 1.

All other remedies are cumulative. A plaintiff may proceed to redeem and foreclose by bill in equity, or may adopt other statutory methods, at his option.

Hall v. Hall, 46 N. H. 240, 242; *Currier v. Webster*, 45 N. H. 226, 231; *Wendell v. N. H. Bank*, 9 N. H. 404, 417; *Gunnison v. Twitchel*, 88 N. H. 62, 65; *Lamprey v. Nudd*, 29 N. H. 299, 305.

Prior to the statute of 1834, our court not possessing equity powers, there was no redemption of mortgaged chattels after forfeiture. That statute applies to personal as well as real-estate mortgages.

Wendell v. N. H. Bank, *supra*, 420, 421.

Then, for a time, and until the enactment of the Revised Statutes, chap. 132, §§ 13-16, which are substantially the same as Gen. Laws, chap. 137, §§ 18-21, the only method of redemption or foreclosure of chattel mortgages after forfeiture was under the statute of 1834, in equity.

Leach v. Kimball, 34 N. H. 568, 574.

And jurisdiction in equity was not ousted or impaired when a subsequent statute provided a remedy at law. "If courts of equity had jurisdiction in certain cases for which the ordinary proceedings at common law did not then afford an adequate remedy, that jurisdiction will not be lost because authority to decide in such cases has been conferred on courts of law by statute, unless there are negative words excluding the jurisdiction of courts of equity."

Wells v. Pierce, 27 N. H. 503, 512; *Walker v. Cheever*, 35 N. H. 339, 350; *White Mountain R. R. v. Bay State Iron Co.* 50 N. H. 57, 60; *King v. Baldwin*, 17 Johns. 384; Jones, Chat. Mort. § 779.

Since the Revised Statutes, mortgagees of chattels have proceeded in equity (*Piper v. Hilliard*, 52 N. H. 209), and have obtained relief (*Pierce v. Emery*, 32 N. H. 494, 522).

That the plaintiff has not paid the prior mortgages is not to her prejudice. It would be an idle ceremony to compel her to advance a sum of money in order to receive, not the mortgaged goods and chattels, but the same sum back again; to compel her to purchase mortgages that the court may decree the funds of the mortgagor in the hands of the sheriff to be paid to her rather than to the prior mortgagees themselves. This is the principle of—

Woods v. Wallace, 30 N. H. 384, 389; *Norris v. Morrison*, 45 N. H. 490, 500.

In this case it is difficult to see how the plaintiff could redeem except in equity. Our statutes do not authorize her to demand, or enable her to compel, an account of the amounts due the prior mortgagees, as in case of mortgages of real estate. (Compare Gen. Laws, chap. 136, with chap. 137.) Nor has she the mortgagor's knowledge of the original indebtedness, the length of time it has subsisted, and the payments made thereon. She could not even make a tender; and as a matter of law, a tender is not necessary, even in case of mortgages of real estate.

Hall v. Hall, 46 N. H. 240, 242.

III. The last prayer of the bill is, "that said

plaintiff may have such further or other relief as the nature of the case may require." Under this prayer, the plaintiff, if the money in the sheriff's hands falls short of satisfying her debt, may have a decree against the mortgagor for the residue.

Bailey v. Burton, 8 Wend. 339, 344; *Savage, Ch. J.*, in support of *Chancellor Walworth's* decree; *Wilkin v. Wilkin*, 1 Johns. Ch. 111, 114, Kent, *Chancellor*; *Hiern v. Mill*, 13 Ves. Jr. 114, 118, *Lord Erskine, Chancellor*; *Story, Eq. Pl. §§ 40, 41*.

"These cases show that, under the prayer for general relief, courts of equity will grant specific relief differing very widely from the special relief prayed for, provided it accords with the case proved."

Gooding v. Riley, 50 N. H. 400, 415.

At law, then, in the case supposed,—and upon the bill it is the probable case here,—the plaintiff would be driven to two suits at least, one against the sheriff, and one against the mortgagor. The prior mortgagees, upon the extent and validity of whose claims the value of the plaintiff's remedy against Lord depends, would be forced to like suits. At all events, these mortgage claims must be established or overthrown before the amount of the plaintiff's decree can be safely fixed. Indeed, the accounts of all the mortgagees—and none of the unpaid mortgagees have demurred to this bill—can be conveniently and economically adjusted in this one suit, and a great amount of vexatious litigation averted. And "it is a favorite object of equity to prevent multiplicity of suits."

Abbot v. Johnson, 32 N. H. 9, 25.

Such prevention is a distinct and important ground of original jurisdiction in equity (*Walker v. Cheever*, 35 N. H. 339, 351; *Story, Eq. Jur. § 64, k*); and its importance is recognized in recent New Hampshire cases (*Connecticut R. Sav. Bank v. Fiske*, 60 N. H. 363, 368; *Hale v. Nashua & Lowell R. R.* 60 N. H. 333, 339; *Page v. Whidden*, 59 N. H. 507, 509; *Eastman v. Savings Bank*, 58 N. H. 421).

Property under a power-of-sale mortgage is a trust fund.

2 Perry, *Trusts*, § 602 l.

Chattel mortgages in this State have a power of sale by statute.

Gen. Laws, chap. 137, § 19.

The seizure of this trust fund by the sheriff did not change its character. He must then hold the same as trustee for the *cestuis que trust*, one of whom this plaintiff is.

This doctrine of a trust is particularly applicable when there are successive liens and incumbrances; and a court of equity will sustain a bill under its general equity jurisdiction over trusts. "Again, equity can afford in this case more ample relief, and can do more complete justice, than can be obtained in a court of law."

The following are cases of a distribution among the holders of successive incumbrances, upon a bill in equity, of such a trust fund arising from the sale of mortgaged chattels. The question of jurisdiction was raised by demurrer. The cases are similar in their facts to the case at bar, and are directly in point.

Dupuy v. Gibson, 86 Ill. 197; *Hammers v. Dole*, 61 Ill. 307, 309. See also *Bryan v. Robert*, 1 Strobb. (S. C.) Eq. 284; *Jones, Chat. Mort.* § 779.

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The foregoing grounds are severally sufficient to sustain the jurisdiction of this court in equity; combined, they cannot fail to do so.

"Mr. Justice Buller, when sitting for the Lord Chancellor in the case of *Weymouth v. Boyer*, 1 Ves. Jr. 424, says: 'We have the authority of Lord Hardwicke that, if a case be doubtful or the remedy at law be difficult, he would not pronounce against the jurisdiction of this court; and the same principle has been laid down by Lord Bathurst.'"

Ludlow v. Simond, 2 Caines' Cas. 1; *S. C.* 2 Am. Dec. 291, 299.

The right is claimed to a personal decree, although not specifically prayed for, against the mortgagor, for that part of the plaintiff's mortgage debt, if any, not covered by a decree against the sheriff. "Under the general prayer for relief, a complainant may pray at the bar for such specific relief as the statements of the bill will warrant, provided it does not conflict with that specifically prayed for."

Busby v. Littlefield, 31 N. H. 193, 200; *Stone v. Anderson*, 26 N. H. 506, 522.

It does not matter that one unpaid mortgagee is a party plaintiff, and three are parties defendant. The latter may have decrees against their codefendants, the sheriff and mortgagor, and especially as such relief is prayed for.

Vanderbeer v. Holcomb, 17 N. J. Eq. 550; *Owings's Case*, 1 Bland, Ch. 370; *S. C.* 17 Am. Dec. 311, 341; *Chamley v. Dunsany*, 2 Sch. & Lef. 709, 718.

This bill may be considered as in the nature of a bill of peace, to establish and enforce the rights of the unpaid mortgagees, as a class, against the sheriff and mortgagor. The very purpose of such bills is to establish as well as to enforce a right.

Walker v. Cheever, 35 N. H. 339, 351; *Super-visors v. Deyoe*, 77 N. Y. 219, 222, 225; *N. Y. etc. R. R. Co. v. Schuyler*, 17 N. Y. 592, 608; *Morgan v. Morgan*, 3 Stew. 383; *S. C.* 21 Am. Dec. 638, 640; *Sheffield Water Works v. Yeomans*, L. R. 2 Ch. 8; *Mayor of York v. Pilkington*, 1 Atk. 282.

See discussion of this matter by *Perley, Ch. J.*, in *Abbot v. Johnson*, 32 N. H. 9, 27-29, and authorities there cited and approved.

The position taken by the demurring defendants, "that vexatious litigation and multiplicity of suits cannot arise until the complainant has established his rights by one suit at law," is untenable. It is only true of another and far different class of cases, brought to "restrain the defendant from reiterating an unsuccessful claim," to prevent the "vexatious recurrence of litigation."

Eldridge v. Hill, 2 Johns. Ch. 281, Kent, *Chancellor*, and cases last cited.

And every case the demurring defendants cite is a nuisance case of this class, praying for an injunction, to wit:

Bean v. Coleman, 44 N. H. 539, 547; *Coe v. Winnepissogee Lake Cotton & W. Mfg. Co.* 37 N. H. 263, 264, 267; *Burnham v. Kempton*, 37 N. H. 485, 492; 44 N. H. 94, 95, 101.

In the last case, *Sargent, J.*, holds that a right at law must be first established in that class of cases, but says: "There are exceptions to this rule, as where the right is admitted, or the facts are all admitted, so that the court can determine, from the admitted facts, whether it

is a case of nuisance or not." The plaintiff's bill shows a right of action in each unpaid mortgagee; it alleges that all the mortgages in question were "duly executed, acknowledged, and recorded;" that the mortgage notes were all for "value received;" and that the "same have never been paid and are still due." And the demurrer conclusively admits the truth of these allegations. "The questions on the demurrer are to be decided by the allegations of the bill itself, taking them to be true."

Blodgett, J., delivered the opinion of the court:

The plaintiff's bill is a reasonably necessary process and convenient procedure for speedily and economically establishing her rights and furnishing their remedy, and as such may be maintained by her (*Webster v. Hall*, 60 N. H. 7; *Metcalf v. Gilmore*, 59 N. H. 417, 434); and, apart from these considerations, it cannot well be doubted that the bill presents other sufficient grounds for equitable jurisdiction. But, although equity has jurisdiction, the validity of the plaintiff's mortgage on an issue of fraud is a question properly determined at law; and the plaintiff may therefore file a declaration in trespass against the officer, as an amendment of her bill. When that is tried and determined at law, there may be work of adjustment under the bill.

Exceptions overruled.

Smith, J., did not sit; the others concurred.

Re Petition of SHULTZ.

It is not necessary that two of the five years' residence required by U. S. Rev. Stat. § 2167, in the case of a minor alien should occur after the applicant for naturalization has reached the age of twenty-one years.

(Merrimack—Decided March 11, 1887.)

PETITION for naturalization. *Granted.*

The applicant was born a German subject, June 24, 1865, and came to this State when five years of age, where he has ever since resided. He made oath to his application October 29, 1886, having never filed any previous declaration of intention to become a citizen. For the past eight years it has been his intention to become a citizen of the United States. The question was reserved whether he is entitled to be naturalized before arriving at the age of twenty-three years.

No counsel.

Allen, J., delivered the opinion of the court:

By the general law of the United States (Act of Congress, April 14, 1802; U. S. Rev. Stat. § 2165) it is provided that an alien may be admitted to become a citizen of the United States, having first declared on oath before a United States court, or a court of record of any State having a common-law jurisdiction, two years at least prior to his admission, that it is *bona fide* his intention to become a citizen, and to renounce forever all foreign allegiance. In two

years after making such declaration, and after a residence of five years in the country and of one year in the State where the court is he may be admitted to citizenship.

Rev. Stat. § 2167, is: "Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of § 2165; but such alien shall make the declaration required therein at the time of his admission; and shall further declare on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his *bona fide* intention to become a citizen of the United States, and he shall in all other respects comply with the laws in regard to naturalization."

To enable an alien to become a citizen under the provisions of this section, it is necessary that, at the time of his application and admission, he shall be twenty-one years of age; that he has resided in the United States five years, of which three years must have been the last years of his minority; and he must satisfy the court of his intention, in good faith, during the preceding two years, to become a citizen. The other condition existing, it may be done any day after the applicant arrives at the age of twenty-one years, without his having made the previous declaration. 2 Kent, Com. *65. A construction of the statute that would make a residence of two years after he arrives at the age of twenty-one necessary would be in conflict with the language of the section, which provides that he may be admitted to citizenship "after he arrives at the age of twenty-one years." The condition of a five years' previous residence, including three years of minority, is not, if the whole five years is during minority and immediately precedes the arrival of majority. If there has not been five years of continuous residence on reaching the age of twenty-one, the application cannot be entertained until that period shall have elapsed. In all cases where the applicant is of the age of twenty-one years or more, and has resided in the United States for a period of five years or more, continuously, of which three years at least were during his minority, he is entitled to be admitted a citizen on taking the required oaths, without having, two years previously, made and filed his declaration of intention to become a citizen.

Section 2167 was enacted in 1824 as an amendment of the general statute upon the subject, and was intended by Congress as a benefit to a class of aliens resident in the country as minors for three years or more, by enabling them to obtain the privileges of citizenship "on arriving at the age of twenty-one years" (the age at which native citizens come to the enjoyment, very generally, of civil privileges), if at that time there should have been a residence of five years. The legislative intention would be defeated if two of the five years must be after the applicant has arrived at his majority. He could as well make his declaration of intention under

oath, and be admitted at the same time he would be without having made his previous declaration; and upon such a construction, the particular benefit intended would be lost, and the amendatory statute without avail and unnecessary.

The petitioner being more than twenty-one years of age, and having resided continuously in the country for more than five years, of which more than three years was during his minority, and having resided in this State for more than one year immediately prior to the application, is entitled to be admitted a citizen of the United States.

Petition granted.

Bingham, J., did not sit; the others concurred.

Town of CAMPTON

Towns of PLYMOUTH AND HOLDERNESS.

Towns which have been required to contribute to the construction of highways and bridges in another town, under Comp. Stat. chap. 55, § 1, may be **required to contribute towards repairing** the same highways, and rebuilding the same bridges, under Gen. Laws, chap. 72, § 4; and the **county commissioners** may also **fix** the ratable contribution which such towns shall make for the future repair and maintenance thereof.

(Grafton—Decided March 11, 1887.)

CASE reserved. Judgment for plaintiff.

Petition praying that the towns of Plymouth and Holderness be ordered to pay a portion of the expense of rebuilding a bridge and repairing a highway in Campton, and of hereafter keeping the same in repair. The highway in question was laid out by a judgment upon a report of the county commissioners at the May Term, 1868. In that report the commissioners estimated the expenses of making said highway at \$5,500. The commissioners, upon due process to Plymouth and Holderness, found that the last-named towns would be greatly benefited by the highway, and that Campton would be excessively burdened by defraying all the expenses of its construction; and they accordingly apportioned said expenses, and directed that Plymouth should pay \$2,100, and Holderness \$1,400 thereof, which was incorporated into their report, and judgment rendered accordingly. Plymouth and Holderness paid the sums named above towards the construction, according to the report and judgment. A substantial part of the expense of building the new highway was the erection of a bridge across the Pemigewasset River, near Livermore's Falls. The petition then alleges that the bridge there erected was made of wood, and that on May 20, 1884, the same became decayed, insufficient, and out of repair; and that thereupon Campton rebuilt it of iron, at an expense of \$7,100, which expense is and will be excessively burdensome to Campton; and that Plymouth and Holderness are greatly benefited by it and by said highway, and ought, and are legally bound, to contribute towards said expenses, and to the

maintenance of said highway and bridge hereafter.

This petition was referred to the county commissioners at the November Term, 1885. At the hearing before the commissioners February 16, 1886, the towns of Plymouth and Holderness appeared and objected to the jurisdiction of the commissioners in the premises, and denied that any legal ground for relief is shown by the petition.

"First, because the petition of Joseph Holmes and others for the highway and bridge originally laid out and built was filed in court, and all proceedings thereon held under Comp. Stat. chap. 55, § 1, then in force; that under this statute the towns of Plymouth and Holderness had no voice in the laying out of said highway, and the judgment of the commissioners imposed all the burdens upon said towns that the law at that time contemplated or allowed; and that, upon the discharge of such burden, their liability thereafter to render contribution for rebuilding or repairing said highway forever terminated.

"Second, because Gen. Laws, chap. 72, § 4, under which the plaintiff seeks relief, applies only to cases where the towns benefited have not contributed to the original construction of the highway, and was not intended to apply to towns that had paid contribution under Comp. Stat. chap. 55, § 1; and any attempt to apply such construction to said statute would give it a retrospective action.

"Third, because the judgment on the afore-said petition of Joseph Holmes and others, that Plymouth should pay \$2,100 contribution, and Holderness \$1,400, towards the highway in question, was an adjudication of the whole matter of contribution between the towns of Campton, and Plymouth, and Holderness; and the satisfaction of such judgment, as admitted in the plaintiff's petition, is a bar to any subsequent petition for aid in reference to the same highway."

The commissioners reported that, in their opinion, Plymouth should pay \$2,000 towards rebuilding the bridge and repairing the highway, and three eighths of the expense of hereafter keeping the highway and bridge in repair; and that Holderness should pay \$500 towards rebuilding the bridge and repairing the highway, and one eighth of the expense of hereafter keeping the same in repair.

The defendants moved to dismiss the petition and all proceedings thereunder, and the questions thereupon arising were reserved for the opinion of the court.

Messrs. Chase & Streeter and Page & Story, for plaintiff.

Messrs. Burleigh & Adams, for Plymouth.

Messrs. Bingham & Mitchell and C. A. Jewell, for Holderness.

Blodgett, J., delivered the opinion of the court:

At the time the proceedings for the highway now in controversy were commenced, the statute authorized the commissioners to apportion part of the expense of its construction to other towns in the vicinity benefited thereby, but gave them no power to award contribution for its future maintenance and repair. Comp. Stat. chap. 55, § 1.

Under this statute the defendants were found liable to contribution, and the commissioners in their report fixed the amounts they should respectively pay towards the construction of the highway. Having done this, the duty of the commissioners was performed, and their power exhausted; and there being no facts tending to show that they violated their trust by increasing the award against either of the defendants, on account of the expense of the subsequent maintenance of the highway, and the legal presumption also being to the contrary, the judgment upon the report is to be taken as an adjudication that the defendants were assessed agreeably to the statute, and not otherwise.

The defendants' contribution to the original construction of the highway not being a bar to the present petition for rebuilding and keeping it in repair, and the power of the commissioners to impose contribution upon them for rebuilding being expressly conferred by statute, the only matter remaining to be considered is that part of the report which requires the defendants to contribute to its repairs in the future.

In respect of future contribution, the authority of commissioners primarily rests upon Gen. Laws, chap. 72, § 4, which provides that "when the expense of rebuilding or repairing a highway would be excessively burdensome to the town in which it is situate, and another town is greatly benefited by such highway, the commissioners, on petition to the supreme court, and proceedings thereon, as in the case of laying out a highway, may order a portion of the expense to be paid by such other town." In express terms this statute does not authorize commissioners to award contribution for the future, but nevertheless we think it is to be so construed. There is certainly nothing in its language showing that the legislative purpose was to restrict its operation to immediate repairs rather than to those certain to be required sooner or later in the ordinary course of events. The phrase "rebuilding or repairing a highway," as used in the section under consideration, as well as in the preceding § 1 and the title of the chapter itself, fairly means keeping a highway in repair in view of its continuing necessities and the continuing duty of the towns benefited by it, as contended by plaintiff's counsel; and therefore repairing is not to be construed as limited to one point of time, but as relating to the future as well as to the present. The same conclusion follows from the application of the familiar principle in statutory construction that all statutes upon the same subject-matter are to be considered in interpreting any one of them. The substantial part of this highway is a bridge, and when this is the case, the last clause of chap. 68, § 12, provides that other benefited towns than the one in which it is situate shall at all times contribute their proportion towards its repair and maintenance, to be determined by the commissioners at the time of laying out the highway. It is true that this clause is directly applicable only to highways laid out subsequently to its adoption; but it is nevertheless important in its relation to the present case as showing that the legislative purpose then was to compel all benefited towns to contribute proportionally towards the future maintenance of highways

burdensome to the towns where situate, and in which the building of bridges constituted a substantial part of the expense of their construction.

This material change in the law first appeared in the Revision of 1867. The effect was manifestly to discriminate between precisely similar cases, and make the matter of future contribution depend entirely upon the point of time when the petition for such a highway happened to be filed. For example: if the original petition for this highway had been filed at the November Term, 1867, rather than at the May Term, 1866, when it was actually filed, it would have clearly come within the express terms of the clause referred to, although it is equally clear that the subject-matter of the petition came within the reason and policy of the statute no less in the former year than in the latter. To provide against and remedy the inequality and injustice that would otherwise necessarily result in this class of cases, the Legislature enacted § 4 at the same session the bridge clause was enacted, and thereby put cases arising before the adoption of that clause on the same footing with those arising after its adoption, and also went one step further, and extended the right of future contribution to all cases of burdensome highways, whether from bridges or otherwise, arising before the adoption of the clause and not included in it, as well as to cases arising after its adoption.

The commissioners did not exceed their authority in apportioning part of the future maintenance of the highway to the defendants; but if time brings changes that may make the apportionment inequitable, it may be altered by the court upon proper proceedings. Chap. 68, § 12; chap. 72, § 4, *supra*.

Judgment for the plaintiff on the report.

Allen, J., did not sit; the others concurred.

Lowell EASTMAN

v.

City of CONCORD.

A court once regularly convened continues open until actually adjourned.

(Merrimack—Decided March 11, 1887.)

ON defendant's exceptions. *Overruled.*
Petition for leave to file the statement required by Gen. Laws, chap. 75, § 7, with respect to damage suffered by reason of a defective highway. The hearing was had April 28, 1886, and at its close the presiding justice announced his decision granting the petition, in the presence and hearing of counsel; and on the next day entered with the clerk an order accordingly, whereby leave was granted to file the statement on or before June 1, 1886. April 28 the court took a recess until May 8, when another justice came in and presided until May 25, at which time the final call of the docket was had, and it was then announced that all cases were finally disposed of except *State v. Coffran*; and that judgments not then already entered would be entered up as of that day; and this plaintiff had judgment for costs in this proceeding dated that day. The court then

took a recess until June 7, for the trial of *State v. Coffran*. The trial of that case before another justice of the court occupied until June 11, when the court was adjourned without day. June 4 the plaintiff's counsel moved the justice before whom the petition was heard that the time for filing the petition be extended. The defendant's counsel were present and objected; but the motion was allowed, and the time for filing the required statement extended to June 15, to which the defendant excepted.

Messrs. Leach & Stevens, and Chase & Streeter, for defendant.

Messrs. Albin & Martin, for plaintiff.

Blodgett, J., delivered the opinion of the court:

A court held by adjournment is not a new term, but a continuance of the former term (*Commonwealth v. Norfolk*, 5 Mass. 435, 436); and a court once regularly convened continues open until actually adjourned (*People v. Central City Bank*, 53 Barb. 412). Keeping in mind these propositions, the modification of the original order was made in term time, and this bill of exceptions presents nothing requiring extended consideration.

When the order granting the petition was made and filed, it became both a judgment and a record of the court; and the power of courts, for sufficient cause, to set aside or modify their judgments, and to amend their records, is too well established in this jurisdiction to be now regarded as an open question. *Mullin v. Mullin*, 60 N. H. 16; *Clough v. Moore*, 63 N. H. 111, 112; *Wiggin v. Veasey*, 43 N. H. 313, 314. Whether there was sufficient cause to require an extension of the time originally prescribed for the filing of the requisite statutory statement was a question of fact for the trial court (*Clough v. Moore*, 63 N. H. 112), and having been determined affirmatively by that court, the propriety of the exercise of its power to modify the order accordingly is not subject to exception.

Exceptions overruled.

Smith, J., did not sit; the others concurred.

George HILLIARD

v.

Oscar BOTHEL and Trustee.

A loan by the plaintiff of his own check, which the borrower uses as money, is like the loan of money. It is not necessary that the check should be paid by him before commencing a suit to recover the amount of it from the borrower.

(Cooe—Decided March 11, 1887.)

CASE reserved. *Judgment for plaintiff.*

Assumpsit. Facts found by a referee. September 13, 1884, the plaintiff loaned the defendant his check on the Littleton National Bank for \$235, upon the agreement that the defendant should, on the following Wednesday, deposit in said bank the amount of the check to the plaintiff's credit; and on September 30 loaned him another check of the same descrip-

tion for \$225, with a like agreement. The defendant did not deposit the amount of the checks according to his promise; and when they were presented for payment at the bank, he had drawn upon his account so that he had not funds there to pay them. The \$235 check was negotiated by the defendant to one Stevens as collateral security for cattle which he bought from Stevens, with the request that he would hold it for a few days. The defendant afterwards paid Stevens \$100 towards his indebtedness, leaving an unpaid balance of \$131, which sum the plaintiff paid Stevens to give up his check. Stevens had at that time been trusted in a suit against the defendant, and the plaintiff was obliged to pay and did pay \$35 to procure the discharge of the trustee process. October 10, the plaintiff, learning that the defendant had failed, presented the check for payment, which was refused. The \$225 check was used by the defendant in his business, and reached the bank in due course, when it was protested for nonpayment, of which the plaintiff received notice October 4. The plaintiff afterwards, on the day the trial before the referee commenced, paid the amount of that check to a *bona fide* holder who took it from the defendant. This suit was commenced October 6, 1884. An item of \$66 in the plaintiff's specification, with interest since October, 1884, was found to be due. Two items amounting to \$10 accrued since the date of the writ. The question reserved was the amount for which the plaintiff should have judgment.

Messrs. Aldrich & Remick, for plaintiff.

The only question that can be legitimately raised is whether the loan of the check was a good consideration for the promise to pay. All of the authorities show it to be both a legal and adequate consideration.

Pars. Cont. 431, 436; 1 Add. Cont. (Morgan's ed.) §§ 8, 9; 2 Kent, Com. 464, 465; Dan. Neg. Inst. § 188.

In this case no question of adequacy can arise, because the defendant received from the plaintiff property equal in value to the amount he promised to pay, and had actually realized thereon prior to the suit.

Messrs. Drew & Jordan and W. & H. Heywood, for defendant:

The plaintiff, who was the drawer of these accommodation checks, could not maintain an action upon the implied obligation until he had been damaged by being compelled to pay them. This rule of law was not changed or varied by such an implied obligation becoming an express contract at the time the checks were given. The transaction did not essentially differ from the common everyday occurrences of procuring checks to be used, but not to be presented to the bank for days, or perhaps weeks.

This plaintiff occupies the position of surety for the defendant Bothel. The law governing the right of action by a surety, on account of the nonpayment of negotiable paper by his principal, obtains and controls here.

2 Dan. Neg. Inst. § 1204; Mayne, Dam. (Wood's ed.) §§ 419, 429; *Hoyt v. Wilkinson*, 10 Pick. 31; *McDonald v. Magruder*, 3 Pet. 479 (28 U. S. bk. 7, L. ed. 744).

Blodgett, J., delivered the opinion of the court:

There can be no recovery upon the two items amounting to \$10, which did not become due until after the action was commenced. An action does not lie until a cause of action has accrued.

As to the checks, the case stands as it would if the plaintiff had loaned the defendant a like amount of money. Having treated and used the checks as money, the defendant is chargeable for them as money. *Mathewson v. Powder Works*, 44 N. H. 289, 291, 292, and cases cited; 4 Wait, Act. & Def. 470, 472, 474. In this view it is immaterial whether the plaintiff paid the checks before or after suit. They were simply evidence of the defendant's indebtedness to him, which might be procured after suit as well as before, without in any way affecting the rights of either party. The test is not the time when the checks were actually paid, but whether the loan of them to the defendant, upon the agreement and under the circumstances detailed in the referee's report, gave the plaintiff a cause of action against him at the date of the writ; and that it did, we are entirely satisfied.

Judgment for the plaintiff accordingly.

Clark, J., did not sit; the others concurred.

SAINT MARY'S BENEVOLENT ASSOCIATION

v.

Dennis J. LYNCH *et al.*

The treasurer of a benevolent association is not allowed for expenses incurred by him in carrying out an illegal vote to dissolve the association; nor for the costs and expenses of an equity suit brought by members to restrain him from carrying into effect the illegal vote.

(Rockingham—Filed March 11, 1887.)

CASE reserved. *Set-off disallowed.*

Bill in equity. The facts were found by a referee, as follows:

"This is a bill in equity for an accounting, filed December 31, 1884; and the referee finds that the defendant Lynch was then indebted to the plaintiff corporation in the sum of \$80, unless the court shall find otherwise upon the following statement of facts:

"In 1882 said Lynch was treasurer of Saint Mary's Benevolent Association, a charitable society consisting of about thirty members. The Constitution provided that the association should never be dissolved while ten members were willing to continue it. At a meeting in September, 1882, nineteen members being present, it was voted to dissolve the society, sell its property, pay its debts, and divide the balance, including the funds of the society deposited in the Portsmouth Savings Bank, among its members; and a committee, of which said Lynch was one, advertised the property for sale, and said Lynch withdrew the money on deposit.

"October 4, 1882, fifteen members of the association filed their bill in equity alleging the illegality of the proceedings at said meeting, and praying for an injunction against the sale

or division of said property or funds, and for a return to the bank of the funds withdrawn by said Lynch. The injunction sought was granted, and at a hearing on the bill at the October Term, 1883, a decree was entered that Lynch pass over the bank book showing deposit in Portsmouth Savings Bank to the treasurer of the corporation (his successor in office), with costs for plaintiff. Lynch defended the suit in good faith, and alleges that he has expended, in making preparations to sell the property so voted and defending said suit, more than \$80, and claims to be allowed for the same. Plaintiff claims that he cannot be so allowed, because the court, in ordering a decree for plaintiff must have found the proceedings of the meeting illegal.

If the amount thus expended by Lynch can be allowed in set-off to the amount due from him to the plaintiff corporation, the case is to be recommitted to the referee to find the amount that can be thus allowed."

By agreement of parties, the questions raised by the report were reserved.

Mr. James W. Emery, for plaintiff.

Messrs. Frink & Batchelder, for defendant Lynch.

Mr. Calvin Page, for defendant Conlon.

Clark, J., delivered the opinion of the court:

In 1882 the St. Mary's Benevolent Association, at Portsmouth, of which the defendant Lynch was treasurer, consisted of about thirty members. In September, 1882, a special meeting of the association was called by the president, on the written request of five members, in conformity with the provisions of the Constitution; and notice given by publication in the two daily papers in the city of Portsmouth. The object of the meeting was not specified in the notice. The president presided at the meeting, nineteen members being present; and it was voted to dissolve the association, sell its property, pay its debts, and divide the balance, including the funds of the association in the Portsmouth Savings Bank, among its members; and a committee, of which Lynch was one, was appointed to carry the vote into effect. The vote for dissolution was passed by ten voting in the affirmative, being a majority of the members present. The Constitution contained a provision that the association should not be dissolved while ten members were willing to continue it; and the president, at that time, in the presence of Lynch, gave notice that if ten members were willing to continue the association, they would have the regular monthly meeting. The committee proceeded to advertise the property for sale, and Lynch withdrew the money on deposit in the bank. October 4, 1882, fifteen members of the association filed a bill in equity for an injunction against the sale or division of the property or funds, alleging the illegality of the vote of dissolution; and at the October Term, 1883, the injunction was granted, with costs for the plaintiffs. Lynch defended the injunction suit; and he now claims to set off against his indebtedness to the association the expenses incurred by him in making preparations for the sale of the property, and the costs and expenses in the injunction suit.

The set-off cannot be allowed. The notice of the special meeting contained no intimations of a purpose to act upon the question of winding up the association, and the vote to dissolve it and sell its property was unauthorized. The members of the association were entitled not only to notice of the time and place of the meeting, but of the business proposed to be transacted, especially if the business was of an unusual character; and the vote was not binding upon the absent or dissenting members. They had no notice of a meeting to act upon the question of dissolving the association. Nor would the vote have been binding if the notice had been sufficient. By the provisions of its Constitution, the association had no power to dissolve while ten members were willing to continue it: and it appears that at the September meeting, after the passage of the vote of dissolution, the president gave notice in the presence of Lynch that the regular monthly meeting would be held if ten members were willing to continue the association; and that as early as the next day ten members signed a paper protesting against the proceedings of the meeting, and stating their willingness to continue the association. Upon these facts the vote to sell the property was a nullity. It conferred no authority upon the committee appointed to carry it into effect; and the expenses incurred by Lynch in making preparations for the sale were not a legal claim against the association. Neither were the costs and expenses of the injunction suit chargeable to the association. It was prosecuted by fifteen members, and a temporary injunction was served on Lynch the 2d day of October. There is no evidence of any request or authority from the association to contest the suit, and there is no ground for charging the association with the costs and expenses of it.

Set-off disallowed.

Blodgett, J., did not sit; the others concurred.

Charles W. DURRELL *et al.*

v.

Thomas D. EMERY.

An action of **assumpsit for use and occupation** cannot be maintained when there is no contract or promise, express or implied, to pay for the occupation.

(Belknap—Filed March 11, 1887.)

ON defendant's exceptions. *Sustained.*

Assumpsit for use and occupation from October 1, 1883, to July 1, 1885.

Thomas Durrell devised the premises to the plaintiffs, and died May 9, 1883, at the age of 85 years. The plaintiffs introduced evidence tending to show that, July 1, 1885, the defendant was, and for a year or two had been, in occupation of the premises, and that on that day they demanded rent, which the defendant refused to pay. The defendant moved for a nonsuit. It appearing that the principal question of fact in dispute was whether G. Burleigh paid to Thomas Durrell, November 7, 1882, \$300 for five years' rent in advance, the motion was denied for the purpose of trying that question, and the defendant excepted.

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Burleigh owned a building on the land, and for many years paid to Thomas Durrell a monthly ground rent of \$1.50 to \$4, until 1882, and of \$5 during that year until November 7. The defendant introduced evidence tending to show that on that day Burleigh paid to Durrell \$300 for the ground rent for five years from that date, and took his receipt for the same. Whether Burleigh paid that sum to Durrell was the only question submitted to the jury, who found for the plaintiffs.

Burleigh occupied the premises until the fall of 1883, when the defendant took possession under a contract (the particulars of which did not appear) with Burleigh, of whom, April 10, 1884, he bought the building, together with the right to occupy the premises, free of ground rent, until November 7, 1887.

There was no evidence of any contract or of any communication whatever between plaintiffs and defendant, except as before stated.

Messrs. E. A. & C. B. Hibbard, for defendant:

It is evident that there was no contract or promise, express or implied, to pay for the occupation, and no occupation by the permission of the plaintiffs. Therefore the defendant is not liable to them for use and occupation.

Austin v. Thomson, 45 N. H. 113, 120; *Sar. Bank v. Gatchell*, 59 N. H. 281; *Barron v. Marsh*, 63 N. H. 107; *Wiggin v. Wiggin*, 6 N. H. 298; *Allen v. Thayer*, 17 Mass. 299; *Taylor, Land. & T. § 636*; 2 Saund. Pl. & Ev. § 1172; 1 Chitty, Pl. 18th Am. ed. 105, note 7; *Allen v. Pickering*, 9 N. H. 494; *Codman v. Jenkins*, 14 Mass. 98; *Boston v. Binney*, 11 Pick. 1; *Patton v. Deshon*, 1 Gray, 325, at 330; *Flood v. Flood*, 1 Allen, 217; *Knowles v. Hull*, 99 Mass. 562.

The various English statutes on the subject which have been adopted here (see 21 N. H. 236; 24 N. H. 253) enable a grantee or mortgagee of the reversion, including an assignee of a term of years, when that is the former landlord's estate, to succeed to the landlord's place and rights.

Stat. 1865, now Gen. Laws, chap. 250, § 22, merely enables the landlord's grantee to proceed under the Landlord and Tenant Act for the ejectment of a tenant, and has no bearing on this case; nor has any other statute.

No brief filed for plaintiffs.

Clark, J., delivered the opinion of the court:

There being no evidence of any contract, express or implied, between the plaintiffs and the defendant, to pay for the occupation of the premises, or that the relation of landlord and tenant ever existed between them, the action cannot be maintained, and the motion for a nonsuit should have been granted.

Exceptions sustained.

Carpenter, J., did not sit; the others concurred.

Emma McCORMICK

v.

Walter TOWNS, *Def't.*, Amoskeag Mfg. Co., *Trustee*, and Horace E. Stevens, *Claimant*.

An order for an **assignment of wages** already earned, otherwise valid, is not

rendered invalid by an understanding that the employer is to retain the amount due him from the assignor for house rent and fuel furnished prior to the date of the order or assignment.

(Hillsborough—Filed March 11, 1887.)

ON plaintiff's exceptions. *Overruled.*

Foreign attachment. Issue between the plaintiff and claimant.

Facts found by the court:

When the writ was served on the trustee January 27, 1885, there was \$22.50 due from it to the defendant for his labor during the preceding month. On the same day and before the service of the writ, an order in writing, signed by the defendant, was left with the trustee directing it to pay "to Horace E. Stevens \$50, or the amount due me for labor."

When this order was given, Towns owed Stevens \$51.81 for groceries; and this indebtedness was the consideration for the order. The purpose of Stevens in taking the order was to obtain payment of his debt from Towns; and it was not his purpose to hinder, delay, or defraud other creditors of Towns, although he knew the result of his taking such orders would be to prevent other creditors from collecting their claims by trustee process. The court ordered that the trustee be discharged, and the plaintiff excepted.

Messrs. Osgood & Prescott, for plaintiff.

To justify a court in inferring that an instrument or conveyance was made with fraudulent intentions, when no fraud in fact is proved, two things at least must concur: (1) there must be creditors known to the parties; (2) the necessary consequences of the transaction must be to produce such delay or hindrance. These this case finds.

Pope v. Wilson, 7 Ala. 690; *Green v. Tanner*, 8 Met. 411; *Partelo v. Harris*, 26 Conn. 480; *Bancroft v. Blizard*, 18 Ohio, 80; *Chouteau v. Sherman*, 11 Mo. 385.

The case finds that the claimant received from defendant orders on defendant's earnings daily, and that these were given and taken with the understanding that defendant should have his house rent and coal paid out of the earnings so assigned,—creating a secret trust,—which must make the order or assignment void as to creditors, and must be so pronounced by the court without further inquiry.

Coburn v. Pickering, 3 R. 415; *Paul v. Crooker*, 8 N. H. 283; *Winkley v. Hill*, 9 N. H. 81-84; *Coolidge v. Melvin*, 42 N. H. 516.

Messrs. Burnham & Brown, for claimant.

Clark, J., delivered the opinion of the court:

The order being given upon a sufficient consideration and without any fraudulent intent, the fact that the claimant knew that it would prevent other creditors of the defendant from collecting their debts by trustee process did not invalidate it. *True v. Congdon*, 44 N. H. 48. It is contended that the assignment was void as to creditors because there was an understanding that the defendant should have his house rent and coal paid for out of the earnings assigned, and that this was a secret trust fraudulent as to creditors. But it appears that the house rent

and coal were furnished by the trustee; and if there was an agreement that the trustee should retain the amount due it out of the defendant's wages, against the claimant's assignment, it was merely a recognition of its legal right to set off any indebtedness of the defendant existing at the date of the assignment, and did not invalidate it. The assignment was not of wages to be earned in the future. It was an order for wages already earned. It is found as a fact that it was given upon sufficient consideration, and was not made for the purpose of hindering, delaying, or defrauding creditors. It was prior to the service of the writ upon the trustee, and was a valid assignment.

Exceptions overruled.

Smith, J., did not sit; the others concurred.

STATE of New Hampshire

v.

DEMERRIT.

An indictment against the clerk of a school district for not recording the warrant for an annual meeting of the district, and discharging other duties of his office with respect to such meeting, must show that a warrant for the meeting was issued and given to him, as required by the statute.

(Coos—Filed March 11, 1887.)

ON defendant's demurrer. *Sustained.*

Indictment under Gen. Laws, chap. 262, § 13, charging the defendant with wilfully neglecting the duty of his office as clerk of School District No. 1 in Erroll, in not recording the warrant for the annual meeting of the district, March 29, 1883, and in not attending that meeting, and keeping a true and attested record of its doings, etc. The defendant demurred.

Mr. J. H. Dudley, Solicitor for the State.

Messrs. Drew & Jordan, for defendant.

Clark, J., delivered the opinion of the court:

The indictment does not allege that a warrant was issued by the prudential committee for the annual meeting, or given to the clerk to be recorded (Gen. Laws, chap. 87, § 5); nor does it in any way allege that the meeting was legally called or duly held. *State v. Marshall*, 45 N. H. 281.

The clerk had no official duty to perform in connection with the meeting unless it was a lawful one. *Bish. Stat. Crimes*, §§ 832, 833.

Demurrer sustained.

Allen, J., did not sit; the others concurred.

James B. SPAULDING

v.

Town of NORTHUMBERLAND

The plaintiff agreed to indemnify the town against loss, if it would release certain goods attached in a suit upon a collector's bond, and permit him to satisfy an execution which he held

against one of the defendants in that suit, by levy upon the goods so released. The town having obtained judgment, levied its execution, by advice of counsel, on the homestead place of one of the defendants, disregarding a demand that a homestead be set out therein, whereby the whole levy failed. After this levy the selectmen, against the plaintiff's objection, gave up to the collector the tax lists and warrants which they had before held as security for the default of the collector (upon which there were sufficient collectible taxes due to satisfy the remainder of their execution), to be collected for the benefit of his sureties. Held, that the plaintiff was not entitled to an injunction to restrain the town from proceeding with a suit at law to enforce performance of the indemnity agreement.

(Coos—Decided July 29, 1886.)

ON report. *Bill dismissed.*

Bill in equity for an injunction to restrain the further prosecution of an action at law upon the plaintiff's agreement to indemnify the town of Northumberland against loss on account of releasing an attachment.

Facts found by the court.

About the 1st of April, 1877, Charles Cobleigh, collector of taxes of Northumberland for the years 1870, 1871, 1872, and 1874, being in default in the performance of his duties as collector, went away out of the State, with no definite intention as to returning, leaving his tax lists and warrants with directions that they should be delivered to the selectmen, if they called for them. The selectmen, understanding that Cobleigh was in default, and that his return was uncertain, called for and took possession of the tax lists and warrants, April 2, 1877, and April 7, 1877, caused two suits to be commenced upon the collector's official bonds, —one against Charles Cobleigh, Wayne Cobleigh, and W. A. Little, and the other against Charles Cobleigh and Wayne Cobleigh; and in both suits an attachment was made of all the real and personal estate of Wayne Cobleigh. At that time the board of selectmen consisted of the plaintiff, John Eames, and Frank E. Wood. After an absence of thirteen days Charles Cobleigh returned, and the selectmen offered him the tax lists and warrants, and asked him if he was willing to take them and collect the taxes uncollected, and he declined to take them. When the selectmen took possession of the tax-books they considered them to be of value, and to some extent security for the uncollected taxes due the town; and when they offered to return them to Charles Cobleigh, if he would collect the taxes, they understood he was to collect them for the town. In the suits upon the bonds of the collector, judgments were recovered at the October Term, 1879, exceeding \$2,000, as the amount of the uncollected taxes which might have been collected by due diligence on the part of the collector.

September 29, 1877, the plaintiff, being the owner of an execution against Wayne Cobleigh for about \$300, made an agreement with the other selectmen, Eames and Wood, that his

execution might be satisfied by levy upon a portion of the goods of Wayne Cobleigh, then under attachment in the town suits, upon condition that he would indemnify the town against loss by reason of releasing the attachment upon the goods levied upon; and thereupon executed and delivered a paper stipulating that, "whereas, the town of Northumberland has released from attachment, on certain writs against Wayne Cobleigh and others, sufficient of the goods so attached to satisfy a certain execution against said Cobleigh for about \$300, I hereby undertake and agree to save the said town harmless from any and all loss, cost, or damage, which may accrue to them or the selectmen from having so released said goods." The paper was under seal and dated September 29, 1877. The plaintiff's execution was thereupon satisfied by a levy and sale of goods so released to the amount of \$181.72.

The judgment against Charles Cobleigh, Wayne Cobleigh, and W. A. Little was for \$1,714.88. An execution issued upon this judgment was returned satisfied in full out of the estate of Wayne Cobleigh, by the application of \$649.87, proceeds of personal property attached and sold on the writ, by set-off of a piece of land appraised at \$75, and by set-off of $\frac{1}{10}$ of the homestead place of said Wayne Cobleigh in Groveton village, —said homestead place being appraised at \$1,100. Seisin and possession of the real estate set off were given to the town, and the execution and levy were duly recorded in the Coos registry of deeds.

February 27, 1880, and before the completion of the levy, Cobleigh and his wife made a written request and demand on the officer holding the execution to have a homestead in the premises levied upon, set out, and assigned to them. This request was refused, and the levy upon the homestead place was made, disregarding the application for the assignment of a homestead. July 6, 1877, after the attachments in the Northumberland suits, Wayne Cobleigh executed a mortgage of his homestead place to Kensell, Tabor & Co., of Portland, Maine, to secure his note of that date for \$397, payable in one year; and his wife joined in the execution of the mortgage, both releasing their homestead rights. April 2, 1880, Kensell, Tabor & Co. commenced a foreclosure of this mortgage by bill in equity against Wayne Cobleigh and his wife and the town of Northumberland; and at the October Term, 1882, it was adjudged and decreed that the levy of the town of Northumberland upon the homestead place, made in disregard of the application of the debtor and his wife for an assignment of a homestead, was void.

Since the levy of the town executions, Charles Cobleigh, Wayne Cobleigh, and W. A. Little have had no property open to attachment or levy; and the town, having failed to satisfy its judgments in full out of the property attached, by reason of the failure of the levy upon the homestead place, called upon the plaintiff to make good the deficiency to the extent of the value of the goods released and applied on his execution, and, upon his refusal, commenced an action upon the agreement of September 29, 1877; which is the action the plaintiff now seeks to have enjoined.

The plaintiff's contention is that the action at

law should be enjoined and the written agreement surrendered to him, because, by disregarding the demand for a homestead, the sum of \$800 was lost, which might have been secured by a levy upon the homestead place after setting out the homestead demanded by Wayne Cobleigh and his wife; and the remaining \$455 of the deficiency might have been secured from the uncollected taxes on the tax-lists which remained in the custody of the selectmen until August, 1880, when they were delivered to Charles Cobleigh, against the objection of the plaintiff.

If a homestead had been set out and assigned as demanded by Cobleigh and wife, the execution of the town must have been returned unsatisfied to the extent of \$455, for want of property of the debtors on which to levy. In making the levy, disregarding the application for a homestead, the agents of the town acted under the advice of eminent counsel. When the demand for a homestead was made, the question of the right of Cobleigh and wife to a homestead was discussed, and the conclusion was that they were not entitled to a homestead, and that it was safe to disregard the demand; and in this view the plaintiff concurred. There was no negligence on the part of the agents of the town in making the levy, unless as matter of law they were chargeable with negligence by reason of not having the question of the right of homestead determined in the mode prescribed in Gen. Laws, chap. 138, § 20, before completing the levy.

About August 1, 1880, Charles Cobleigh called upon R. C. Chesman, one of the selectmen of Northumberland, for the warrants and tax-lists taken by the selectmen in April, 1877. Chesman told him he wanted time to ascertain whether it was right for him to have them. Chesman consulted the counsel for the town in the Cobleigh suits, and was advised that the best course would be to deliver the warrants and tax-lists to Cobleigh; but, on account of Spaulding's connection with the matter, he had better consult him about it, and get his consent to the surrender of the books to Cobleigh. Spaulding was not a selectman at that time. Chesman saw Spaulding, and informed him that the tax-books had been called for, and that the counsel for the town advised giving them up. Spaulding objected to their being given up until his agreement was given up. At the time the agreement was made, in September, 1877, it was the understanding that the tax-books should be held as additional security for the claims of the town until it was satisfied. Cobleigh called again for the tax-books, and Chesman delivered them to him. Chesman understood that Spaulding's objection to giving up the books was that it might increase his liability on the written agreement he had given the town, upon which he might be liable in case the Cobleighs succeeded in maintaining their claim to a homestead. He also understood that Cobleigh intended to contest the right to a homestead; but at that time he had no actual knowledge of the bill in equity filed April 2, 1880, by Kensell, Tabor & Co., against the Cobleighs and the town of Northumberland.

When the tax lists and warrants were delivered by Chesman to Charles Cobleigh, it was

understood that all taxes collected upon them would go for the benefit of Wayne Cobleigh, and would not be paid to the town. At that time Chesman, and all parties acting for the town, understood that the executions in the bond suits had been satisfied in full by levies which they supposed to be valid, upon the property of Wayne Cobleigh. When the tax-lists were delivered to Charles Cobleigh by Chesman there were upon the lists unpaid taxes that were collectible to the amount of \$800. While the warrants and tax-lists were in the possession of the selectmen no attempt was made to collect anything upon them. No steps were taken for the removal of Charles Cobleigh as collector, or for the appointment of a new collector in his stead.

The defendant claimed that, until Charles Cobleigh was removed and a new collector appointed, the selectmen had no right to retain the tax-warrants and lists; and that Spaulding, being one of the selectmen and interested individually in the matter, should have taken active measures to have Cobleigh removed, and a new collector appointed to take the tax-lists and collect them. The plaintiff claimed that the refusal of Charles Cobleigh to take back the warrants and proceed with the collection of the uncollected taxes, upon his return, amounted to a resignation of the office; but that there was no call upon Spaulding or any of the selectmen afterward to fill the vacancy, or take any active measures for the collection of the taxes, as long as it was understood that the town was secured in the proceedings upon the bonds; and that the legal wrong to the plaintiff consisted in giving up the tax-lists for the benefit of Wayne Cobleigh, against the plaintiff's objection, before it had been determined whether the claim for a homestead was sustained.

Messrs. Ladd & Fletcher, for plaintiff.

Messrs. W. & H. Heywood, for defendant.

Smith, J., delivered the opinion of the court:

1. The defendants are not, as matter of law, chargeable with negligence by reason of not having had the question of the right to a homestead determined in the mode prescribed in Gen. Laws, chap. 138, § 20, before completing the levy. Whether they were negligent in this respect is a question of fact which has been found in their favor. Furthermore, the plaintiff, at the time of the levy, concurred in the conclusion of the defendants that Cobleigh and wife were not entitled to a homestead, and that it was safe to disregard their demand. Having assented to the levying of the execution without the setting out of a homestead, he cannot now be heard to say the defendants were negligent in disregarding the demand.

2. The plaintiff contends that his agreement to indemnify the town ought not to be enforced against him because of the neglect of the selectmen to enforce the collection of the uncollected taxes. It is not contended that there was any resignation of the office of collector by Charles Cobleigh, except by implication. Whether his action in April, 1877, was a resignation of the office is a question of fact which has not been found; nor, if there was a resignation has its acceptance been found. The offer of the lists

to him in April, 1877, and his calling for and receiving the lists in August, 1880, are facts from which it would seem the parties,—collector and selectmen,—understood he had not resigned.

The selectmen at any time from and after April, 1877, might have required of him a new bond within ten days after a written notice to that effect, and upon his neglect to give one, might have removed him without a hearing. Gen. Laws, chap. 42, § 9.

It was the duty, then, of Charles Cobleigh, not having resigned nor been removed, to collect the uncollected taxes, first for the town, according to the precept of his warrants, and secondly for the benefit of his sureties in case the judgments of the town should be satisfied out of the property of his sureties. The delinquent taxpayers were not released from liability to pay their taxes, or from compulsory payment, by the fact that the defendant town recovered judgment against the collector and his sureties for the amount of the uncollected taxes. The selectmen had no power to agree that the collection might be stayed or delayed. They could neither collect the taxes themselves, nor give directions concerning their collection. They had no power over the collector, except to remove him if, in their judgment, he should become insane, or otherwise incapacitated to discharge the duties of collector, or should fail to give a new bond when required. Gen. Laws, chap. 42, § 9; *Northumberland v. Cobleigh*, 59 N. H. 250, 255.

It does not appear that the return of the lists to Charles Cobleigh in August, 1880, was wrongful.

The plaintiff's claim for relief seems to rest upon two grounds: (1) that the defendants omitted to enforce payment of the uncollected taxes, and (2) that he was prejudiced by the redelivery of the lists to the collector. The lists were delivered to Cobleigh against the objection of the plaintiff. But it does not appear how he would be benefited by having the lists lodged with the selectmen, thereby depriving the collector of the power of collecting the delinquent taxes, the lists undoubtedly growing more uncollectible with the delay. Any collections made by the collector would belong primarily to the defendants until their claims against him should be satisfied, and the balance they would hold in trust for the benefit of his sureties whose property may have been taken to satisfy his debt to the town. Any verbal understanding that the taxes should go for the benefit of Wayne Cobleigh, and were not to be paid to the town, could not control the duty of the collector or selectmen.

The defendants having released their attachment upon the plaintiff's undertaking to indemnify them, they owed him no duty except to refrain from the doing of any act which might work injury to him. If they had more than one remedy, as by extent, a suit on the collector's bond, or the appointment of a new collector (*Northumberland v. Cobleigh*, 59 N. H. 250, 255), the plaintiff's agreement gave him no right to elect which remedy the defendants should pursue. By accepting the plaintiff's agreement, the defendants did not waive or abandon any remedy given by the law to secure payment from the collector of the delinquent

taxes. If one course was more favorable than another to the plaintiff, it was incumbent on him, at least, to make his wishes known. But if there was any negligence in the selectmen in not enforcing collections prior to March, 1878, the plaintiff, as one of the board, was guilty with the others, and cannot complain that nothing was done; and it does not appear that he ever complained, after March, 1878, that the taxes were not collected, or requested his successors in office to appoint a new collector, require a new bond of Cobleigh, or take any other steps to compel payment of the uncollected taxes. Having done nothing while he was in office to compel payment of the delinquent taxes, and having made no complaint after he went out of office that nothing was done, it would seem that he was content to have nothing done.

Upon the facts reported, the plaintiff shows no cause for relief.

Bill dismissed.

Clark, J., did not sit; the others concurred.

ADAMS, *Appl.*,

v.

ADAMS *et al.*

1. A petition to the probate court for the appointment of a trustee will not be dismissed for want of service because the original petition, instead of a copy, was left with the defendant.
2. The conduct of one who is appointed in a will to an active trust concerning property and incomes, may amount to a declaration of the trust without words; and in such a case the probate court may appoint another to fill the vacancy.
3. In a petition which asks generally for the appointment of some suitable person or persons to a trust, one who has appeared in the probate court to oppose the granting of the petition need not have formal notice of a further application, in the form of a petition, which names the trustees desired.
4. An objection that the petitioners are not jointly entitled to maintain the proceeding, if available at all, must be interposed at the earliest opportunity.

(Carroll—Filed March 11, 1887.)

A PPEAL from a decree of the probate court appointing Charles F. Stone and John B. Garland trustees under the will of Isaac Adams, upon the petition of the defendants, beneficiaries of an active trust thereby created, respecting the management of a large amount of property, real and personal, and the distribution of the income to minor children. *Exceptions overruled.*

The trustees named in the will were Anna R. Adams, the testator's widow, and this appellant, Julius Adams, his son. The widow died without entering upon the duties of the trust. The appellant contested the will in a suit which

lasted about two years, and was finally determined in favor of sustaining the will; and he never undertook or offered to perform any of the duties of the trust with respect to the control, care, and management of the trust estate, or the rights of the beneficiaries under the will, up to the filing of this petition. Facts found by the court.

Mr. Julius Adams, pro se, for plaintiff.

Mr. T. J. Whipple, for defendants.

Smith, J., delivered the opinion of the court:

1. The plaintiff moves to dismiss the petition for want of service. By mistake, the original petition and order of notice, instead of copies, were left at his place of abode. The object of notice was to inform him of the pendency of the proceedings in the probate court, in order that he might appear and defend. The original papers gave him the same information that copies would. The law generally, if not always, regards the substance rather than the form of proceedings. In this case, as no possible harm was or could be done to any one by the mistake, justice does not require the dismissal of the petition for the reason assigned. A similar question was raised in several cases referred to in *Lewis v. Louges*, 63 N. H. 287.

2. The plaintiff also moves to dismiss for want of jurisdiction in the probate court. The judge of probate has jurisdiction to appoint a trustee in the place of one who declines the appointment, or is removed, or resigns; and may remove a trustee who has become "disqualified for the discharge of the trust by becoming insane, or otherwise incapable, or evidently unsuitable for the execution of the trust." G. L. chap. 205, §§ 5, 7. The plaintiff did not formally and expressly decline the trust; but his refusal for more than two years after the decease of the testator, and for more than two months after the order of the supreme court affirming the probate of the will, to take any steps looking to his appointment, or to file a bond, or take possession of and manage the trust property, or enter into any arrangement, when applied to by the beneficiaries during the contest over the will, by which they might receive an allowance from him or from the income accumulating in the hands of the executors; and his suffering the buildings to become out of repair and untenable, and the land to be sold for nonpayment of taxes, are acts inconsistent with any purpose on his part to accept the appointment and properly discharge the duties of the trust, and are equivalent to a declination of the trust. His payment of small sums of money to his brother and sister while the contest upon the will was pending was not done in the execution of the trust. He expected to be reimbursed from their shares in the estate when they should come to realize them. The money was in fact loaned. He did not at the hearing in either court claim that he had accepted the trust, and he does not now offer to accept it. A declination need not be express. It may be inferred from acts or conduct. *Cloutman v. Pike*, 7 N. H. 210; *Johnson v. Wilson*, 2 N. H. 202.

Upon a petition for his removal, the plaintiff might be removed if he had accepted, it appearing that he is an unsuitable person

for the execution of the trust. That fact is expressly found, and all the facts show it. It would be the duty of the court to remove him. His complaint here is that others have been appointed trustees instead of him. This petition proceeds upon the ground that the office is vacant. It sets forth that in and by the will "certain property, both real and personal, was devised in trust for the benefit of the petitioners and their families; and certain persons were named in said will to hold and manage the same as trustees, in a manner directed in said will, one of whom is deceased and neither of whom has been appointed to said trust; and the surviving party named in said will as trustee has failed to qualify as required by law, and is otherwise ineligible to receive the appointment; and the petitioners are *cestuis que trust* named in the will." The prayer is "that such suitable person or persons as to the court may seem just and right be appointed their trustee or trustees, upon filing such bonds as the court may order." Upon the facts shown, the judge of probate, and the supreme court at the trial term, were justified in treating the office as vacant, and in appointing another person to execute the trust in place of the plaintiff.

3. The ruling of the court at the trial term to proceed with the trial without passing upon the defendants' demurrer presents no question open to revision at the law term. That question, like many others which are mere matters of practice, is necessarily determined at the trial. *Owen v. Weston*, 63 N. H. 599. But if the question can be regarded as an open one, it is certain a trial of the case upon its merits could not injure the plaintiff; for if the trial should result in his favor, the demurrer could then be considered, the costs being regulated as justice might require; and if the result should be against him, there would be no occasion to pass upon the demurrer. An exception to a ruling by which a party is not harmed cannot be sustained.

4. The cause having been continued *nisi*, the trial court had jurisdiction of the same during the vacation following the close of the term of that court. *Stratford Bank v. Cornell*, 2 N. H. 324, 329; *Shapley v. White*, 6 N. H. 175; *State v. Rye*, 35 N. H. 375.

5. The plaintiff objected to the caption of the defendants' depositions at the time of the caption. His neglect to furnish us with the depositions, or to inform us of the nature of his objections, must be considered as a waiver of them (*Lobdell v. Marshall*, 58 N. H. 342); and his permitting the depositions to be read at the trial without objection was also a waiver of the objections taken at the caption.

6. The special petition for the appointment of Stone and Garland was in the nature of a supplemental petition, or an amendment of the original petition, and no notice was necessary to the parties who had appeared in the original petition. *Metcalf v. Gilmore*, 59 N. H. 417, 431.

7. It is no objection to the petition that the plaintiff's name was not mentioned in it as "the surviving party named in the will as trustee" who "has failed to qualify as required by law, and is otherwise ineligible to receive the appointment." The petition is somewhat inarti-

ficially drawn. But no one objects except the plaintiff, and he has not been misled. The will on file in the probate office appoints him and his mother, Anna R. Adams, trustees. That he has been informed of her death is certain from the fact that he has offered her will for probate. But if the defect can be considered material, it is one that can be cured by amendment. Neither the identity of the persons intended, nor the nature of the subject-matter of the petition would thereby be changed. *Patrick v. Cowles*, 45 N. H. 558; *Dodge v. Sickeney*, 60 N. H. 461.

8. No notice to the executors of the will is necessary. They are not interested in the subject-matter of the petition. But if it were otherwise, there would be a question whether service on one was sufficient. Personal service having been made upon the contingent remaindermen, the only other persons interested are the children of Durward Adams and Mrs. Ulman. One of the children of Mrs. Ulman is of age, and does not object. The interests of the others are represented by their parents. If a more formal appearance is necessary, Durward Adams and Mrs. Ulman, or some other suitable person, can be appointed guardian *ad litem* for the minor children, and such further hearing had, if any, as their interests may require.

9. The objection that the "original petition was not on file in the probate registry, nor was it produced at the hearing," is sufficiently answered by the fact that the plaintiff had it in

his possession at the hearing in the probate court, and did not disclose the fact.

10. If the objection that the defendants cannot maintain a joint petition might be interposed, it should have been made at the earliest opportunity.

11. The appointment of a person to administer a trust which the plaintiff has declined to accept is not an invasion of rights guaranteed to him by § 1 of the Fourteenth Amendment of the Constitution of the United States.

12. If there are other objections contained in the plaintiff's assignment of reasons of appeal, which we have not considered, they are either not supported by the facts found at the trial, or do not seem to us, in the absence of any suggestions from the plaintiff by way of brief or argument, to be of sufficient importance to merit special mention. The proceedings before the probate court are not quashed by the appeal. The whole case within the causes of appeal filed is open to the plaintiff at the hearing on the appeal; and if there were defects of form or substance in the proceedings in the probate court, they gave the plaintiff no cause for complaint, the court to which he has appealed having jurisdiction of all matters in which he complains there was error. *Campbell v. Windham*, 63 N. H. 465; *Moses v. Julian*, 45 N. H. 52, 59, 60; *Perkins v. George*, 45 N. H. 458, 454.

Exceptions overruled.

Allen, J., did not sit; the others concurred.

MASSACHUSETTS.
SUPREME JUDICIAL COURT.

Frederick SAUNDERS *et al.*

Mary M. ROBINSON, *Def't.*, and the Supreme Council of the Royal Arcanum, *Trustee.*

1. When, in the **certificate of incorporation**, members of the Supreme Council of the Royal Arcanum are referred to as those for whose **benefit the association** is intended, those who constitute the body which administers its affairs are not alone included, but all who, through the subordinate councils, become **members of the organization**.
2. The **fund** due on the certificate of a corporation organized under Pub. Stat. chap. 115, § 8, is **not subject to attachment** while it remains in the hands of the corporation.

(Suffolk—Filed March 23, 1887.)

APPEAL by plaintiffs from a judgment of the Superior Court of Suffolk County discharging a trustee. *Affirmed.*

This action was brought against Mary M. Robinson, and the writ was served on the Supreme Council of the Royal Arcanum, which answered, denying that it held any funds belonging to said Mary M. Robinson, and alleging that it had in its custody a fund of \$3,000 on account of a benefit certificate issued to Carlton W. Robinson, deceased, the late husband of the defendant, which sum, by the original certificate, was payable, one third to Mary M. Robinson, and remainder to the children of the deceased; that December 27, 1884, the said Carlton W. Robinson surrendered such benefit certificate and ordered a new one issued, payable, one third to James M. Bean, his brother-in-law, and the remainder to his said children, as therein named and now living; that said surrender was made in accordance with the laws of the Royal Arcanum, and that under said laws Mary M. Robinson has no right to any part of the fund. The answer further alleged that the Supreme Council is an association formed for a charitable and benevolent purpose, as set forth in Pub. Stat. chap. 115; and that the fund above described is not liable to attachment by trustee or other process.

By the interrogatories and answers filed, it appeared that said Carlton W. Robinson died December 31, 1884; that the surrender and the direction for change of beneficiary, with the required fee, was received at the office of the supreme secretary on the forenoon of January 5, 1885, and was put in charge of the clerk who usually does the work of changing benefit certificates. On the following day, January 6, the trustee process in this suit was served upon the supreme secretary, who directed that the issue of the new benefit certificate be delayed until further orders from the supreme regent, or until the legal question raised by the trustee process had been settled.

After hearing in the superior court on the interrogatories and answers, the court dis-

charged the trustee, and the plaintiffs appealed to this court.

Further facts appear from the opinion.

Messrs. W. F. & W. S. Slocum, for plaintiffs:

The "benefit certificate" is a policy of insurance upon the life of Carlton W. Robinson for \$1,000, payable upon his decease to the defendant.

Commonwealth v. Wetherbee, 105 Mass. 149-160.

The \$1,000 payable by the trustee to the defendant by virtue of this policy, is not exempt from attachment under the provisions of Pub. Stat. chap. 115, § 8. This section only applies to a case where the person making the payment or deposit for the benefit of his wife, or children, or other person dependent upon him, is a member of the corporation to which he makes the payment, and the payment by a member of such corporation, of a fixed sum, to be held by it until the death of the member occurs, and then to be forthwith paid to the person entitled thereto. And it is only such fund so held that is exempt from attachment.

Elsey v. Odd Fellows Mut. R. Asso. 142 Mass. 226, 2 New Eng. Rep. 667.

Carlton W. Robinson was not a member of the corporation that issued this policy or benefit certificate. That corporation is the "Supreme Council of the Royal Arcanum." There is a distinction between a member of the order called the Royal Arcanum, and a member of the Supreme Council of the Royal Arcanum as it is incorporated and issued this policy. Members of the grand council and of the subordinate council are not members of the Supreme Council of the Royal Arcanum.

The articles of association and certificate of incorporation being silent as to who shall be members of the corporation, its Constitution and by-laws contain the only rule for membership.

Ang. & A. Corp. §§ 113, 114.

Carlton W. Robinson was merely a member of Hope Council No. 23, a subordinate council under the jurisdiction of the Grand Council of the State of Michigan.

The fund is not raised as provided by Pub. Stat. chap. 115, § 8. It is not a fixed sum paid in by the member, to be held by the association until his death, and then to be forthwith paid over to his widow or orphans. A member of a subordinate lodge pays a small sum for his degree, upon joining it, of from \$1 to \$4, according to his age, and a like sum whenever the condition of the supreme treasury shall make it necessary to lay an assessment "to pay a death benefit," upon proceedings had as required by the laws of the organization to which he belongs. This practice has nothing in common with the proceedings pointed out by Pub. Stat. chap. 115, § 8. It is merely a scheme of assessment insurance upon lives.

Commonwealth v. Wetherbee, 105 Mass. 160.

This statute "authorizes an association of a peculiar character; its object is to enable a man to lay aside a portion of his income or property, in the nature of an insurance upon his life, to be applied at his death to the use of his widow and orphans, or other persons dependent upon him."

Elsey v. Odd Fellows Mut. R. Asso. 142 Mass. 225, 2 New Eng. Rep. 667.

The interest of the defendant in the sum of \$1,000 payable to her by this policy became fixed and vested in her upon the death of the assured, and liable to be taken for her debts.

Norris v. Mass. Mut. L. Ins. Co. 181 Mass. 294; *Troy v. Sargent*, 132 Mass. 408, 409.

The provisions of Pub. Stat. chap. 115, § 8, exempting the "fund so held," applies to the fund held during the life of the member, but does not exempt it from the debts of the beneficiary after the death of the insured. It is analogous to life insurance, which the wife may hold independent of the claims of the husband who pays the premium, and is intended to go no further.

Pub. Stat. chap. 119, § 167; *Norris v. Mass. Mut. L. Ins. Co.*; *Troy v. Sargent*; and *Elsey v. Odd Fellows Mut. R. Asso. supra*.

The original benefit certificate, by its terms, holds good; and the amount payable under it is payable to the beneficiaries therein named, "if the certificate shall not have been surrendered and another certificate issued at his request, in accordance with the laws of the order."

Stevens v. Warren, 101 Mass. 564; *Radger v. American Pop. L. Ins. Co.* 103 Mass. 244.

The new certificate, if issued, must issue in accordance with the laws of the corporation; and those laws require that the benefit be made payable to someone related to the member assured, or dependent upon him; and the grand secretary is to consider and act upon the question whether the proposed beneficiary is related to the assured or dependent upon him, before a new certificate can be lawfully issued.

Any other construction of these laws of the corporation would make them inconsistent with the statute relied upon by the trustee, as by that statute the only beneficiaries mentioned are the "widow, orphans, or other person dependent upon the deceased member;" and also inconsistent with the charter of the corporation.

Pub. Stat. chap. 115, § 8; *Elsey v. Odd Fellows Mut. R. Asso.* 142 Mass. 224, 2 New Eng. Rep. 667.

The phrase "or other relatives," as used in Stat. 1882, chap. 195, § 2, and as used in the by-laws of the trustee corporation, does not include a brother-in-law. They include none but blood relations or next of kin according to the Statute of Distribution.

Estey v. Clark, 101 Mass. 86; *Kimball v. Story*, 108 Mass. 382; *Drew v. Wakefield*, 54 Me. 291; *Ennis v. Pentz*, 3 Bradf. 382.

James M. Bean, in whose favor the attempt to surrender was made, was not so related to Carlton W. Robinson, whose life was assured, as to give him an insurable interest in it; and, he not being a *bona fide* assignee of the policy for a valuable consideration, the attempt to substitute him for Mrs. Robinson as a beneficiary under the policy or certificate was invalid, and Bean could take nothing under it.

Elsey v. Odd Fellows Mut. R. Asso. supra; *Mut. L. Ins. Co. v. Allen*, 138 Mass. 24-27; *Cammack v. Lewis*, 15 Wall. 643 (82 U. S. bk. 21, L. ed. 244); *Warnock v. Davis*, 104 U. S. 775 (Bk. 26, L. ed. 924).

Messrs. William S. Stearns and John Haskell Butler, for trustee:

Carlton W. Robinson, to whom the benefit certificate was issued, was a member of the association, within the scope and meaning of

Pub. Stat. chap. 115, § 8; and said fund was not liable to attachment by trustee or other process, as therein provided.

Any other view or construction would nullify the terms and intent of the statute, as well as the object of the association.

Am. Legion of Honor v. Perry, 140 Mass. 560, 589, 1 New Eng. Rep. 715.

Devens, J., delivered the opinion of the court:

It is the contention of the plaintiffs that Carlton W. Robinson was not a member of the association known as the Supreme Council of the Royal Arcanum; that there were two distinct bodies; and that there is a distinction between such membership and that of the Royal Arcanum, of which he was a member. They therefore urge that while a benefit certificate was issued to Robinson as a member, it is to be treated as an ordinary insurance on his life; and that, as he cannot be regarded as a member of the corporation that issued it, the rules which apply to policies of insurance on lives govern it, and not those which apply to certificates issued under the provisions of Pub. Stat. chap. 115, § 8. The articles of association, and also the certificate of incorporation, being silent as to who shall be treated as members of the corporation, the plaintiffs contend that its Constitution, art. 4, § 1,—which provides that "this Supreme Council shall be composed of its officers, the representatives from grand councils, and all past supreme regents," and that "no other member of this order shall be admitted under any circumstances," except that original incorporators, if in good standing in their subordinate councils, shall be life members,—prescribes the only rule for membership, and therefore that Robinson cannot be regarded as a member. There is, it must be admitted, a certain confusion resulting from the fact that the Supreme Council is sometimes treated in the certificate of incorporation, Constitution, and by-laws as the corporation, and sometimes as only its governing body who directs its operations. It is to the body acting in the latter capacity that the article in question refers. The section quoted contemplates distinctly, by the use of terms referring to them, that there are other members of the order. An examination of the whole system will show that the association was established, among other things, for the purpose of affording mutual aid to its members, and also for the purpose of establishing what was termed a widows' and orphans' benefit fund, for the payment of specific sums to the widows, orphans, and other dependents of deceased members. It transacted its business mainly through the agency of grand councils composed from the subordinate councils in each State, and through the agency of their subordinate councils; both of which councils operated under charters granted by the Supreme Council, and in accordance with the rules prescribed in such charters. As Robinson became a member of a subordinate council, he was entitled to a voice in its representation in the Supreme Council as the governing body. When, in the certificate of incorporation, members of the Supreme Council of the Royal Arcanum are referred to as those for whose benefit the association is intended, those

who constitute the body which administers its affairs are not alone included, but all who, through the subordinate councils, become members of the organization, or order, as it is termed.

The plaintiffs further contend that the sum paid in by the beneficiary is not a fixed sum to be held by the association; but as, with the exception of a small sum paid upon his admission into the order, he is to pay fixed assessments from time to time as they may be deemed necessary, and as they shall be ordered by the Supreme Council, for the payment of what are termed death benefits, the fund is not raised in the manner contemplated by Pub. Stat. chap. 115, § 8. But the scheme is one of co-operative insurance, and there is no more objection to this mode of providing the fund than to an assessment insurance on lives when effected by a stock company incorporated for such insurance. *Commonwealth v. Wetherbee*, 105 Mass. 160.

It enables a party to lay aside portions of his income, in the nature of an insurance upon his life, to be applied at his death to the use of his widow, orphans, or other dependents, although the method in which he lays it aside is by providing them with a right to its payment from the accumulated funds of the corporation, or from an assessment on others to be laid by it. *Elvey v. Odd Fellows Mut. R. Asso.* 142 Mass. 225, 2 New Eng. Rep. 667; *Crossman v. Mass. Benefit Asso.* 143 Mass. 435, 3 New Eng. Rep. 517; Stat. 1880, chap. 196.

If we were able to hold that the benefit certificate was like an ordinary policy of insurance; that Robinson was not a member of the corporation; or that its funds were not obtained in compliance with the laws regulating associations of this class,—we cannot perceive that it would be for the advantage of the plaintiffs. If Robinson was not a member, or if funds can only be obtained to pay his benefit certificate by methods not permitted by law to this corporation, the act of the association in issuing the policy was *ultra vires*, and cannot be enforced by us. Whatever the remedy, if any, Robinson's administrator might have to recover back what he has paid, his beneficiary, of whom it is alleged the corporation is trustee, could not enforce such a contract. It is only upon the theory that she can that the plaintiffs can charge the association as her trustee. That the association has made a contract such as it might lawfully make with Robinson as its beneficial member is therefore the point of view apparently most favorable to the plaintiffs' contention.

Without considering whether there had been a change in the beneficiary, fully completed at the time the process was served, and assuming there had not, the question is presented whether the fund which became payable to the wife upon the death of her husband would, after such death, be attachable by the trustee process. That, if the benefit certificate is to be treated as an ordinary life insurance policy, the amount due would become liable for her debts on the decease of her husband, may be conceded. *Norris v. Mass. Mut. L. Ins. Co.* 181 Mass. 294; *Troy v. Sargent*, 132 Mass. 408, 409.

Pub. Stat. chap. 115, § 8, enacts that a corporation organized under that chapter may 2 MASS.

"provide in its by-laws for the payment by each member of a fixed sum to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto; and such fund so held shall not be liable to attachment by trustee or other process." In view of the object of these beneficiary corporations; of the limited number of persons for whose benefit they are intended; of the fact that the member of the corporation could not provide for his creditors by a benefit certificate, or dispose of the fund by testamentary bequest,—we cannot doubt that the fund due on the certificate is not subject to attachment while it remains in the hands of the corporation. If it were, it would be impossible for the member in many instances to provide for those for whom it was contemplated that he should by this method be able to make provision. It is unnecessary, therefore, to consider whether there had been a completed change in the beneficiary made by the member at the time of his decease.

Judgment affirmed.

Henry E. HATT
v.

Moses E. NAY.

1. In an action for injury received while at work on a pile-driver owned and controlled by the defendant, evidence is admissible of the reputation of the foreman in charge for skill and competency, where the cause of the injury is alleged to be his negligence; but special acts of negligence at other times are not admissible.
2. A court in instructing the jury is not limited by the requests made. It was proper to instruct the jury that, if the plaintiff knew that the foreman was a careless, improper man, unskillful, habitually careless and negligent, and he failed to notify the defendant of these facts, but continued in the service, he could not recover for an injury resulting from such carelessness.

(Suffolk—Filed March 17, 1887.)

ON plaintiff's exceptions. *Overruled.*
Action of tort to recover damages for personal injuries received by the plaintiff April 8, 1882, while at work on a pile-driver owned and controlled by the defendant.

At the trial in the superior court, before Thompson, J., it appeared that the defendant was engaged in driving piles on Huntington Avenue, in Boston, laying the foundation for the Hotel Oxford; the defendant employed a foreman, who worked as foreman from December, 1881, to the time of the accident, having under his charge seven men, one of whom was the plaintiff, who acted as loftsmen, and had so worked for three weeks prior to said April 8, 1882.

The plaintiff introduced evidence tending to show that the foreman hitched a rope used on the pile-driving machine, for hoisting piles, to the end of a long, heavy pile, some twenty feet

away from the pile-driver; that the foreman walked in toward the machine, and attempted to roll the machine along, but found he could not do so, because a pin-stick, so called, was placed in such a way as to prevent the machine from rolling; that the foreman knocked out this pin-stick, and then gave orders to the engineer to go ahead and draw in the pile. There was evidence tending to show that the rollers under the pile-driver were in such a position that the order to haul in the pile should not have been given, with this pin-stick knocked out; but the evidence upon this point was conflicting. The court allowed the plaintiff to introduce evidence that the foreman's reputation for competency in his position was bad; but, against the offer of the plaintiff, refused to allow evidence of specific acts of carelessness on the part of the foreman on this same job before the accident happened.

The court instructed the jury that, if the plaintiff, Hatt, knew that the foreman was a careless and improper man, unskillful, habitually careless and negligent, and the plaintiff failed to notify the defendant employer of that fact, and continued in the service, knowing that fact and not complaining of it to the defendant, that plaintiff could not recover, because, in that case, plaintiff understood fully the hazards of the business in which he was engaged; and, by continuing in the employment after a full knowledge of that fact, he assumed the extra risk and hazard. This ruling was given by the court without having been requested by the defendant, who had previously submitted his requests for rulings to the inspection of plaintiff.

The plaintiff requested the court to rule that there was no evidence in the case that the plaintiff did know of the carelessness or incompetency of the foreman; but the court declined so to rule, and ruled that the jury must decide that question upon all the evidence in the case.

The evidence as to the plaintiff's knowledge of the competency or incompetency of the foreman was, in substance, that the plaintiff had been a pile-driver for a number of years, and was acquainted with the business, and was a practical loftsman, and had worked as loftsman under this foreman for three weeks, and had good opportunity to see his competency or incompetency during that time, and had worked with him on another job before. And it was further in evidence that the loftsman had the best opportunity of any of the workmen to see and judge of the capacity of the foreman, owing to his position when at work; and, among other things, the plaintiff testified in answer to questions put by defendant's counsel:

Q. Had you ever seen the foreman knock out that pin-stick before this accident? A. I could not say I had.

Q. And he never had any tip-over, had he? A. Not to my knowledge.

Q. The foreman always had that machine properly blocked, as far as you had seen? A. As far as I had seen.

Q. Now, I understand you never had seen the foreman do that before? A. Not that I know of.

Q. Well, up to the time of the accident you had not had any serious accident there, had you? A. No, sir.

Q. During the three weeks you worked under the foreman, had the machine been properly blocked? A. As far as I recollect.

Q. You, being aloft, could see all the blocking? A. Yes, sir; I could see it.

Q. You never saw anything that needed notifying, did you, before? A. Nothing particular.

The plaintiff also testified that he never notified the defendant that the foreman was careless or incompetent, or made any complaint about him to the defendant.

Verdict was for defendant, and plaintiff alleged exceptions.

Mr. D. F. Kimball, for plaintiff:

The defendant was bound to use due care, both in procuring and in retaining the foreman in his employ. If, in the exercise of due care, he might have known of the incompetency of the foreman, the defendant failed in his duty by retaining him in his employ.

The plaintiff claims, therefore, that he ought to have been allowed to introduce "evidence of specific acts of carelessness on the part of the foreman on the same job before the accident happened." Indeed, it would be difficult to show want of due care in retaining an incompetent foreman in any other way. The plaintiff's full rights, therefore, were not protected in this regard by allowing evidence merely of the foreman's reputation for competency in his position.

Gilman v. Eastern R. R. Co. 18 Allen, 440; *Arkerson v. Dennison*, 117 Mass. 407; *Cayzer v. Taylor*, 10 Gray, 275; *Post v. Boston*, 141 Mass. 189, 1 New Eng. Rep. 542.

In regard to the ruling concerning the plaintiff's knowledge of defendant's incompetency, the plaintiff is aware that the following decisions seem perhaps to sustain the correctness of part of said rulings; but plaintiff claims that the court has never yet gone to the full extent of the ruling made. Even if the court should now do so, plaintiff claims that a refusal to admit the evidence referred to in point 1 greatly prejudiced his case before the jury.

Farwell v. Boston & W. R. R. Corp. 4 Met. 55; *Osborne v. Morgan*, 180 Mass. 102.

Messrs. Lund & Welch, for defendant:

Carelessness or negligence of a fellow-servant is not sufficient to render the master liable to a fellow-servant, unless it amounts to incompetency. That is one of the risks the fellow-servant takes upon himself.

Kivley v. Belcher Silver Min. Co. 8 Sawy. 487; *Farwell v. Boston & W. R. R. Corp.* 4 Met. 49, 57; *Hayes v. Western R. R. Corp.* 8 Cush. 270.

The offer to prove specific acts of carelessness on the part of this foreman on this same job before this accident happened was clearly incompetent.

Robinson v. Fitchburg & W. R. R. Co. 7 Gray, 92; *Collins v. Inhabitants of Dorchester*, 6 Cush. 396; *Maguire v. Middlesex R. R. Co.* 115 Mass. 289.

The plaintiff is guilty of negligence, and not in the exercise of ordinary care, if he knows the foreman was incompetent, etc., and continues to work under him without informing the employer of it; he, being a collaborer, assumes the risks of all the conditions that are known to him; and, further, he is acting in bad faith to

wards his employer if he does not notify him of incompetency of the coworkman, if it exists, and he knows it.

2 Thomp. Neg. p. 1008, and notes; *Ladd v. New Bedford R. R.* 119 Mass. 412; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572, 585; *Sullivan v. India Mfg. Co.* 113 Mass. 396; *Dillon v. Union Pac. R. R. Co.* 3 Dill. 819; *Patterson v. Pittsburg & C. R. R. Co.* 76 Pa. 389; *St. Louis & S. E. R. Co. v. Britz*, 72 Ill. 256, 261; *Davis v. Detroit & M. R. R. Co.* 20 Mich. 105, 124 *et seq.*; *Wright v. N. Y. Cent. R. R. Co.* 25 N. Y. 564, 566, 567; *Skipper v. Eastern Counties R. Co.* 9 Wels. H. & C. 228.

It was the duty of the court to instruct the jury in all the law pertaining to the case, whether requested or not. This is not a matter of exception; requests are only made as a matter of convenience to both court and counsel.

Vaughn v. Porter, 16 Vt. 266.

Devens, J., delivered the opinion of the court:

The plaintiff was permitted to put in evidence the reputation of the foreman for skill and competency, by whose carelessness he alleged that he was injured while in the employ of the defendant. As the defendant was bound to use due care, both in procuring and retaining a suitable person as the foreman in his employ, this evidence was properly admissible. The plaintiff desired further to put in testimony as to certain specific acts of carelessness on the part of the foreman while engaged in the same job, and before the accident happened. This was properly excluded. Because a servant may have been guilty of negligence on certain specified occasions, it by no means follows that he was on the occasion in question, or that he might not ordinarily be a careful and skillful workman, and properly employed as such. The investigation of other individual acts of alleged carelessness on the foreman's part would have a necessary tendency to confuse the case by collateral inquiries, to protract it indefinitely if those inquiries were carefully made, and to mislead and distract a court or jury from the true issue. *Robinson v. Fitchburg & W. R. R. Co.* 7 Gray, 92; *Maguire v. Middlesex R. R. Co.* 115 Mass. 289.

The ruling that if the plaintiff knew that the foreman was a careless and improper man, unskillful, habitually careless and negligent, and failed to notify defendant of those facts, but continued in the service, he could not recover for an injury resulting from such carelessness, as he understood fully the hazards of the business, and assumed this extra risk and hazard, — was correct. Even if this ruling was not requested by defendant, it was appropriate to the matter in issue. The judge in giving those instructions which he deems adapted to a proper decision is not limited by the requests made to him. It is a familiar principle that if a servant capable of contracting for himself, and with full notice of the risks he may run, undertakes a hazardous employment, or to put himself in a hazardous position, or to work with defective tools or appliances, no liability is incurred by the master for injuries incurred from these hazards. *Coombs v. New Bedford* 2 Mass.

Cordage Co. 102 Mass. 572, 585; *Sullivan v. India Mfg. Co.* 113 Mass. 396; *Ladd v. New Bedford R. R. Co.* 119 Mass. 412; *Osborne v. Morgan*, 130 Mass. 102; *Leary v. Boston & A. R. R. Co.* 139 Mass. 580; *Taylor v. Carew Mfg. Co.* 140 Mass. 150, 1 New Eng. Rep. 210; *Lynch v. Sagamore Mfg. Co.* 143 Mass. 206, 8 New Eng. Rep. 322.

In a similar way, if a workman knows that the foreman under whom he is working is incompetent, but continues to work under him, making no complaint to the master and not calling his attention to it, he must be held to have assumed the risk and hazard arising therefrom. *Davis v. Detroit & M. R. R. Co.* 20 Mich. 105.

Exceptions overruled.

William H. CLARK

v.

Mary E. FONTAIN *et al.*

Where, by the terms of the agreement in the mortgage, the grantee is to release from time to time, whenever requested, any portion of the land, on being paid at the rate of 50 cents per foot; and the plaintiff has offered to pay the amount thus fixed for the release; and the defendant has refused to execute a release except upon the payment of a larger sum; and no interest was stipulated for in the agreement, and it is apparent that none was intended to be paid by the owners of the several lots, — a ruling on the hearing, that the interest did not begin to run until the time of the decree fixing the amount to be paid, was affirmed.

(Suffolk — Filed March 23, 1887.)

A PPEAL by defendant from a decree of a single justice of the Supreme Judicial Court in favor of plaintiff in a bill in equity to redeem premises from the lien of a mortgage and to compel a release of the same. *Affirmed.*

This was originally a bill in equity filed by William H. Clark against Mary E. Fontain, to restrain the foreclosure of a mortgage on a parcel of land, and to compel the mortgagee to release the land from the mortgage.

The original case was heard before Colt, J., who reported it for the consideration of the full court, on the following facts:

On November 7, 1870, Horace Sargent and Prentice Sargent, being the owners of a parcel of land in Boston, mortgaged the same to the defendant, by a deed recorded November 18, 1870, and containing the following clause: "The grantee, for herself, her heirs, executors, administrators, and assigns, hereby agrees with the grantors, their legal representatives and assigns, that she will release from time to time, whenever requested, any portion or portions of said land, * * * on being paid therefor at the following specified rates, viz.: for upland * * * at the rate of 50 cents per foot, * * * and all sums so paid for releasing said land * * * shall be indorsed on the mortgage notes * * * and be so much paid on the mortgage debt. Pro-

vided always that the mortgagee shall not be required to release under the foregoing provisions so as to impair this mortgage as security for the part of the mortgage debt remaining unpaid."

After the mortgage was given, the mortgagors divided the land into houselots, and on January 14, 1878, conveyed to the plaintiff, by a deed of warranty, which was recorded on January 15, 1878, one of said houselots, containing 1,200 feet, which lot is the one in regard to which the plaintiff seeks relief. On January 14, 1874, the mortgagors conveyed to Margaret Smith, by a deed of warranty recorded on March 14, 1874, another of said lots, also containing 1,200 feet. Prior to either of these two deeds, the mortgagors had erected upon each of the two lots conveyed, which were upland, a dwelling-house of the value of \$3,000; and, at the date of the deed to the plaintiff, there was due upon said mortgage a sum not exceeding \$2,100.

The rest of the premises conveyed by the mortgage consists of vacant upland, the value of which does not exceed \$1,000 and which still remains in the hands of the mortgagors, who are insolvent.

The mortgage became due on November 7, 1876. At the time of the deeds to the plaintiff and Smith, the mortgagors did not disclose the fact of the existence of the mortgage; and neither the plaintiff nor Smith knew of such mortgage until March 4, 1878.

On March 2, 1878, the defendant advertised the whole of the estate described in said mortgage for sale on March 26, 1878, under the power of sale contained in said mortgage, there having been a breach of the condition thereof, and notified the plaintiff, Smith, and the mortgagors, of such proposed sale.

The plaintiff, hearing that Smith had demanded of the defendant a release of the Smith lot upon payment of 50 cents per foot therefor, notified both the defendant and Smith of his deed from the mortgagors, and protested against the Smith lot being released unless the defendant first released the plaintiff's lot, or applied the full value of the Smith lot and said vacant land toward the payment of the mortgage. On March 14, 1878, after such notice and protest to the defendant and Smith, the defendant did release the Smith lot to Smith for the sum of \$600 paid by him. At the time of such release, the fair market value of the Smith lot was \$3,500, and the value of the vacant land covered by said mortgage and never conveyed by the mortgagors was \$1,000, and the value of the plaintiff's lot was \$3,500.

In the deed of the Smith lot from the mortgagors to Smith, and in said release to Smith, the land is described as bounded "northeasterly by the estate of W. H. Clark, 60 feet."

The plaintiff contended that the defendant should be held to have received the full value of the Smith lot, or so much thereof as should be sufficient to pay said mortgage, or so much thereof as would, with the vacant land still held by the mortgagors, pay said mortgage; and asked that the defendant be decreed to release the plaintiff's lot from the operation of said mortgage.

The court, on these facts, in an opinion re-

ported in 135 Mass. 464, held that the plaintiff could procure a release by the payment of the specified sum, which he had not offered to do, the bill being brought solely to compel a release of the land from the mortgage without any payment by him; and ordered the bill to stand to allow plaintiff to move to amend by making it a bill to redeem; if such amendment should not be allowed, the bill to be dismissed with costs.

Plaintiff amended his bill by adding Margaret Smith as defendant, alleging the facts set forth in a previous bill and also the tender of \$600 and refusal of defendant to accept the same; and asked that it be determined what sum, if any, the plaintiff should be required to pay the defendant Fontain to redeem his lot from said mortgage; and that Fontain, upon being paid such sum, might be required to execute and deliver to plaintiff a release of his said lot from said mortgage.

The case was again heard before a single justice, before whom the facts, as set out above and as alleged in the amended bill, were admitted; and it was ordered that the defendant execute, acknowledge, and deliver to the plaintiff a release of his said premises upon payment to defendant, or into this court, of the sum of \$600 with interest from the date of this decree; such release to be of such form and tenor as to effectually release the land from all claims under the mortgage. From this decree defendant appealed to the full court.

Messrs. J. E. Cotter and C. F. Jenney, for defendant Mary E. Fontain:

The right of the plaintiff to redeem the said estate from the said mortgage, without the payment of the full amount due thereon, if it exists at all, must depend upon the agreement contained in the original mortgage.

Apart from this agreement, no owner of the equity of redemption in a part of the premises conveyed by said mortgage could maintain a bill to redeem his part of said premises, without the payment of the full amount due thereon.

Taylor v. Porter, 7 Mass. 355; *Jones, Mort.* § 1063.

If the plaintiff is entitled to redeem, as set forth in said decree, which is not admitted, he should be compelled to pay interest on the amount named therein from the date of filing the original bill, March 23, 1878, at least to the date of the first decree in this case, September 19, 1883. During all this time, the plaintiff prevented the defendant from foreclosing said mortgage, and realizing thereon. Up to the last date the plaintiff never intended or offered to pay to the defendant any amount whatever in redemption of his premises. During all this time, the interest due the defendant was increasing, thus impairing the security, although the defendant was rightfully resisting the plaintiff's claim, as has already been decided. The plaintiff's act prevented the defendant from realizing anything upon her security, and he is not now, in equity and good conscience, entitled to redeem without paying interest upon said amount, by way of compensation for the injury and delay he has caused the plaintiff.

Frazer v. Bigelow Carpet Co. 141 Mass. 126, 1 New Eng. Rep. 525.

Mr. N. W. Bragg, for plaintiff.

Gardner, J., delivered the opinion of the court:

When this case was last before the court, it was decided that the bill was to stand to allow the plaintiff to amend by making it a bill to obtain a release from the mortgage. *Clark v. Fountain*, 135 Mass. 464. The bill has accordingly been amended.

The opinion in the former case contained the following language, at page 468: "The plaintiff can procure a release by the payment of the specified sum; * * * the plaintiff appears to have a right to redeem upon the payment of the agreed sum per foot, and the bill is to stand to allow him to move to amend by making it a bill to redeem." The words "right to redeem," and "bill to redeem" mean the same as "right to obtain a release" and "bill to obtain a release." The court expressed the opinion that the plaintiff was entitled to a release upon the payment of the agreed sum per foot, and the bill was ordered to stand to enable the plaintiff to amend his bill accordingly. Upon consideration, we think that the plaintiff is entitled to a release from the mortgage upon the payment of the stipulated price per foot.

The defendant contends that she is entitled to interest on the sum of \$600, which is the amount, at 50 cents per foot, of the number of feet in plaintiff's land, from the date of filing the original bill. By the terms of the agreement in the mortgage, the grantee agrees that she will release from time to time, whenever requested, any portion of the land, on being paid at the rate of 50 cents per foot; and all such sums shall be indorsed on the mortgage notes and be so much paid on the mortgage debt.

The agreement is to release whenever requested, on being paid the specified sum. The original bill was to restrain the foreclosure of the mortgage on the plaintiff's land, and to compel the mortgagee to release the land from the mortgage. The amended bill offers to pay \$600, the stipulated price per foot, for a release of the plaintiff's land from the mortgage. The plaintiff has offered to pay the amount for a release, and the defendant has refused to execute a release except upon the payment of a larger sum. No interest is specified in the agreement, and it is apparent that none was intended to be paid by the owners of the several lots. It is difficult to determine, if interest is to be paid, at what time it is to begin to run.

The release was to be given "whenever requested," on being paid the specified sum. The plaintiff has requested a release, and the defendant has refused to give one upon the payment of the amount offered.

At the hearing before a single justice, it was found and determined, in substance, that there was no agreement to pay interest, and that therefore it did not begin to run until the time of the decree fixing the amount to be paid. A majority of the court are of opinion that there is no error in this determination.

Decree affirmed.

Mary ELLIOT

v.

D. A. BARRETT

A real-estate broker who has made a pa-
2 Mass.

N. E. R., v. IV.

rol contract of sale of realty cannot, after his principal has contracted to sell the land to another purchaser, and has so informed the broker, make such a memorandum as will take the case out of the Statute of Frauds.

(Middlesex—Filed March 23, 1887.)

ON report. *Judgment for defendant.*

Action of contract to recover damages for the refusal by defendant to convey to plaintiff certain real estate in Melrose.

At the trial in the superior court, before Blodgett, J., without a jury, the following facts appeared:

One Hannaford, a real-estate broker, testified that the defendant, in the year 1882, placed certain real estate in his hands for sale, and that he sold it in the fall of 1882; that it subsequently came back to the defendant, and remained in the hands of Hannaford for sale; that shortly before October 13, 1883, he had negotiations with one J. M. Elliot, the husband of the plaintiff, who testified he was acting for the plaintiff, for a sale of the premises; that he, said Hannaford, made an oral contract with the plaintiff, through her husband, on October 12 or 13, 1883, to sell said premises to the plaintiff upon the following terms: \$100 was to be paid on the delivery of the deed, and \$100 was to be paid the 1st of January following, and \$600 during the year following the first payment was to be paid on the second mortgage; the date of that payment was not fixed, but to be within the year. There was a first mortgage on the place, of \$2,000. The second mortgage was to be \$1,400, all to be paid within three years; that some time early the following week, but what day he could not state, he made the memorandum of said sale upon two books; one upon a book in which he entered the property when it was placed in his hands for sale, which was as follows:

"D. A. Barrett, Cedar Park; 1½ story house, 10 rooms, all modern conveniences, cemented cellar.

8192 sqr. \$4,000

\$4,000

\$4,000

\$3,700

\$3,500

Oct. 13, sold for
to J. M. Elliot."

This memorandum above the words "sold \$3,700" was cancelled by lines drawn through and across the figures and words. The other memorandum was as follows:

"Oct. 5, J. M. Elliot, Melrose. Barrett's C. Park.

Oct. 13, sold for \$3,500."

The plaintiff offered evidence tending to show that she seasonably tendered \$100 to the defendant, as alleged in the declaration, and demanded a deed of the premises, which the defendant refused to give. It appeared that October 13 was Saturday, and that on that day the defendant made a contract for the sale of said premises to another party, through another broker, and so informed Hannaford on the evening of the thirteenth; and that said Hannaford on Monday, the 15th day of October, gave the key of said premises to J. M. Elliot, and he on that day went into the

house on said premises. Upon the foregoing evidence the court ruled that the action could not be maintained, and found for the defendant, to which ruling the plaintiff excepted; and at her request, and with the consent of the defendant, the court reported the case for the determination of the supreme judicial court.

Mr. A. V. Lynde, for plaintiff:

The memorandum made by the broker, Hannaford, in his books, was sufficient to take the case out of the operation of the Statute of Frauds.

The authority of the broker to act for the defendant was complete, and is shown by the entry in his books, at defendant's request, of the estate for sale, by the fact of the broker having once before sold it for a larger sum, and the reconveyance to the defendant, and return of the estate for sale to his hands.

Coddington v. Goddard, 16 Gray, 442.

Although the contract was chiefly oral in this case, yet "the note or memorandum" of the contract made by the broker was sufficiently explicit to bind the defendant.

Hawkins v. Chace, 19 Pick. 502; *Williams v. Bacon*, 2 Gray, 387; *Salmon F. Mfg. Co. v. Goddard*, 14 How. 446 (55 U. S. bk. 14, L. ed. 498); *Coddington v. Goddard*, *supra*.

The price and description of the property sold were a sufficiently definite "memorandum."

Gouen v. Klous, 101 Mass. 453; *Hurley v. Brown*, 98 Mass. 545-547; *Mead v. Parker*, 115 Mass. 418.

Messrs. Wiggin & Fernald, for defendant:

If the memorandum made by the broker, Hannaford, had been duly executed and delivered, so as to constitute evidence of any contract; and was otherwise sufficient,—it does not support the plaintiff's declaration, because it proves a contract varying in substance from the contract declared upon. The memorandum shows a contract between the defendant and J. M. Elliot, instead of a contract between him and the plaintiff, Mary Elliot; and parol evidence is not admissible to substitute one name for the other. It also shows, by its legal construction, a sale of the premises for \$3,500, cash, and not for \$100 dollars, cash, and the balance upon time; which was the contract declared upon, proved by the oral testimony of Hannaford, and the contract the plaintiff offered to perform.

Gardner v. Hazeltan, 121 Mass. 494; *Ryan v. Hall*, 13 Met. 520; *Riley v. Farnsworth*, 116 Mass. 228.

The memorandum was never delivered to the plaintiff as the defendant's agreement.

Parker v. Parker, 1 Gray, 409.

C. Allen, J., delivered the opinion of the court:

There was no memorandum signed by the defendant, "or by some person thereunto by him lawfully authorized," as required by the Statute of Frauds. Pub. Stat. chap. 78, § 1.

Hannaford made no memorandum until after the defendant had contracted to sell the land to another purchaser, and had so informed Hannaford, whereby his authority ceased. Moreover, the contract as made by Hannaford was not expressed in either memorandum. The terms of sale were omitted. If Hannaford was authorized to make, in behalf of the de-

fendant, the contract as testified to by him, he was not authorized to make a memorandum of it which differed in respect to the terms of sale. *Morton v. Dean*, 18 Met. 385; *Coddington v. Goddard*, 16 Gray, 436, 443, 445; *Dodd v. Farlow*, 11 Allen, 426; *Boardman v. Spooner*, 13 Allen, 353. These objections are sufficient to defeat the action, without considering others. *Judgment for defendant.*

Samuel F. TOWLE *et al.*, Exrs.,

v.

Sarah DELANO *et al.*

1. Where the construction of a clause in a will is difficult on account of meagre, involved, or contradictory phraseology, the true meaning of the testator may be sometimes ascertained by examining other provisions.
2. When a clause in a will is in itself intelligible and expressed in apt words, a court cannot speculate on the motives which might have governed the testator, or conjecture that he has failed to express his motive, and thus supply it.
3. In a clause of a will directing the payment of an annuity to the mother of the testator's two daughters during her life, and to the said daughters of the testator "so long as both they and their said mother shall all live," it is impossible to supply the words "during their respective lives," where the subsequent clause provides for the contingency of one of the daughters dying before the mother.
4. Where the clause also provides that upon the death of either of the daughters there shall be paid to the children of her body, or child of her body if but one, and if more than one in equal shares and proportions, the sum of \$10,000, but that if such daughter shall die and shall not leave a child living at the time of her death, the testator's brother shall retain said sum of \$10,000 to his own use; and, at the time a suit in equity was brought for the sale of certain lands for the payment of the charges and annuities created by the will, the mother had died leaving one of the daughters, a widow aged 51 years, with living issue, and the other daughter unmarried, aged 53 years and 9 months, without issue,—it was directed that a fund of \$10,000 should be set aside to be paid to the children of the widowed daughter at her decease; but that neither she nor her sister should receive the annuity after the death of the mother; and that the further sum of \$10,000 should be set aside for the future children of the unmarried daughter should she leave issue; and that sufficient lands should be sold for these purposes.
5. Although the testator made no gift in terms of the income of the \$10,000, which income might accrue after the death of

the mother and before the death of a daughter surviving the mother, when the principal sum would become payable to the daughter's children should she leave any, it cannot be said that, because the testator's brother is thus to retain the \$10,000 to his own use, it therefore must be inferred that the annuity to the daughter should be continued during this period because it would approximate the interest of that sum, and that the testator has thus indicated an intention that his brother should not have the income or interest during this time.

(Suffolk—Filed February 25, 1887.)

ON report.

Bill in equity brought under Stat. 1879, chap. 125 (Pub. Stat. chap. 120, § 122), by Samuel F. Towle and others, executors of David Miller, against Sarah Delano, Maria D. Miller, Almira D. Moore, and the minor children of the latter, for the sale of certain lands for the payment of charges and annuities created by the fifth clause of the will of William Miller, deceased, which clause was as follows:

"Fifth. I give, devise, and bequeath all the rest, residue, and remainder of my estate, real, personal, or mixed, of which I shall be seised and possessed, or to which I shall be entitled at time of my decease, to my said brother, David Miller, to have and to hold the same to him, the said David Miller, his heirs and assigns, forever, upon the condition nevertheless and subject to the charges and payments following, viz.: that he or his executors, administrators, heirs, or assigns pay annually to Sarah Delano, mother of my two illegitimate children, Maria D. Miller and Almira D. Miller, all of Roxbury, during her life, the sum of \$200, and the sum of \$500 annually to each of my above-named illegitimate daughters, so long as both they and their said mother shall all live; and, after the death of either of my said daughters, that he or they pay to the survivor of them, my said daughters, during the life of their said mother, the sum annually of \$600; and that on the death of my said illegitimate daughter Maria D. Miller, he or they pay to the children of her body, or child of her body, if but one, and if more than one in equal shares and proportions, the sum of \$10,000, to have and to hold the same to him, her, or them, to his, her, or their sole use and behoof forever. My meaning is that the said sum of \$10,000 be paid to the child of her body if but one living, or, if more than one, that the said sum of \$10,000 be divided between said children share and share alike. But, if my said daughter shall die and shall not leave a child living at the time of her death, that my said brother retain said sum of \$10,000 to his own use forever; and that, on the death of my said daughter Almira D. Miller, the said David Miller or his executors, administrators, heirs, or assigns pay to the child or children of her body the sum of \$10,000; and, if there be more than one child then living, that said children shall receive equal shares or proportions of said sum of \$10,000, to have and to hold the same to him, her, or them, to his,

her, or their sole use and behoof forever. But, in case my said daughter shall die leaving no child of her body alive, that my said brother shall retain said sum of \$10,000 to his own use."

The case was heard in the supreme judicial court, before Devens, J., where the following facts appeared:

Portions of the lands originally in question in this cause have been sold from time to time in accordance with interlocutory decrees of this court, under direction of the special master and by consent of parties; and the annuities accruing under the fifth clause of the will, up to May 1, 1885, have been paid from the proceeds of such sales, but the annuities accruing May 1, 1886, have not yet been paid. About 99,000 square feet of land on Edgewood Street in the Roxbury district of Boston, of the value of \$81,500, now remain unsold.

The said Sarah Delano referred to in the will died June 27, 1886; Almira D. Miller, also referred to therein, is now named Almira D. Moore, is a widow and has living issue, she being now aged 51 years; Maria D. Miller, also referred to in said clause, is now aged 58 years and 9 months, having been born in January, 1838, and has never been married and has never had any child.

At the hearing upon the question as to the terms upon which the unsold residue of the lands should be sold, the parties agreed that sufficient land should be sold to satisfy the unpaid annuities accruing up to the death of Sarah Delano, on June 27, 1886.

There were further conflicting claims as to the proper construction of said fifth clause of the will of William Miller.

The petitioners contended that all the annuities ceased upon the death of Sarah Delano, and that, as Maria D. Miller had attained in a childless and unmarried condition an age at which a court of equity would adjudge her incapable of child-bearing, a final decree should be made for the sale of sufficient land to produce the sum of \$10,000 and no more, and that this sum should be placed in the hands of a competent trustee to be appointed by this court, to be held upon the following trusts, to wit: (1) to invest the same in such securities as are defined by the law for the investment of the funds of savings banks, and to hold the same during the life of said Almira D. Moore, paying the net annual income in annual payments to the persons entitled to the land under the will of David Miller; and (2) upon the decease of said Almira D. Moore to divide said principal sum of \$10,000 among the children of her body, upon the terms set forth in said fifth clause of the will of William Miller.

The respondents, on the contrary, contended: (1) that, notwithstanding the death of said Sarah Delano, the annuities created by the will of William Miller for the benefit of his two illegitimate daughters continue during the life of each of said daughters respectively at the rate of \$600 per annum for each; (2) that it cannot now be determined upon the foregoing facts that no sum of \$10,000 should be set apart for such child or children as may be hereafter born of the body of said Maria D. Miller; and (3) that sufficient land should be hereafter sold to satisfy said annuities and to produce the sums necessary for the children of said Almira D.

Moore and the future children, if any, of said Maria D. Miller.

The court reserved the case upon the foregoing facts for the consideration of the full court.

Messrs. M. & C. A. Williams, for petitioners:

The plain and natural construction of the will, from the literal meaning of the words, is that the annuities were given only during the mother's life, and ceased upon her death; hence, our opponents are compelled to ask the court to go outside the will, and, by conjecture, make a new will for the testator. But conjecture never authorizes the going outside of a will; and, if the provisions are intelligible and clear, they must be enforced as they stand, without the addition or suppression of words.

Jarm. Wills, Rule 19; 2 Wms. Exrs. 1084, 1085; *Metcalf v. Framingham Parish*, 128 Mass. 374.

"The decision of this question doubtless depends upon the intention of the testator, as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture."

Butterfield v. Hamant, 105 Mass. 388; *Abbott v. Middleton*, 7 H. L. Cas. 68.

We submit that, as the language is clear, and the legal effect of such language is unquestionable, our opponents have no concern with the reasons which led the testator to use it. If the court should decide in our favor, David Miller's inheritance from his brother will still be what the old books call *damnosa hereditas*, a burden, not a blessing. There is no force in the suggestion that the words "so long as both they and their said mother shall all live," should be construed disjunctively, in such manner as to give the mother an annuity for her life and also the daughters annuities for their lives, (1) because this would ignore the use of the word "both," and give no effect to it; (2) because the clause has nothing to do with the mother's annuity, that being fully provided for by the previous clause; and (3) because the \$600 annuity for the surviving daughter, in case of the death of either, is also limited to the lifetime of the mother. There can be no good reason for further holding a fund of \$10,000 for children of Maria D. Miller, she having attained the age of 53 years and 9 months in a childless condition. Although there is no case upon the subject in the Commonwealth, it is well settled in England that a court of equity will liberate a fund upon the facts disclosed. This was done in *Re Widdows' Trusts*, L. R. 11 Eq. 408. See also *Forty v. Reay*, referred to in *Dart, Vend. & P. p. 320*.

Messrs. C. K. Fay and F. I. Amory, for defendants:

We claim that, by the fifth clause of the will of William Miller, annuities of at least \$500 each were given to said defendants for their respective lives, and not merely during the life of their mother. He intended to provide for them for their own lives, as is manifest from the whole will; and, such being his intention, it is submitted that said clause can be so read as to carry it out. If this sentence can be construed so as to deprive the daughters of any income after the death of their mother, it may, with

equal propriety, be urged that, upon the death of both daughters, the mother would be deprived of her income for the rest of her life. If the clause above referred to cannot be thus construed, the testator has omitted to provide, in express words, for his daughters after the death of their mother.

See *Metcalf v. Framingham Parish*, 128 Mass. 370; *Sweeting v. Prideaux*, L. R. 2 Ch. Div. 418; *Re Daniel's Trust*, L. R. 1 Ch. Div. 375; *Greenwood v. Greenwood*, L. R. 5 Ch. Div. 954; *Mellor v. Daintree*, L. R. 33 Ch. Div. 198.

Even if the annuities to the daughters are limited in express terms to the mother's lifetime, and no words can be supplied to extend their duration, nevertheless the fact that David Miller's interest in \$10,000 is postponed until the death of each daughter shows that he was not to have the beneficial interest therein before that time, and, as he is also the residuary devisee, it would defeat the testator's expressed intention, unless some person other than David Miller should have said beneficial interest. In such cases, the person after whose life the devise is limited takes a life estate by implication.

See *Ralph v. Carrick*, 11 Ch. Div. 873; *Macy v. Sawyer*, 66 How. Pr. 381.

If the connection between the beneficial interest in said \$10,000 and an annuity of \$600 is not sufficiently close, the actual income, at least, of said \$10,000 should be paid to each daughter, and not to the heirs of David Miller.

Devens, J., delivered the opinion of the court:

The argument for defendants Maria D. Miller and Mrs. Moore properly concedes that, without reference to other parts of the will, it might be urged that the clause relating to the daughters of the testator made no provision for them, except during the lifetime of the mother. The residuum of the estate is devised and bequeathed to David Miller, upon the condition and subject to the charge of paying to the mother an income of \$200 "during her life," to each of the daughters a certain income "so long as both they and their said mother shall all live," and it then provides that, "upon the death of either" of the daughters, a larger annuity shall be paid to the survivor "during the life of their said mother."

This is the only provision made for annuities to the daughters who were not the testator's legitimate children, and nothing is found in it which indicates that the duration of the annuities bequeathed to the daughters extends beyond the life of the mother. On the contrary, an almost necessary construction of it limits them to this period.

When the construction of a clause is difficult, on account of meagre, involved, or contradictory phraseology, the true meaning of the testator may be sometimes ascertained by examining other provisions. But, even if the clause in question could be held to be of this character, an examination of other portions of the will does not reveal any intention to extend the annuities beyond the life of the mother. He has given, by a subsequent clause, \$10,000 to the children of either daughter, should she leave children at her decease; and, in the event of the death of either daughter without children, the

will provides that David Miller "shall retain said sum of \$10,000, to his own use." The testator perhaps contemplated, as suggested on behalf of the daughters, that a fund of \$20,000 would be required for carrying out his will in regard to the illegitimate branch of the family. But this sum of \$10,000 is dealt with by the will independently of the provision made thereby for the incomes to the mother and daughters. Thus, if one of the daughters had deceased during the life of the mother, leaving children, while the income of the surviving sister would have been increased, the sum of \$10,000 would be at once payable to her children.

The testator has, indeed, made no gift in terms of the income of the \$10,000, which income might accrue after the death of the mother and before the death of a daughter surviving the mother, when the principal sum would become payable to the daughter's children, should she leave any; but it is within the scope of the residuary clause; and it cannot be said that, because David Miller is thus to retain the \$10,000 to his own use, it therefore must be inferred that the annuity to the daughter should be continued during this period because it would approximate the interest of that sum, or that the testator has thus indicated any intention that David Miller should not have its income or interest during this time.

That great latitude has been used in construing the words of a will, where the intention of a testator could, from the whole context, be ascertained, is certainly true; but when a clause is in itself intelligible and expressed in apt words, we cannot speculate on the motives which might have governed the testator, or conjecture that he has failed to express his intention, and thus supply it. *Metcalf v. Framingham Parish*, 128 Mass. 374.

It is impossible to read the clause "so long as both they and their said mother shall all live," by supplying the words "during their respective lives." This would be to introduce words which contradict those which follow them, and thus to control the construction of the sentence by the words thus introduced. The mother's annuity during life has been provided for by the previous clause. Even if the word "all" may sometimes be used in the sense of "each," when it follows the words "both they and their mother" the sentence is applied to the life of all the three. The subsequent clause then provides for the contingency of one of the daughters dying before the mother. We are therefore of opinion that a fund of \$10,000 should be set aside to be paid to the children of Almira D. Moore, at her decease, but that she and her sister are not entitled to annuities after the death of the mother, and the further sum of \$10,000 should also be set aside for the future children of Maria D. Miller, and that sufficient land may be sold for these purposes. Notwithstanding the age of Miss Miller, and the extreme improbability that she can hereafter have offspring, we are not prepared to say that this fund should now be liberated, although we are aware that, under similar circumstances, this has been done by the English court of equity. *Locering v. Locering*, 129 Mass. 97; *Re Widows' Trusts*, L. R. 11 Eq. 408.

Instructions accordingly.

2 Mass.

Charles C. BARTON, Assignee,
v.

Reynolds T. WHITE *et al.*

1. The statute relating to insolvent debtors includes patents as property which should pass to the assignee by the assignment; but as an assignee in insolvency does not acquire a title merely by force of the assignment, and without a conveyance by the debtor, the assignee is entitled to the aid of a court of equity in his effort to require an insolvent debtor to make and execute such instruments and writings, and do all such other lawful acts and things as are necessary to perfect such transfer.
2. The words "by law exempt from attachment," in Pub. Stat. chap. 154, § 44, do not mean that all the property which cannot be attached or seized on execution shall not pass by the assignment in insolvency, but only such property as is by statute exempted from attachment.

(Suffolk—Filed March 23, 1887.)

ON report. *Decree for plaintiff.*

This was an action brought by Charles C. Barton, as assignee of Reynolds T. White, against Reynolds T. White, John J. McNutt, and Edward Hobbs, to determine the ownership of certain letters patent, and for a temporary injunction to restrain the alienation of the same pending the determination of the suit.

The complaint alleged that on September 10, 1885, the plaintiff was appointed assignee of the estate of the defendant White, an insolvent debtor; and on that day all the estate, real and personal, of said White, including all the property of which he was possessed, or in which he was interested, or to which he was entitled on August 15, 1885, was assigned to him as assignee by the judge of the Court of Insolvency of Suffolk County; that among said property were three certain letters patent, which on or before September 10, were assigned by said White to the defendant McNutt, as collateral security for a loan; that said assignments to McNutt have never been recorded in the patent office as required by law; and that the plaintiff is informed and believes that the loan has been paid. The plaintiff further alleged on information and belief that said McNutt had assigned one of said letters patent to Hobbs, at request of White, but that the same had never been delivered, and that the assignment was without consideration and void; that McNutt does not claim any interest in said letters patent and is willing to assign the same to plaintiff with consent of White; that plaintiff has demanded same of White, but that White refused and still refuses to assign the same to him.

The plaintiff prayed: (1) that the court ascertain to whom said letters patent rightfully belonged on August 5, 1885, and what interest, legal or equitable, said White had therein on that day; (2) that, if the court found that on such day said letters patent belonged to White, or if assigned to White by McNutt for security to a loan which has been paid, or if held by Hobbs without consideration, such party or

parties holding the legal title to said patents may be ordered by the court to assign them to the plaintiff; (3) that pending the determination of the suit the defendant may be enjoined from transferring or assigning said letters patent.

A temporary injunction was accordingly granted by the court.

The case was heard in the supreme court by Holmes, J., on the complaint and demurrer and an agreement by the parties that the facts alleged in the complaint should be admitted for the purposes of the suit. The court overruled the demurrer, and, at the request of the defendants, reported the case to the full court.

Mr. J. E. Maynadier, for defendants:

Letters patent are, by law, exempted from attachment.

Carver v. Peck, 181 Mass. 291; *Ager v. Murray*, 105 U. S. 126 (Bk. 26, L. ed. 942); *Stephens v. Cady*, 14 How. 531 (55 U. S. bk. 14, L. ed. 528); *Stevens v. Gladding*, 17 How. 451 (58 U. S. bk. 15, L. ed. 155); *Ashcroft v. Walworth*, 1 Holmes, 152.

This defense is based upon these propositions:

1. The Commonwealth did not intend to bring letters patent of the insolvent debtor within the power of its court of insolvency.

2. The Commonwealth did intend to exclude the letters patent of the insolvent debtor from the power of its court of insolvency, (1) because letters patent are the grant of the United States of America; (2) because they are not local; (3) because they are within the express terms of the exception in the assignment.

United States letters patent cannot be transferred except by an instrument in writing signed by the owner of the patent, and White has never signed an assignment to Barton.

Ashcroft v. Walworth, *supra*; *Gordon v. Anthony*, 16 Blatchf. 234.

Mr. Justice Hagner, of the Supreme Court of the District of Columbia, in his opinion in *Murray v. Ager*, 20 Off. Gaz. 1811, says: "The case in 1 Holmes, Rep. 152 (*Ashcroft v. Walworth*), which decides that a trustee in insolvency under the Massachusetts statute has no title to a patent-right, proceeds upon the express words of the statute, which declares that only those species of property which can be seized on execution at law pass to the assignee; and, as it is settled that a patent-right cannot be taken on execution at law, the statute necessarily excluded it as assets from the trustee in insolvency."

The right of an assignee in insolvency to the property of the insolvent depends upon the insolvent laws of this Commonwealth, and has no relation to the rights of a judgment creditor as to the property of the judgment debtor.

On the point that the Commonwealth did not intend to include United States patents, it may be said by complainant that Pub. Stat. chap. 157, § 46, provides: "The assignment shall vest in the assignees all the property of the debtor which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution."

In reply, it is submitted that § 46 must not contradict § 44; and that the general language of § 46 must be limited by the express terms of the exception in § 44, except, of course, of the specific provisions, *e. g.* notes, etc., of § 40.

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It may also be urged by the complainant that the exception in the assignment relates only to the articles especially exempt from execution on the grounds of immunity, by Pub. Stat. chap. 171, § 84.

In Reply:

No case has been found so construing the statutes of this Commonwealth.

The dicta in *Ashcroft v. Walworth* and *Murray v. Ager* are directly against this contention of the complainant.

See also *Campbell v. James*, 5 Fed. Rep. 806.

All the statutes of this Commonwealth relating to property are intended to relate to personal property by force of the residence of its owner, or local as real estate is local; that is, because within the Commonwealth. The authorities are unanimous that letters patent of the United States are not local in Massachusetts, but coextensive with the United States.

Mr. Charles H. Drew, for plaintiff:

The plaintiff, by the assignment to him, as the assignee in insolvency of the defendant White, became, as such assignee, the owner of "all the property of the debtor, real and personal, which he could have lawfully sold, assigned, or conveyed."

Pub. Stat. chap. 157, § 46.

Letters patent are property, and may be, "sold, assigned, or conveyed" by the patentee or his assignee.

Brown v. Duchesne, 19 How. 195 (60 U. S. bk. 15, L. ed. 595); *Seymour v. Osborne*, 11 Wall. 533 (78 U. S. bk. 20, L. ed. 85); *Consolidated Fruit Jar Co. v. Wright*, 94 U. S. 96 (Bk. 24, L. ed. 70); *Cammeyer v. Newton*, 94 U. S. 226 (Bk. 24, L. ed. 72); *James v. Campbell*, 104 U. S. 357 (Bk. 26, L. ed. 787).

It is true that the nature of the property in letters patent is such that it cannot be said that the property exists exclusively in Massachusetts, or any particular State, but is coextensive with the United States.

Stevens v. Gladding, 17 How. 451 (58 U. S. bk. 15, L. ed. 155); *Ashcroft v. Walworth*, 1 Holmes, 154; *Gordon v. Anthony*, 16 Blatchf. 234-239; *Dehon v. Foster*, 4 Allen, 545; *Warren v. Warren Thread Co.* 134 Mass. 247; *Carver v. Peck*, 181 Mass. 292.

It has been uniformly held in England that patents passed by an assignment in bankruptcy, even without express words to that effect in the statute.

Hesse v. Stevenson, 3 Bos. & Pul. 565; *Bloxam v. Elsee*, 1 Car. & P. 558; *Hudson v. Osborne*, 39 L. J. N. S. Ch. 79.

In New York and California also it has been held that the court may, upon a creditor's motion, order the assignment and sale of a patent-right for the payment of the patentee's judgment debts.

Clan Ranald v. Wyckoff, 9 Jones & S. 527; *Barnes v. Morgan*, 3 Hun, 703; *Gillet v. Bate*, 86 N. Y. 87; *Pacific Bank v. Robinson*, 57 Cal. 520.

The Supreme Court of the United States has decided that letters patent may be subjected by a bill in equity to the payment of the judgment debt of the patentee.

Ager v. Murray, 105 U. S. 126 (Bk. 26, L. ed. 942).

The cases of *Stephens v. Cady*, 14 How. 528 (55 U. S. bk. 14, L. ed. 529), and *Stevens v.*

Gladding, 17 How. 447 (58 U. S. bk. 15, L. ed. 155), go no further than to hold that copyrights and letters patent cannot be seized and sold on execution.

Ager v. Murray, 105 U. S. 180 (Bk. 26, L. ed. 943).

If the plaintiff is entitled to claim the letters patent in controversy as part of the property of the insolvent, there can be no doubt about the power of this court to compel him to make a proper conveyance.

Story, Eq. Jur. §§ 743, 744; *Massie v. Watts*, 6 Cranch, 148 (10 U. S. bk. 3, L. ed. 181); *Dehon v. Foster*, 4 Allen, 545.

C. Allen, J., delivered the opinion of the court:

We have no doubt that it was the intention of the Legislature, in enacting the statute relating to insolvent debtors, to include patents as property which should pass to the assignee by the assignment. This was so declared in *Carver v. Peck*, 131 Mass. 291, though the point was not essential to the decision. There is nothing in the nature of a patent, to prevent it from so passing. *Ager v. Murray*, 105 U. S. 126 [Bk. 26, L. ed. 942]. But it has been considered that an assignee in insolvency does not acquire a title merely by force of the assignment, and without a conveyance by the debtor; the reason given being that the statutes of the United States contemplate an instrument of transfer, signed by the owner of the patent and recorded in the patent office. *Ashcroft v. Walworth*, 1 Holmes, 152.

It is now contended on the part of the defendant that, since a patent cannot be attached or seized on execution, it is "by law exempt from attachment," within the meaning of Pub. Stat. chap. 154, § 44, and therefore, by the express terms of the statute, does not pass to the assignee; but the words above quoted do not mean that all property which cannot be attached or seized on execution shall not pass by the assignment, but only such property as is by statute exempted from attachment. Section 46 of the statute provides that "the assignment shall vest in the assignee all the property of the debtor, real or personal, which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution upon a judgment against him." A patent, clearly, is property which the owner could have lawfully sold, assigned, and conveyed (and this falls within the terms of § 46), though it could not have been taken on execution upon a judgment against him. The policy of the Insolvent Act is to vest in the assignee all the property of the debtor, of every description, except such as is exempted by statute from attachment. It has never been considered that the fact that a debtor's property was of such a character that it could not be seized on execution, excluded it from the operation of the insolvent laws. Such a construction, indeed, has not been contended for, so far as we know; and cases assuming the contrary are numerous. *Bassett v. Parsons*, 140 Mass. 169, 1 New Eng. Rep. 225; *Warren v. Warren Thread Co.* 134 Mass. 247; *Davis v. Newton*, 6 Met. 537, 543; *Smith v. Chandler*, 3 Gray, 392, 396; *Burnside v. Merrick*, 4 Met. 537.

In *Stearns v. Harris*, 8 Allen, 597, it was said, that "the words of the insolvent law, describ-

ing and enumerating the property and rights of property which pass by the assignment, are large and comprehensive, and have always been liberally construed by the court, so far as to include every valuable right in property, real or personal, not clearly excepted, whether legal or equitable, absolute or conditional, which could have been enforced by the debtor in any kind of judicial process."

The defendant further contends, though without laying very much stress upon this ground of argument, that the State has not the power to enact a statute which has the effect to pass a title to letters patent of the United States; but we have no doubt upon this point. Under § 74 of the Insolvent Act, it is the duty of an insolvent debtor to make and execute such deeds and writings, and do all such other lawful acts and things as the assignee at any time reasonably requires, and as are necessary and useful for confirming the assignment; and the assignee is entitled to the aid of a court of equity in his endeavor to acquire the title to the patent in controversy, the facts alleged in the bill being admitted to be true.

Decree for the plaintiff.

George W. PHELPS *et al.*, Exrs.,
v.

John W. PHELPS *et al.*

1. **A will**, after certain donations, gifts, and provisions therein made by the testator, **contained the following**: "After deducting the above donations, gifts, and provisions, one half of the income of the remainder of my property, both real and personal, I give to my son Henry, for the support of himself and family,—at his decease to be disposed of to his legal heirs as he shall desire or direct, by will or otherways. The income of the other half of my estate, both real and personal, after deducting as above provided, is to be given to my son John W., for the support of himself and son Willis (the support of the son shall be as the father shall elect). One half of this half of my estate is to be disposed of at the decease of my son John W., to his heirs, as he shall direct, etc. The other half of the same, which my son John W. is to receive the income from, shall go to my grandson Willis, provided said executors, or a majority of them, at the decease of my son John W., shall judge said grandson to be a person of good habits and capable of managing, etc.; if not, it is to go to my legal heirs."

Held:

(a) That the **executors**, by the provisions of said will, are **vested with the title to the real, and to hold the personal, property, subject to the trust:** (1) to invest the personal property as a general fund, and hold the same with the real estate, out of which the legacies, gifts, and provisions shall be paid as they become payable; (2) to pay one half of the income of the general fund and of the real estate remaining after the payment of the legacies, etc., to the testa-

tor's son Henry, during his life, for the support of himself and family, and to pay the other half of said income to the testator's son John W., for the support of himself and his son Willis, and, at the decease of Henry and John W., respectively, to dispose of the remainder of the estate in accordance with the provisions of the will.

- (b) That the "**donations, gifts, and provisions**" are not to be deducted and set apart as a separate fund, but are to be deducted as they become due and payable. They remain, subject to payment, a part of the general fund, the income of which is to be paid, one half to said Henry and one half to said John W. When any of the legacies are paid, the amount of the general fund and of its income are proportionably diminished.
2. Certain legacies given by said will were payable when the legatees arrived at a certain age or were married; or, in one case, if the executors should not think the legatee capable, etc., he was to receive the income thereof annually. *Held*, that the legacies cannot earn interest which will enure to the benefit of the legatees, before the time specified in the will for the payment of the legacies or of their income.
 3. A provision in the will that the grandsons should have a college education, and that the executors should pay each of them annually, while in college, a certain sum.—*Held*, to indicate an intention by the testator to give the executors the estate in trust.
 4. Although the testator has appointed no trustees, yet, if by the will the property is to be kept together for a time, the executors become trustees during the time it is necessary for them, under the terms of the will, to act in that capacity.
 5. Power given to executors to sell and dispose of all the estate, and invest the proceeds, without limit as to time, gives them the estate in trust.
 6. To a bill by executors for the construction of a will, an attaching creditor is not a necessary party. In such equitable suit, the court cannot determine the rights of a creditor of a legatee to the income payable by the will to the latter.
 7. A gift to one for the support of another creates a trust in favor of the latter.

(Hampden—Filed February 24, 1887.)

ON report.

Bill in equity, filed by George W. Phelps and Charles Marsh, a majority of the executors of the will of Willis Phelps, against John W. Phelps and others, seeking the instruction of the court as to the interpretation of the will of Willis Phelps.

The bill of complaint set forth that on October 27, 1881, said Willis Phelps made his last will, and on November 25, 1883, died; that said will was duly probated and admitted, and letters testamentary issued to the plaintiffs, and

to Henry Willis Phelps, one of the defendants, they being the executors named in the will. Among the provisions of the will are the following: "After deducting the above donations, gifts, and provisions, one half of the income of the remainder of my property, both real and personal, I give to my son Henry Willis Phelps, for the support of himself and family,—at his decease to be disposed of to his legal heirs as he shall desire and direct, by will or otherwise."

It was claimed by said H. W. Phelps, that by the foregoing clause in said will he is vested with the legal title in fee simple to one undivided one half of all the real estate of the testator, subject only to the powers of the executors to sell the real estate in Massachusetts, and to the power of the courts of other States where lands of the testator are situated to order a sale of said lands for the payment of debts or the satisfaction of legacies; that he is entitled to an absolute interest in one half of the proceeds of the real estate situated in Massachusetts, which has been sold or may be sold by the executors, except so far as the same is needed for the payment of debts, legacies, and charges of administration; that, if under said will he is not entitled to a fee simple in one undivided one half of the real estate and an absolute interest in the personality, he is at least entitled to a legal estate for life in one undivided one half of the realty, and life interest in one half of the personality, with a right to receive possession of the same after a fulfillment of the trusts of the executors concerning the payment of debts and charges, and provisions for legacies other than residuary, and to hold the same for the benefit of himself for life, and such legal heirs as he shall appoint, by will or otherwise, to receive the same at his decease; and, in pursuance of the foregoing claims, he further claims that the executors ought to give and allow him possession of the real estate of the testator to hold, as a tenant in common of a legal estate therein, together with John Wesley Phelps as tenant in common of one undivided half thereof, and that the executors ought not to interfere with the said joint possession and ownership, and with his accounting with John Wesley Phelps on the basis thereof; but that, if this court shall decide that the executors hold the legal estate in one undivided half of the testator's realty in trust for John Wesley Phelps, then that the executors should account with said Henry Willis, as vested jointly with him with a legal estate in the realty of the testator, and as to the personality of the testator, except such part as may be needed for the payment of debts or legacies, other than residuary, and charges of administration; that the executors ought to pay one half thereof to the said Henry Willis upon his filing with them a bond with satisfactory sureties, as provided by law, for the saving of the executors from loss by reason of said payment.

It is claimed by the children of Henry Willis Phelps that all the remainder of the testator's estate, both realty and personality, is, as to the legal title thereof, vested in the executors, to hold the same in trust for said Henry Willis for life, and, at his decease, for "his legal heirs, as he shall devise and direct, by will or otherwise."

It was claimed by John Wesley Phelps that he has no interest in the estate other than arising under the provisions of the following clause of the will: "The income of the other half of my estate, both real and personal, after deducting as provided, is to be given to my son John Wesley Phelps, for the support of himself and son, Willis Phelps, 2d. One half of this half of my estate is to be disposed of at the decease of my son John Wesley, to his heirs, as he shall direct, provided no part of the same shall be given to her who is or has been known as Fanny Their." And the said John W. further claims that his interest thereunder is an equitable one only, and that the executors are seised and possessed of one half of the remainder of the testator's estate, whether personally or realty, upon a trust for himself and Willis, 2d, and that said one half of the remainder, whether in the hands of the executors or in the hands of said John W. so far forth as it may have been paid to the said John W. by the executors, is charged with a trust in behalf of Willis Phelps, 2d, and that said trust attaches to the whole of said one half of the remainder, and not to any specific and divisible part thereof; so that the executors cannot discharge themselves of the said trust for Willis Phelps, 2d, by payments to any other than him, the said John, in his own person, or that of his attorney, of all the income of one half of the remainder of the estate, and cannot be charged, in trustee process or otherwise, in any suit brought against him, the said John W. Phelps, in which the interest of him may hereafter be attached, or is now attached; and that as to the one half of the remainder of the real estate of the testator, after payment of debts, legacies, and charges, the executors, being seised of the fee thereof, must properly manage the same for the benefit of the said John Wesley and Willis Phelps, 2d, as interested therein jointly but in proportions or shares indeterminate; and that the said John W. will hold the executors responsible for the proper management thereof. It was further claimed by the said John W. that the entire remainder of the testator's estate, after deducting debts, legacies, and charges, is to be held by the executors, during the joint lives of Henry Willis Phelps and John Wesley Phelps, as one undivided trust estate, and the income only thereof divided as the same shall become payable.

It was claimed by said Willis Phelps, 2d, upon the clause of the will last above cited, that as to the entire remainder of the testator's estate, after deducting debts, charges, and legacies other than residuary, that the executors are possessed of the personalty and seised of the legal title of the realty upon trust to pay one half the net income thereof to John Wesley Phelps during the life of him, "for the support of himself and son, Willis Phelps, 2d," and, after the death of the said John Wesley, in trust to convey one fourth of said remainder to him, the said Willis Phelps, 2d, if at that time they shall judge him to be a person of good habits and capable of managing the same with skill and prudently; and he, the said Willis, 2d, claims that he will hold the executors responsible for the proper management of said estate. And the said Willis Phelps further claims that if any part of the income of

one half of the remainder of the estate is paid by the executors to John Wesley Phelps, it is in the hands of said John Wesley charged with a trust in favor of the support of him, the said Willis.

It was claimed by Willis Phelps, Henry Willis Phelps, Jr., Mary Isabella Phelps and Annie Warner Phelps, that the general legacies to them bequeathed are to be held in trust by the executors until the time of their payment arrives; and that, if they earn any interest while so held, such interest attaches to the fund which earns it, and is payable to the legatees when the principal of the legacies becomes payable; and it was further claimed, by some or all of the legatees above named, that each general legacy is to be kept by the executors as a trust fund by itself, together with the earnings attaching thereto, and that it is the duty of the executors to invest said legacies, and to invest them separately as aforesaid.

It was claimed by said Henry Willis Phelps and John Wesley Phelps that the general legacies last above named are not to be held in trust as claimed, but that the legatees are entitled to receive the principal only at the time when payable by the terms of the will, and that any income thereon prior thereto is payable to them, the said Henry W. and John Wesley.

The plaintiffs say that they have no interest in the subject-matter in controversy, but, being in doubt upon the questions raised, seek the advice of the court. They are in doubt (a) as to the relation of the executors to the real estate of the testator,—whether they are vested with the legal title in fee, and, if so vested, then subject to what trusts as to Henry Willis Phelps, John W., Willis Phelps, 2d, and the family and heirs of Henry Willis Phelps, and the heirs of John Wesley Phelps; (b) as to the personalty; (c) as to the legacies to Willis Phelps, 2d, Henry Willis Phelps, Jr., Mary Isabella and Annie Warner Phelps.

The prayer of the bill was that defendants be decreed to interplead and state their several claims upon the plaintiffs, so that they (the plaintiffs) may know what to do in the premises; the answers to the bill admitted that the claims set forth were accurately stated; and the case was heard in the supreme court, before William Allen, J., on bill and answers, and reserved for the full court.

Mr. W. W. McClench, for Henry Willis Phelps, defendant:

Although the testator neither makes in terms any bequest or devise in trust, nor appoints any trustees, the terms of the will imply that the property is to be kept together for a period. The executors therefore become trustees of both the real and personal estate.

Kingsbury v. Gould, 9 Met. 285; *Blake v. Dexter*, 12 Cush. 587.

Henry W. Phelps claims to take an absolute estate, free from all trusts. The language used by the testator creates no trusts in favor of the children of Henry W. The rule of law is well settled that, to create a trust, the words must be imperative, the subject-matter must be certain, and the objects must be as certain as the subject.

Wright v. Atkyns, 1 Turn. & R. 157; *Morice v. Bishop of Durham*, 10 Ves. 584; *Thorp v. Owen*, 2 Hare, 608; *Wood v. Cox*, 2 Myl. & C. 684; *Thayer v. Thayer*, 129 Mass. 192, and

cases cited by counsel for plaintiff; *Schmauns v. Goss*, 132 Mass. 141.

The language used in this case is not imperative. "To be disposed of," etc., imposes no obligation. They are merely words of direction.

Hess v. Singler, 114 Mass. 57; *Sears v. Cunningham*, 122 Mass. 588; *Barrett v. Marsh*, 126 Mass. 213.

The subject-matter is uncertain. It does not appear by the will certainly whether it is the income or the principal that is "to be disposed of" at the decease of Henry W. Phelps. The objects also are uncertain.

Meredith v. Heneage, 1 Sim. 558.

But if Henry W. Phelps has not a fee simple in an undivided half of the real estate, and an absolute interest in the personal estate, he claims that, at least, he is entitled to an estate for life in the realty, and also a life interest in the personality, with the right of possession. He claims that, under the will, after the payment of legacies as above specified, there will exist no further occasion for the intervention of a trustee, and that the executors should account with him as vested jointly with them with a legal estate in the realty, and that one half of the personality ought to be transferred to him, either with or without security, as this court may determine.

1 Jarm. Wills, 502; 2 Jarm. Wills, 202; *Flake v. Cobb*, 6 Gray, 144; *McCarthy v. Cosgrove*, 101 Mass. 124; *Taggard v. Piper*, 118 Mass. 815; *Quigley v. Gridley*, 132 Mass. 88.

This case differs from *Hooper v. Bradbury*, 133 Mass. 303. In that case there was a distinct appointment of a trustee.

As to the legacies, this defendant claims that interest cannot be earned by the legacies before the time specified in the will for the payment of the legacies themselves. The general rule governs these legacies. These legacies do not come within the exception to the rule, by reason of being legacies to grandchildren. In the case of *Acherley v. Wheeler*, 1 P. Wms. 788, interest was allowed upon a general legacy to a niece, only because, by the terms of the will, the testator recognized his obligation to support her. None of these legacies are specific, and the general rule ought to govern.

1 Wms. Exrs. 1424-1427; *Crickett v. Dolby*, 3 Ves. 10; *Merritt v. Richardson*, 14 Allen, 241; *Kent v. Dunham*, 106 Mass. 586.

Mr. Chas. L. Long, for Mary Isabel Phelps and Chas. L. Long, as guardian *ad litem*, defendants:

"The principal object in construing a will is to ascertain the intention of the testator. This, being ascertained, will prevail, unless it is inconsistent with some fixed rule of law."

Brown v. Merrill, 131 Mass. 824.

"It is presumed that the testator did not intend to leave any part of his estate intestate."

Soule, J., in *Weston v. Weston*, 125 Mass. 270. The provision to Henry does not give to him a fee. The only power of disposal is by will. There is no language adequate to show a purpose to bestow upon him the whole estate. There are no words, such as "any estate remaining at his decease," to be disposed of, etc.; all that he has is held by him "for the support of himself and family," thus creating a trust for them, and a provision that would be violated

were he to have an estate that would give to him the power of disposal by conveyance. It is not a case of an absolute gift of a life estate, with a full power of disposal by deed or otherwise, over the entire property, as in *Ide v. Ide*, 5 Mass. 499; *Burbank v. Whitney*, 24 Pick. 146; *Hale v. Marsh*, 100 Mass. 466; *Kelley v. Meins*, 135 Mass. 281.

In *Metcalf v. Framingham Parish*, 128 Mass. 870, Gray, *Ch. J.*, says: "If the reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has, on the whole will, sufficiently declared."

The devise to Henry is coupled with a trust in favor of his family (*Andrews v. Bank of Cape Ann*, 3 Allen, 313; *Whiting v. Whiting*, 4 Gray, 286); the word "family" including his wife and children (*Bradlee v. Andrews*, 187 Mass. 55; *Bouditch v. Andrew*, 8 Allen, 839; *Bates v. Dewson*, 128 Mass. 884). It gives to Henry the power to dispose of the estate; but a power that cannot be operative until his death. A devise such as this existed in *Hubbard v. Rawson*, 4 Gray, 242, where the estate was in trust to be managed for the benefit of A as she should direct, and on her death to be conveyed to such persons as "she should appoint;" and the court says that, "by will or otherwise, she might appoint the person to whom the estate was to be conveyed."

The reading of the whole will produces the conviction that it was the intention of the testator to give the heirs of Henry a remainder in fee. Words of inheritance are not necessary.

Cook v. Holmes, 11 Mass. 530.

In *Metcalf v. Framingham Parish*, *supra*, the court says: It is well settled in England that a devise or bequest to a widow for life, if she shall not marry, and, if she shall marry, then over to another person, gives the remainder to him if she dies unmarried; and that in such case a general intent is implied to give the remainder over after death of the tenant for life. So that, if Henry dies without directing how the principal estate shall go, it will go to his heirs by implication.

But little difficulty exists as to the legacy to John W. Phelps. There can be no merger of a life estate and the power of disposal, here. The testator expressly states that "the income of the other half of my estate is to be given to my son John Wesley Phelps, for the support of himself and son, Willis Phelps, 2d." For the reasons given, this entitles the son John to receive the income of this half; but in his hands it is coupled with a trust for the support of his son Willis.

Andrews v. Bank of Cape Ann, and *Whiting v. Whiting*, *supra*.

The legacies to Willis Phelps and Henry Willis Phelps, Jr., are of a nature requiring that they be held in trust, because they are not to be paid until the legatees arrive at the age of twenty-one years; and not then, unless the executors shall think them "capable of managing the same prudently and with economy;" if not, they are to receive the income of the same an-

nually, which would give them the income for life, the remainder to fall into the residue.

Waite v. Belding, 24 Pick. 129; *Hatfield v. Sohler*, 114 Mass. 48; *Perry*, Tr. § 468.

So far as an executor holds funds of an estate with which to meet its liabilities or to pay legacies which are not to be held in trust, he is not charged with the duty of investing them; but when he holds a legacy in a trust capacity, his obligation is the same as any trustee's.

Boynston v. Dyer, 18 Pick. 7; *Whiting v. Whiting*, *supra*.

It is the duty of a trustee to keep invested the trust property; and any income the property earns attaches to the property and becomes a part of the legacy.

Eliott v. Sparrell, 114 Mass. 404.

Mr. George M. Stearns, for John W. Phelps, defendant:

The income of one-half "is to be given" John W., for the support of himself and son, Willis, 2d. Every dollar John W. receives is charged with a trust in his hands for the support of Willis, 2d, as much as his own.

Chase v. Chase, 2 Allen, 101; *Loring v. Loring*, 100 Mass. 840; *Proctor v. Proctor*, 141 Mass. 169, 2 New Eng. Rep. 888.

There is no such power of disposal as in *Clapp v. Ingraham*, 126 Mass. 200.

The fact that the income is charged with a trust for the support of Willis, 2d, as settled by the cases cited above, establishes the claim of said John W. that his interest is only an equitable one. See also—

Saunderson v. Stearns, 6 Mass. 87; *Field v. Hitchcock*, 17 Pick. 182; *Barrus v. Kirkland*, 8 Gray, 512; *Hatfield v. Sohler*, 114 Mass. 48; *Simonds v. Simonds*, 121 Mass. 191; *Smith v. Snow*, 128 Mass. 323; *Sanford v. Sanford*, 135 Mass. 314.

This interest cannot be reached by attachment at common law.

Sibley v. Quinsigamond Nat. Bank, 153 Mass. 515.

The testator had the right to say who should divide the income between John W. and Willis, 2d, and he declared that John W. should so do. The court cannot substitute its discretion for that of John W., and say what portion shall be given one and what the other. The case is different from *Loring v. Loring*, 100 Mass. 840. There the testator did not fix the tribunal which should pass upon the division, and the court under its general equity power decreed its division. Neither is it like *Forbes v. Lothrop*, 137 Mass. 528, where the entire interest in the property was given one defendant subject to a trust solely for the benefit of the other defendant. This case is like—

Broadway Nat. Bank v. Adams, 138 Mass. 170; *Foster v. Foster*, 138 Mass. 179.

If any income was to be added to the gifts, the testator would have so declared. The legatees are not takers of the income of a residue, as in *Lovering v. Minot*, 9 Cush. 151, and *Sargent v. Sargent*, 108 Mass. 297; nor of specific legacies, as in *Steech v. Thorington*, 2 Ves. 560; nor entitled by the terms of the will to interest, as in *Knight v. Knight*, 2 Sim. & S. 490; nor is the legacy to a child; and grandchildren do not stand in the position of a child.

Lupton v. Lupton, 2 Johns. Ch. 614-628; *Miles v. Wister*, 5 Binn. 477-479; *Ellis v. Ellis*, 2 Mass.

1 Sch. & Lef. 1; *Hearle v. Greenbank*, 3 Atk. 716.

Gardner, J., delivered the opinion of the court:

The plaintiffs, executors, seek the instruction of the court as to the interpretation of the will of Willis Phelps, deceased. Although the testator appointed no trustees, it is clear that, by a fair implication, by the will, the property is to be kept together for a time. The executors therefore became trustees of both the real and personal estate during the time it was necessary for them, under the terms of the will, to act in that capacity. The real and personal estate would vest in the executors upon the same trust. *Kingsbury v. Gould*, 9 Met. 282.

The defendant Henry Willis Phelps, while admitting that the executors became trustees of the real and personal estate for a certain period, argues that, upon the termination of the general trusts by the payment of the legacies, or the refusal to pay them, he is, by the terms of the will, vested with the legal title in fee simple to an undivided one half part of all the real estate of the testator, and to an absolute interest in one half of the personal estate. The clause of the will relating to Henry Willis Phelps is as follows: "After deducting the above donations, gifts, and provisions, one half of the income of the remainder of my property, both real and personal, I give to my son Henry Willis Phelps, for the support of himself and family; at his decease to be disposed of to his legal heirs as he shall desire or direct, by will or otherwise."

It is not clear, by the power of disposal in the latter part of this clause, whether it is income or principal which the testator refers to; but comparing this power with that given to John in the clause: "One half of this half of my estate is to be disposed of at the decease of my son John," etc., we think that the true meaning of the testator was to give his son Henry Willis Phelps, at his decease, power to dispose of, by will or otherwise, one half of the remainder of the testator's estate. The presumption is that the testator did not intend to leave any part of his estate undisposed of. *Weston v. Weston*, 125 Mass. 270. His intention to dispose of all his property is apparent from the language of the will, by the words which he has used. If he has omitted to express his intention, this omission cannot be supplied by conjecture. "But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given, which is not bequeathed by express and formal words, the court must supply the defect (by implication, and so mould the language of the testator as to carry into effect as far as possible the intention which it is of opinion that he has, on the whole will, sufficiently declared." *Metcalf v. Framingham Parish*, 128 Mass. 370.

The bequest to Henry of the income of one half of the remainder is coupled with a trust for the support of his family. To give property to one person for the support of another is sufficient to show that a trust is intended in favor of the latter. *Loring v. Loring*, 100 Mass. 840; *Andrews v. Bank of Cape Ann*, 8 Allen, 319; *Whiting v. Whiting*, 4 Gray, 236. The word "family" includes the sons and daugh-

ters so long as they may live together and form a portion of the same household. *Bradley v. Andrews*, 187 Mass. 50. The purpose of this bequest of the income is "for the support of himself and family." He has a life interest in the income, coupled with a trust for the support of his family. He has no absolute estate in the half remainder; nor is the bequest of the income clothed with a trust in favor of his children or of "his legal heirs." At his decease, the estate is to be disposed of to his legal heirs as he may wish, by will or otherwise. The disposition of the estate is limited to his legal heirs. But this power to dispose of the estate cannot be exercised until his decease. The provision made for John is, in many respects, similar to that made for Henry. "The income of the other half of my estate, both real and personal, after deducting as provided above, is to be given to my son John Wesley Phelps, for support of himself and son Willis Phelps, 2d (the support of the son shall be as the father shall elect). One half of this half of my estate is to be disposed of, at the decease of my son John Wesley, to his heirs, as he shall direct; provided no part of the same shall be given to her who is or has been known as Fanny Ther." The other half of the half from which John is to receive his income goes to Willis Phelps, 2d, son of John and grandson of the testator, provided the executors, or a majority of them, at the decease of John, "shall judge said grandson to be a person of good habits, and capable of managing the property with skill, and prudently; if not, it is to go to my legal heirs."

It is apparent that the testator intended that the executors should hold the property up to the time of John's death, and that then they should determine what disposition should be made of the one half which, in a certain event, they were to deliver over to Willis, 2d. This was a question for them to determine, and, to enable them effectually to carry out the intention of the testator, it was necessary that they should have the control and possession of the property. The income of one half "is to be given" to John W., for the support of himself and his son, Willis, 2d. The income which went into John's hands was charged with a trust for the benefit of his son, in the same way and to the same extent that the income given to Henry was charged with a trust to support his family. In neither case was the income of the estate received by the sons to be held absolutely by them to be disbursed at their pleasure. They each took the income of one half of the estate in trust, so that the family, the wife and children of one, and the son of the other, could enforce its due appropriation, in part for their benefit, in a court of equity. Otherwise it would be in the power of either son to defeat the purpose of the testator, by depriving the family of one and the son of the other of the support which was expressly provided for by the will. *Chase v. Chase*, 2 Allen, 101; *Proctor v. Proctor*, 141 Mass. 169, 2 New Eng. Rep. 353; *Andrews v. Cape Ann Bank*, 8 Allen, 313.

Inasmuch as the income, when received by Henry and John, is charged with a certain trust for the support of the family of Henry, and for the support of the son of John, their

respective interests are only equitable. To give them the principal might defeat the intention of the testator in his provision for their respective heirs, to whom the principal sum is to go at their decease. *Saunderson v. Stearns*, 6 Mass. 37; *Field v. Hitchcock*, 17 Pick. 182; *Barrus v. Kirkland*, 8 Gray, 512; *Hatfield v. Sohler*, 114 Mass. 48; *Simonds v. Simonds*, 121 Mass. 191; *Smith v. Snow*, 123 Mass. 323; *Sanford v. Sanford*, 135 Mass. 314.

An examination of the provisions of the will shows the purpose and intention of the testator. The provision that the grandsons shall have a college education if they desire, and that the executors, at such times as they shall think advisable, shall pay them \$600 each, annually, for four years, if they remain in college so long, indicates that the executors should hold the remainder of the estate in trust. The amount required by the executors for this purpose is uncertain, and will depend upon the determination of the grandsons. Power is given the executors to sell and dispose of all the testator's estate in this State, and to invest the proceeds. They are not limited as to time in making such sale and investment; and it appears to have been the intention of the testator that they were to have such power as occasion might require, in carrying out the purposes of the testator; and that, for these purposes, the executors should hold the real estate in trust. The clause in the will that the support of the son of John should be as the father shall elect indicates that the funds to supply that support should come from the executors; that, although they should supply the funds, they should not dictate the manner of support which the father should furnish the son. There are other indications in the will pointing to the same conclusion.

The duty of the court, in giving a construction to the will, is to ascertain the real intent and meaning of the testator. *Cook v. Holmes*, 11 Mass. 530; *Metcalf v. Framingham Parish*, *supra*. From reading the whole will and examining its provisions, we are led to the conclusion that it was the intention of the testator that the executors should be vested with the title to the real estate, and should hold the personal property subject to the trust: (1) to invest the personal property of the testator as a general fund, and hold the same with the real estate, out of which the legacies, donations, gifts, and provisions shall be paid as they severally become due and payable; (2) to pay one half of the income of the general fund and of the real estate remaining after the payment of the legacies, donations, gifts, and provisions, as they severally become due and payable, to Henry Willis Phelps, during his life, for the support of himself and family; and to pay the other half of said income to John Wesley Phelps, during his life, for the support of himself and his son, Willis Phelps, 2d.; and, at the decease of Henry Willis Phelps and John Wesley Phelps, respectively, to dispose of the remainder of the estate in accordance with the provisions of the will. By the terms of the will, the "donations, gifts, and provisions" are not to be detached and set apart as a separate fund, but are to be deducted as they become due and payable. They remain, subject to payment, a part of the general fund, the income of which is to be paid one half to Henry Willis Phelps, and one half

to John Wesley Phelps. When any of the legacies are paid, the amount of the general fund is reduced to the extent of payment, and the amount of the income is also diminished. The legacies cannot earn interest which will enure to the benefit of the legatees, before the time specified in the will for the payment of the legacies or of their income. The testator has provided that, under certain conditions, the income of the legacies of \$3,000 to his grandsons, Willis Phelps and Henry Willis Phelps, Jr., shall be paid to them annually after they "shall be twenty-two years of age." He has also provided that the legacies to his grand-daughters shall be paid to them when they arrive at a certain age, "or, if any of them should be married before they arrive at that age, they are to receive the same when married." It was apparently the intention of the testator that income should not be added to the legacies and gifts until they were due and payable. The general rule of law that legacies payable at a certain time do not bear interest until that time arrives governs in this case. *Merritt v. Richardson*, 14 Allen, 239; *Kent v. Dunham*, 106 Mass. 586.

Upon a bill of this character, where the executors ask for the construction of the will, an attaching creditor is not a necessary party. In this suit in equity, we cannot determine the rights of creditors of John W. Phelps to any part of the income payable to him by the terms of the will.

Decree accordingly.

Inhabitants of DEERFIELD

v.

CONNECTICUT RIVER R. R. Co.

1. A town may acquire by prescription a private right of way as appurtenant to a public burial ground belonging to the town.
2. Such a way, although open to use for all persons who have a right to go to and from the burial ground, is not necessarily a public way for all travelers.
3. The remedy for an obstruction of such private way is by an action by the town.
4. Any use made of such way in going to and from the cemetery, by the inhabitants of the town, or by persons holding rights in the cemetery derived from the town, and any acts of the town in constructing or repairing the way, are competent evidence in an action by the town to recover for an obstruction of the way, to prove that a private right of way, as claimed by the town, had been acquired by prescription.
5. The defendant is entitled to have the whole use made of the way put in evidence; but it is for the jury to determine whether such evidence shows that it was used as a public or private way.
6. Where there was evidence for the jury that the plaintiff had acquired a private way by prescription, unless a license put in evidence rendered the use permissive, the court properly refused

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to rule that the plaintiff had not shown such use as would give it a prescriptive right to the way.

7. The selectmen, by virtue of their office, had no right to construct a private way for the use of the inhabitants of the town.
8. To acquire a right of way over the land of another by prescription, the user must be adverse; that is, under a claim of right; and it must be acquiesced in by the owner of the land.
9. It is not necessary that a claim of right be expressly made, or that the acquiescence be declared; if the user is of such a character that it may reasonably be inferred to be adverse, and it be known to the owner of the land, and he does not interrupt it or object to it, a prescriptive right may be established; or if the adverse user is so open and notorious that the owner of the land ought to have known of it, his acquiescence may be presumed, even if it is not found that he actually knew of it.
10. Filing in the town clerk's office an agreement made by the owner of land with an agent of the town, granting it a license to construct a way across the land, is notice to the town of the agreement; and a subsequent use by the town of the way, consistent with the agreement, will be presumed to be under it, unless the owner knew to the contrary.
11. If defendant silently submitted to the plaintiff's use of the way, under a belief that such use was permissive and in pursuance of the agreement made with plaintiff's agent, this fact is material upon the question of acquiescence, if such use was consistent with the agreement.
12. Where the instructions given to the jury were not all that the case required, and might have misled the jury, a new trial will be granted.

(Franklin—Filed April 4, 1887.)

ON defendant's exceptions. *Sustained.*

Action of tort to recover for the obstruction of a private way, claimed to belong to the plaintiffs, along and across the land of the defendant, a railroad corporation, and used by it for railroad purposes; said way being the way from the county road into the cemetery of the plaintiffs.

It appeared that the land occupied for the cemetery, and also the land lying westerly thereof to the county road, embracing the land crossed by the railroad and by the way in question at the time the railroad was constructed, in 1846, was owned and occupied by the plaintiffs under a deed of the same to them, dated in 1805. There was evidence that at the time the railroad was built, in 1846, the only road-way to said cemetery was by means of a traveled private way from said county road up the hill to the only entrance into the enclosed part of the cemetery. In 1885 one Williams and others petitioned the selectmen of Deerfield for a change in said way, and a town meeting was

called, April 2, 1885, and it was voted that the selectmen be a committee to grade the road to the burying ground, and that the assessors be authorized and directed to raise a sum not exceeding \$150 for the purpose of grading said road. No other or subsequent vote of the town appeared with reference to the action of the selectmen under said vote.

At the trial in the superior court, before Mason, J., the defendant produced a paper, signed by a majority of the selectmen of the town of Deerfield and the president of the corporation, dated May 28, 1855, whereby the defendant corporation gave the town a license to make and use a new road leading to said cemetery, and to maintain the same, until said corporation shall give them notice to discontinue the same. There was no other evidence that the town had any notice of the above paper, and there was no evidence of any action of the town thereon. A duplicate copy of a plan indicating said way, called the Hoyt plan, was found filed in the town clerk's office in the handwriting of the then town clerk.

There was evidence that in 1855, after the aforesaid votes of the town, the way was changed so as to pass along the land claimed by the defendant, until it joined the old way at a point near where the old way crossed the track of the railroad; and that the portion of the old way below the junction was not used thereafter. There was a conflict of evidence as to whether or not any part of the new way was built upon any part of the embankment of the railroad. There was evidence that Hoyt, who made the plan, stuck the stakes for the road in 1855; but there was no evidence, except as aforesaid, that he was employed by the plaintiff town or its selectmen to make any plan or stick said stakes. The plaintiffs claimed that they had a right to the said road by prescription; and they put in evidence the petition of Williams and others; and the aforesaid votes thereon; and a vote of the town in 1873, by which it was voted to build a new fence around the cemetery,—which was done, and the materials carted over this road by men employed by the town; and several witnesses who testified as to the uses of said way by the plaintiffs.

The defendant, to show its title to the premises, put in evidence the deed from the said town to the said defendant corporation, dated July 18, 1849, and recorded in the registry of deeds for Franklin County; and, to show the boundaries of the land conveyed by said deed, was permitted to put in evidence its private office plans of the original location of its railroad,—there being no plan of the survey and location thereof on file in the office of the clerk of courts for said county, as stated in the deed. There was, at the time of the trial, on file in the clerk's office, a book of plans of the location of said railroad, filed February 21, 1846, and another filed April 28, 1847, copies of which were put in evidence. There was a space of 4,500 feet, including the land in question, not covered by any plans to be found in the clerk's office. The books produced contained all the plans of the railroad that they purported to contain. No evidence was introduced by defendant of a person who ever saw the plan on file in the clerk's office, of that part of said railroad included in said missing 4,500 feet.

The plaintiffs claimed that no plan of the location of defendant's railroad over the land of the plaintiffs had ever been filed, and that no land of the plaintiffs had been legally taken by defendant; and, there being no description in the deed of the land thereby intended to be conveyed, that all the land the defendant could hold under said deed was what it actually occupied; and that from 1855 to 1883 defendant had occupied no portion of said private way. The defendant disputed this claim.

Defendant also put in evidence tending to show that for the proper construction of its track, and to lay another track, it was necessary to extend its fill so as to cover a part of the way in question; and also gave in evidence a notice to discontinue said road, served upon the town in 1855. There was evidence of a protracted controversy between the parties, extending from 1846 to the time of giving the deed in 1849; and the money received for this deed was appropriated by vote of the town, July 28, 1849, "for the purpose of fencing the burying ground, removing and fitting up the hearse-house, and, so far as it will go, for grading the road leading to the Town Street Cemetery;" but there was no evidence how much, if any, of said money was used for said grading.

The defendant requested the court to rule: 1. That the plaintiff had not shown such use of the way as would give it a prescriptive right to it as claimed. 2. That if a road was built in 1855, substantially in the location upon the "Hoyt plan" as the "proposed road," and the same was in whole or in part upon the land of the railroad, as shown by the copy of their location, the plaintiff could not, by the use shown thereof, acquire a right of way over said proposed way. 3. That the selectmen had authority to accept in behalf of the town the license granted them by the paper of 1855; and all acts done under the license, and all use made of the road built under it, were, upon the evidence in the case, permissive; and the plaintiff's use was not adverse and no right of way was acquired thereby. 4. That if the selectmen represented to the defendant that they had authority from the town to enter into the contract of 1855, and if the defendant relied upon this representation, and by reason thereof authorized the building of the road, the plaintiffs would acquire no rights to the use of said way until the defendant was notified that the plaintiffs were not using it by virtue of the license or permission therein contained. 5. That if the railroad laid its second track in a reasonable manner, and in so doing necessarily filled up a part of the way, which before that time the town had used, it had a right so to do, and the plaintiffs cannot recover. 6. That if the jury find that a part only of the way built in 1855 was over a part of the way used prior thereto; and if the jury find that so much of the road as was outside of the location of the old road, was built and used by permission of the defendant,—the plaintiffs cannot recover.

The court declined to give any of the rulings requested, but charged the jury in substance as follows: "If the plaintiffs show, by a fair preponderance of the whole evidence, that the original plan of the survey and location was not filed in the office of the clerk of courts, then the original property rights of the town were

never extinguished. If that was filed they were extinguished. If the plans were filed there is no controversy but that the limits of the taking were such as would include the place where the obstructions complained of were placed. That is, there is no controversy but that the second track and the extending of the embankment are within the location acquired by the original taking, if there ever was a valid original taking. Now, if you find upon a fair preponderance of the evidence that there was no valid original taking, then you are to find for the plaintiffs. If you do not find that, but find there was a valid taking, and that the property rights of the plaintiffs were extinguished, either in 1846 or 1849,—it is entirely immaterial which,—then you must find for defendant, unless you find that after 1849 there was twenty years of open, adverse use of this roadway by the town in its corporate capacity. If that is established, then the plaintiffs are entitled to recover."

The jury found for plaintiffs, and defendant alleged exceptions.

Mr. Gideon Wells, for defendant:

If the use made of the way by the town officers in the discharge of their official duties proved anything, it was that it was a permissive way for the convenience of the defendant and others having occasion to pass that way for the same purposes as the plaintiffs, the use of which would not grow into a right.

Plimpton v. Converse, 44 Vt. 158; *First Parish, etc. v. Beach*, 2 Pick. 59, note; *Kilburn v. Adams*, 7 Met. 33.

The use of the way by officers of the town in the burial of paupers were not acts of the town, and plaintiffs could acquire no rights by reason of them. They were in no sense the servants of the town, but public officers, discharging duties imposed upon them by law, for whose conduct the town was not liable; and therefore their use of the road was not use by the town.

Hafford v. New Bedford, 16 Gray, 297; *Dunbar v. Boston*, 112 Mass. 75; *Buttrick v. Lowell*, 1 Allen, 172.

The second ruling asked should have been given. Plaintiffs are the owners of land adjoining land of a railroad. The "proposed way," as shown upon the plan, was not a crossing, but provided for the occupation of land of the defendant for the purpose of conveniently reaching the crossing. The town is undertaking to claim in this action the right to control the use of a strip of the defendant's land parallel to its location, by reason of its occupation thereof. In this respect it would seem to come both within the letter and spirit of Laws 1861, chap. 100, and to differ from *Fisher v. N. Y. & N. E. R. R. Co.* 135 Mass. 107.

The fourth request of the defendant should have been given. The doctrine of prescription is founded upon the theory of a presumed grant; upon the theory that an owner would not permit the use or occupancy of his property by another for a long time without right. Anything that properly accounts for this use or occupancy, short of a grant, rebuts the presumption. Thus, if it appears that the occupation was under a mistake as to the right of the party, the use is not adverse.

Worcester v. Lord, 56 Me. 265; *Dow v. Mc-*

Kenney, 64 Me. 188; *Breidegam v. Hoffmaster*, 61 Pa. 223.

The use must be such and under such circumstances that the owners of the servient tenement know or ought to know that it is adverse, under a claim of right, and not by permission.

Silva v. Wimpenny, 136 Mass. 258; *Thompson v. Pioche*, 44 Cal. 508; *Dodge v. Stacy*, 39 Vt. 558; *Gage v. Pitts*, 8 Allen, 527.

The selectmen, assuming to act for the town, obtained the license given in evidence, and proceeded to build the road under and according to it; the defendant believed and had reason to believe that the selectmen had authority to do what they undertook to do on behalf of the town; this sufficiently accounts for the defendant's permitting the continued use without presuming a grant.

Smith v. Higbee, 12 Vt. 118.

The fifth request should have been granted.

Commonwealth v. Hartford & N. H. R. R. Co. 14 Gray, 379.

The defendant had acquired this land for a public purpose, and it should have the right to serve the public by its use, free from the encroachments which, until it had occasion to use it, were harmless. It would appear that the Statute of 1861, chap. 100, must have been passed to meet just such cases as this.

The sixth request should have been given. The declaration counts upon a right of way from the county road to the cemetery. This was a descriptive averment, and must be proved as laid, or there would be a variance fatal to plaintiffs' case.

Starkie, Ev. pt. 4, 1530; *Rogers v. Allen*, 1 Camp. 313; *Hill v. Haskins*, 8 Pick. 83.

Messrs. Conant & Conant, for plaintiffs:

Continuous adverse use of a way across another's land for twenty years may be established without direct evidence of its actual use during each year.

Bodfish v. Bodfish, 105 Mass. 317; *Carr v. Foster*, 3 Q. B. 581.

The plaintiffs conveyed to the defendant, by deed, all of their land taken by the said railroad company, according to the plan of the survey and location thereof filed in the office of the clerk of the courts for the said county of Franklin. If this plan was filed in the clerk's office, then all the land included in the location was conveyed by said deed, and the plaintiff town could acquire a private right of way over the same.

Fisher v. N. Y. & N. E. R. R. Co. 135 Mass. 107.

That part of the third request relating to the authority of the selectmen in behalf of the town to accept the license granted them by the paper of 1855, was properly refused, because there was no evidence of any authority conferred upon the selectmen by vote of the town prior to their signing the paper. The selectmen, under their general authority, could not bind the town by any such agreement.

Goff v. Rehoboth, 12 Met. 26; *Barker v. Ohesterfield*, 102 Mass. 127; *Palmer v. Haverhill*, 98 Mass. 487.

The fourth request for ruling was properly refused in the form presented, because the selectmen could not bind the town by the contract of 1855, or make any binding representations relating thereto, unless duly authorized

by the vote of the town; and no authority is shown.

Goff v. Rehoboth, 12 Met. 26; *Barker v. Chesterfield*, 102 Mass. 127; *Palmer v. Haverhill*, 98 Mass. 487.

Field, J., delivered the opinion of the court:

We see no reason to doubt that a town may acquire by prescription a private right of way as appurtenant to a public burial ground belonging to the town. The statutes for many years past have provided that "each town and city shall provide one or more suitable places for the interment of persons dying within its limits." Pub. Stat. chap. 82, § 9; Gen. Stat. chap. 28, § 4; Stat. 1855, chap. 257, § 1.

As a town could acquire a private right of way from a public way to a public burial ground by grant, it could acquire a similar right of way by prescription. Such a way, although open to use for all persons who have a right to go to and from the burial ground, is not necessarily a public way. It may not be a way for all travelers, but only for those who have rights in the burial ground. Suppose such a way was closed by a gate at the place where it meets a highway, and this gate was kept locked, and was only opened by some person in charge of the burial ground, for the purpose of admitting persons to it. This would be strong evidence that it was a private way. *Commonwealth v. Low*, 8 Pick. 408; *Commonwealth v. Newbury*, 2 Pick. 51; *Austin's Case*, 1 Vent. 189; *Throner's Case*, 1 Vent. 208; *People v. Jackson*, 7 Mich. 432; *People v. Kingman*, 24 N. Y. 559; *Danforth v. Durrell*, 8 Allen, 242; *Gordon v. Taunton*, 126 Mass. 349; *Bateman v. Black*, 18 Q. B. 870.

If the way in the present case is a public way, the remedy for an obstruction would not be by an action by the town; if it is a private way, belonging to the town, the remedy is by such an action. There is no evidence that the old way was ever laid out, either as a town way or highway, or that this way was altered, or the new way laid out either as a town way or highway. The defendant, in its brief, speaks of the new way as used for the purpose of travel to the depot, as well as to the cemetery, but no such fact appears in the exceptions. So far as appears by the exceptions, the way was only used in going to and from the cemetery. We think that any use made of this way in going to and from this cemetery by the inhabitants of the town or by persons holding rights in the cemetery derived from the town, and any acts of the town in constructing or repairing the way, were competent evidence to prove that a private right of way, as claimed by the plaintiffs, had been acquired by prescription. The rulings upon the admission of evidence offered by the plaintiff to show an adverse use by the town, were sufficiently favorable to the defendant. The defendant was entitled to have the whole use made of the way put in evidence; but it was for the jury to determine whether this evidence showed that it was used as a public or a private way.

The only exceptions of the defendant are to the refusal of the presiding judge to give the instructions requested. We think that there was evidence for the jury that the plaintiff had

acquired a private way by prescription, unless the license put in evidence rendered the use permissive, and that the first request was rightly refused. As to the second request, it is to be noticed, as the defendant contends, "that the proposed way, as shown upon the plan, was not a crossing, but provided for the occupation of land of the defendant for the purpose of conveniently reaching the crossing." We see nothing, however, in the case that distinguishes it, in respect to the question raised by this request, from *Fisher v. N. Y. & N. E. R. R. Co.* 185 Mass. 107. Whether a right of way can be acquired by prescription, across a railroad track, since the passage of Stat. 1853, chap. 414, § 4, has not been argued; but, although this question has not been actually decided in the case of private ways, there are intimations that this can be done. See *Gay v. Boston & A. R. R. Co.* 141 Mass. 407, 2 New Eng. Rep. 240; *Wright v. Boston & A. R. R. Co.* 142 Mass. 296, 2 New Eng. Rep. 725. And in the case of a public way this was decided in *Fitchburg R. R. Co. v. Page*, 131 Mass. 391, although the effect of this statute was not considered.

The third and fourth requests present questions of more difficulty. The petition of Ephraim Williams and others asked that an alteration be made "in the now traveled road by carrying the same, about the width of the present road, to the east, and by commencing the ascent of the hill 2 or 3 rods north of the house of Arad Munn." This was asked because the existing road was "unnecessarily steep and difficult of ascent," and, "in the opinion of your petitioners, a road may be made which will not exceed from 4 to 5 degrees of altitude." The inhabitants of the town, at a town meeting duly warned, voted "that the selectmen be a committee to grade the road to the burying ground, agreeable to the petition of Ephraim Williams and others," and "that the assessors be authorized and directed to raise a sum not exceeding \$150 for the purpose of grading the said road to the burying ground." These votes were authorized by articles in the warrants. The plaintiffs owned the land, except that part which they had conveyed to the defendant. The plaintiffs had conveyed to the defendant "all of the land of the said town there situate, taken by the said railroad company, according to the plan of the survey and location thereof filed in the office of the clerk of the courts for the said county of Franklin, to which said plan reference may be had for a particular description of the land hereby conveyed." No such plan was found in the office of the clerk, and one question in the case was whether any such plan had ever been filed there. The parties make various contentions upon the effect of this deed, if no such plan was filed, but there are no exceptions to any rulings of the court upon this part of the case. If there had been a valid location by the defendant, or if the deed conveyed the land within any defined location, the rights of the plaintiffs in the old road over the location, or the land conveyed, were extinguished. There is nothing in the petition of Ephraim Williams and others indicating that the alteration asked for would make it necessary to enter upon any land owned or occupied by the defendant, and the votes of the town did not authorize them to do this. The third

request ought not, therefore, to have been granted.

On May 28, 1885, after the votes of the town had been passed, two of the three selectmen and the president of the defendant executed the agreement which is annexed to the exceptions. Whatever may be the effect of the deed, the correctness of the plaintiffs' fourth request, and of instructions of the court given upon the same subject, must be tested by assuming that the jury may have found that the defendant owned or occupied, as included in its location, the land where a part of the new way was, and obstructed this new way upon its own land or location. So far as this way was upon the land of the plaintiffs, if it was a private way, the defendant is of course liable for obstructing it there. The court correctly ruled that the acts of the selectmen in building the road, if done under this agreement, were not adverse to the defendant, although done as a committee appointed by the town. The selectmen, by virtue of their office, had no authority whatever to construct a private way for the use of the inhabitants of the town. The question is of the effect of this agreement upon the rights of the plaintiffs. The plaintiffs are asserting a right in the land or location of the defendant, which they claim to have acquired in their corporate capacity as their property. To acquire a right of way over the land of another by prescription, the user must be adverse; that is, under a claim of right; and it must be acquiesced in by the owner of the land. It is not necessary that the claim of right be expressly made, or that the acquiescence be declared. If the user be of such a character that it may reasonably be inferred to be adverse, and if it be known to the owner of the land, and he does not interrupt it or object to it, a prescriptive right may be established. If the owner of the land, by reason of insanity, or other disability, is incapable of acquiescing, or if the user is concealed and unknown to the owner of the land, a prescriptive right is not acquired. If the user is open, continuous, and of such a character that it may reasonably be inferred to be adverse, it has been held that the knowledge of the owner of the land may be inferred from these circumstances; and we think that if the user is adverse, and is so open and notorious that the owner of the land ought to have known of it, his acquiescence may be presumed, even if it is not found that he actually knew of it. Undoubtedly, assent, either expressed or in the mind, is not necessary to constitute acquiescence. One reason for the modern law of prescription is, that the long-continued enjoyment of a privilege in the land of another, under a claim of right, ought not to be disturbed if the owner of the land has unreasonably slept upon his rights. We are not, however, aware of any case in which it has been held that when the owner of land, in dealing with an agent of the plaintiff, has expressly granted a license to the plaintiff to construct a way over his land, and the way has been constructed by the agent, for his principal, under the license, and the plaintiff has used the way in a manner consistent with the license, although without knowledge of it, a right of way has been acquired by prescription. The agent may have exceeded, and in the case at

bar did exceed, his authority, in making the agreement which operates as a license; and if the defendant was proceeding to enforce the agreement against the town, the want of authority would be fatal, and the town could not rely upon the agreement, except by ratifying the acts of its agent. The plaintiffs here do not rely upon the agreement, and the defendant does not necessarily rely upon it, as a substantial matter of defense; if the plaintiffs had no notice or knowledge of the agreement, then the defendant relies upon it as a fact qualifying the inference that otherwise might be drawn from its conduct in not disturbing the plaintiffs in their use of the way. The defendant, in effect, says that it believed that the plaintiffs were using the way under this agreement, and therefore it did not object to or interrupt the use. If this agreement was filed in the town clerk's office, we think that this would be notice to the town of the agreement; and if the subsequent use was consistent with the agreement, we think that it would be presumed to be under the agreement, unless the defendant had notice or knowledge to the contrary. But if the town had no notice or knowledge of the agreement, then it may have used the way under a claim of right; while the defendant may have believed, and reasonably believed, that the town was using the way under its permission, and for this reason may have refrained from preventing or interrupting the use.

It is said in *Edison v. Munsell*, 10 Allen, 557-560, that "in order to require the jury to presume a grant, the possession or use must have all the qualities of a prescription; it must be open, adverse, uninterrupted, and with the acquiescence of the owner. Any fact which directly affects the probability of such acquiescence must be submitted to the jury to assist them in determining whether such a presumption should or should not be made."

In *Smith v. Miller*, 11 Gray, 145, the plaintiff bought his land from Charles P. Phelps in 1832, and the defendant claimed title to his land under Thadeus Smith, who owned it from 1828 to 1835. Smith, in 1829 or 1830, obtained permission from Phelps to dig a drain from Phelps' land across the highway and through his own land. The action was for obstructing this drain, and the plaintiff contended that whether the use of the drain by Phelps was permissive or not, yet, if the plaintiff, when he bought the land in 1832, found a drain there, and continued to use it for twenty years, such use would give him a prescriptive right. It does not appear in the case whether the plaintiff knew that the drain was originally constructed for the benefit of Smith and by the permission of Phelps. The court says that if Smith constructed the drain for his own benefit, with the consent of Phelps, who was then the owner of the plaintiff's land, "the flowing of the water through it, and over the defendant's land, must be considered to have been afterward permissive, and in accordance with the original agreement of the parties, until the plaintiff asserted some claim or exercised some right indicating that he made or intended to assert a claim adverse to the right of the defendant or of his predecessors." In the present case, we think that if the defendant silently submitted to the plaintiffs' use of the way under a belief that

this use was permissive and in pursuance of the agreement made with the plaintiffs' agents, this fact is material upon the question of acquiescence; and that the fourth request should have been granted, with the proviso that the use of the way by the plaintiffs was not inconsistent with the agreement, and the defendant believed that the plaintiffs were using the way in pursuance of the agreement, and this was a reasonable belief under all the circumstances shown. The request, in the form in which it was made, is not accurate and complete, particularly if the town was not shown to have had knowledge or notice of the agreement, and should have been modified, substantially as we have suggested; yet the instructions given on this point were not all that the case required and might have misled the jury, and for this reason we think there ought to be a new trial. See *Rotch's Wharf Co. v. Judd*, 108 Mass. 224; *Blake v. Everett*, 1 Allen, 248; *Root v. Commonwealth*, 98 Pa. 170; *Elwell v. Hinckley*, 188 Mass. 225; *Thompson v. Pioche*, 44 Cal. 508; *Dodge v. Stacy*, 39 Vt. 558, 568; *Hanneft v. Blake*, 102 Mass. 297; *Carbrey v. Willis*, 7 Allen, 364.

The fifth request was rightly refused. If the plaintiffs had a right of way, the defendant showed no right to fill up the way.

The plaintiffs in their declaration described a way leading from a highway across its own land and the land of the defendant to a burial ground. The sixth request, as we understand it, asked the court to rule that the plaintiffs must prove a right of way, as laid in the declaration, from the highway to the burial ground, and that the plaintiffs could not recover if they proved a right of way for only a part of this distance. If this is the law (see 1 Greenl. Ev. §§ 71, 72), we think that from the charge of the presiding justice the jury must have understood that the plaintiffs, to prevail, must prove a right of way throughout the whole distance as claimed in the declaration.

Exceptions sustained.

Sarah A WORMWOOD
v.
CITY OF WALTHAM.

Where the plaintiff employed one of the aldermen to deliver to the city authorities a notice of the time, place, and cause of a personal injury, sustained by reason of a defect in a sidewalk, the fact that the board of aldermen first acted upon the notice, and that then it was delivered to the city clerk, did not affect the sufficiency of the notice.

(Middlesex—Filed March 14, 1887.)

ON defendant's exceptions. *Overruled.*

Action of tort for personal injuries sustained by plaintiff by reason of an alleged defective sidewalk on one of defendant's streets.

The case was tried in the superior court, before Thompson, J., where the following facts appeared:

The plaintiff received the injuries for which she brought the action by a fall upon the ice upon the sidewalk on Moody Street, January

16, 1886. On January 30, thereafter, she signed a notice stating the fact of the fall, the time and place thereof, and the injuries received, and asking for adjustment of the same, and handed such notice to her sister, who delivered it to one Weeks, a member of the board of aldermen of Waltham, and asked him to deliver it to the proper authorities.

It appeared that said notice was first read to the board of aldermen by the president, and by such board the claim for damages was ordered referred to the city solicitor; and then the notice was handed by the president to the city clerk, who was also, by virtue of his office, clerk of the board of aldermen, and was by such clerk filed with other records and papers of the board of aldermen, which are kept in a safe in his office with the other city papers. The first time the clerk saw such paper was when it was handed him by the president of the board of aldermen, after it had been read to the board.

Plaintiff offered such paper in evidence, to which defendant objected on the ground that it had not been properly served on the city. The court ruled that the service was sufficient, and admitted the paper; and defendant alleged exceptions.

Mr. T. H. Armstrong, for defendant:

This is an action seeking to enforce a liability created by statute.

Pub. Stat. chap. 52, § 18; *White v. Phillipton*, 10 Met. 110; *Bigelow v. Randolph*, 14 Gray, 543.

In order to recover, the plaintiff must comply strictly with all the provisions of the statute.

Gay v. Cambridge, 128 Mass. 387; *Laverty v. Chamberlin*, 7 Blackf. 556.

Notice is a condition precedent to recovery, and must be given as required by statute (*Gay v. Cambridge*, *supra*; *McDougall v. Boston*, 184 Mass. 149; *Dalton v. Salem*, 139 Mass. 92), and must appear to be given for the purpose of fixing the rights of the party (*Kenady v. Lawrence*, 128 Mass. 318).

Defendant maintains that notice in this case was not given as required, because (1) notice is required by statute to be given to the mayor, city clerk, or city treasurer; (2) in this case, it was not given to either of said officers; (3) it does not appear to have been given by the plaintiff for the purpose of fixing her right of action.

Stat. 1877, chap. 234; Stat. 1879, chap. 244; Pub. Stat. chap. 52, §§ 19-21.

The statute is directory as to the officers to whom notice is to be given. The word "may" is to be construed as imperative.

Minor v. Mechanics Bank of Alexandria, 1 Pet. 46-64 (26 U. S. bk. 7, L. ed. 47-55); *Opinion of Justices*, 11 Pick. 543; Pub. Stat. chap. 161, § 35.

All Acts *in pari materia* are to be taken together as if they were one law.

United States v. Freeman, 8 How. 564 (44 U. S. bk. 11, L. ed. 727).

The rule, "*Expressio unius est exclusio alterius*," applies with special force to the construction of statutes.

Gregory v. Des Augre, 3 Bing. (N. C.) 85; *McCabe v. Cambridge*, 184 Mass. 484; *Dalton v. Salem*, 139 Mass. 278.

The board of aldermen could not be the agents of the plaintiff to serve the notice on the city clerk.

Kenady v. Lawrence, 128 Mass. 818; *Mooney v. Salem*, 180 Mass. 402; *Potwine's App.* 31 Conn. 381.

Even where notice must be in writing the purpose in which it is given must appear.

Lyman v. Hampshire, 188 Mass. 74.

Mr. Sherman Hoar, for plaintiff:

As to whether the notice was properly given see Pub. Stat. chap. 52, § 19.

The whole duty of the plaintiff was to give notice to the city of Waltham, and any giving of the notice which resulted in the city's receiving it in due course would be a sufficient giving of it to the city within the requirements of the statute.

Pub. Stat. chap. 52, § 21, is merely supplementary to Id. § 19, as far as it relates to the giving of notice.

Commonwealth v. Haynes, 107 Mass. 194, 197; *Sale v. Hannibal & St. J. R. R. Co.* 51 Mo. 532.

Even if the court holds that one of the three officers mentioned in § 21 must receive this notice, it is submitted that in this case the city clerk was duly given this notice within the 30 days required by statute.

McCabe v. Cambridge, 184 Mass. 484; Stat. 1884, chap. 309, § 15.

Per Curiam:

The defendant objected to the notice offered by the plaintiff, upon the ground that it was not properly served upon the city. No other question is raised by the bill of exceptions.

The statute provides that in the case of a city the notice may be given to the mayor, the city clerk, or the treasurer. If this provides the exclusive mode in which a notice may be served, which we do not decide, the service in this case was sufficient. The plaintiff employed Mr. Weeks, one of the aldermen, to deliver the notice to the proper authorities. He might and did act as her agent. If he had delivered the notice to the city clerk, who had laid it before the board of aldermen for their action, the service would have been clearly sufficient. The fact that the aldermen first acted upon the notice, and that then it was delivered to the city clerk, makes no difference. It was still a notice given to the city clerk by her procurement, and was sufficient.

Exceptions overruled.

James H. PAGE, Trustee,

v.

Patrick O'TOOLE.

Where power is given to the city of Boston and the town of West Roxbury to "take or purchase lands," and that "the city or town, as the case may be," shall record in the office of the registry of deeds a description of the land so taken, and the section concludes: "and the title to all land so taken shall vest in said city or town, as the case may be," it was manifestly the intention of the Legislature that the power given should be exercised by the city and

town severally, and that the title to the land should be the title in fee simple, and not merely to an easement in it. (*Dingley v. Boston*, 100 Mass. 554, followed.)

(Suffolk—Filed March 23, 1887.)

A PPEAL by plaintiff from a judgment of the Superior Court of Suffolk County in favor of defendant in an action of ejectment. *Judgment for defendant.*

The case was heard in the superior court on the following agreed statement of facts:

"In the above-entitled action it is agreed that one Gilman Page was in 1868 the owner of land which included the premises described in plaintiff's declaration; that said Gilman Page died in 1881, leaving a will, which was admitted to probate July 25, 1881, by which said will he devised his real estate to the plaintiff, in trust, and upon certain trusts declared in said will; and the plaintiff duly qualified, and was duly appointed trustee under said will on or about said last-named date; that the town of West Roxbury, in said year 1868, duly took certain land and premises, which included the land described in said declaration, under and by virtue of Acts 1868, chap. 223, and duly filed in the registry of deeds for the county in which said land was then situate a description and statement as required by said Act, and, in all other respects, complied with said Act; that thereafter the said town of West Roxbury was by law duly annexed to and became part of the city of Boston, and the said city of Boston succeeded to and became entitled to all the rights obtained by said town under said taking; that thereafter, on or about Nov. 1, 1882, the defendant, by virtue of a contract with said city of Boston, became a tenant at will of said city, as to the land described in plaintiff's declaration; and, as such tenant, defendant entered upon the premises described in said declaration on or about Nov. 1, 1882, and erected thereon certain structures, and has used and occupied the same from said last-named date down to the date of plaintiff's writ; that during said time defendant has paid rent to said city of Boston for said premises as its tenant, under his contract with said city as aforesaid; that on the day of the date of plaintiff's writ, plaintiff entered upon the land and premises declared in his said declaration for the purpose of repossessing himself of the same."

The court ordered judgment for defendant on the agreed facts, and plaintiff appealed to this court.

Mr. C. W. Turner, for plaintiff:

Plaintiff claims that the town of Roxbury, by its taking, did not acquire the fee in said premises, but only an easement therein.

It is well established that, in all cases of taking land by eminent domain, such title only is taken as is necessary for the accomplishment of the public object; and, if the language of the Act admits of a construction which leaves a fee in the owner subject to the public easement, it will be so construed.

Hills, Em. Dom. § 49.

The right of eminent domain is "a power given to provide for an exigency, and is warranted only by the existence of such exigency."

* * * When, therefore, the Legislature, being

vested with the exercise of this high power, uses language not precise and explicit, but open to construction, and if one construction would convey the power beyond the limit necessary to meet the public exigency, and another construction would limit it by the extent of such exigency," the latter should be adopted.

Shaw, *Ch. J.*, in *Harback v. Boston*, 10 Cush. 297.

This principle was early applied in this State to the taking of land for highways.

Commonwealth v. Peters, 2 Mass. 127; *Perley v. Chandler*, 6 Mass. 454; *Stackpole v. Healy*, 16 Mass. 34.

So also for turnpikes.

Robbins v. Borman, 1 Pick. 122; *Adams v. Emerson*, 6 Pick. 57.

So also for railroads.

Weston v. Foster, 7 Met. 299.

The words, "The title to all land so taken shall vest in said city or said town, as the case may be," as used in Act 1868, chap. 223, § 1, do not show conclusively that a fee simple was to be so vested. The word title does not necessarily, or even usually, mean a title in fee. As applied to real estate, its ordinary meaning is the means by which the owner of land has the just possession of a property or estate.

Coke, Litt. 845; 2 Bl. Com. 196; 1 Bouv. L. Dict. p. 596.

The defendant will claim that this case is to be governed by *Dingley v. Boston*, 100 Mass. 554, in which it was held that similar language imported a title in fee simple; but an examination of that case will show that this construction was there based not only upon the language used, but upon the purpose of the Act. That purpose was to abate an extensive nuisance. Land was to be taken and buried at great expense, under earth brought and placed upon it by the city. The cost of doing so would be great, and might exceed the original value of the property taken. The whole of that value at the time of taking was to be paid to the owner as damages. The principal question discussed was the constitutionality of the Act, and it might well have been held that the purpose for which the Act was passed showed that it was the intention of the Legislature that a fee simple should vest in the city.

But the purpose of the Act under discussion does not require any greater estate than an easement. That purpose is stated to be "sewerage," which may well, in the future, be rendered entirely unnecessary by the adoption of some different system. Authority is then given to "remove obstructions in or over Stony Brook and the tributaries thereof;" also to "divert the water, and alter the course, and deepen the channel thereof; and, the more effectually to make the said improvements," authority is given to "take or purchase land not exceeding five rods in width."

This purpose might not last forever. It is, in many respects, analogous to the purpose for which a highway is laid out; and it might well leave in the owner such use of the land taken as was not inconsistent with the improvement; as, for instance, a right to the grass. It was not provided that the land was to be raised or changed. The brook might be widened, or deepened, or have its course altered, just as the

wrought part of a town road might be widened or raised from time to time, as public travel required; but all this calls for no higher right or estate than an easement. So, too, there is nothing in the Act to indicate that the owner was to have as damages the whole value of the land taken, as was the case in *Dingley v. Boston*. His damages were to be assessed in the same manner as "when land is taken in laying out highways," and he was liable to assessment on account of the improvement to his remaining land.

If the town of West Roxbury took only an easement, the city of Boston, as its successor, had no greater estate, and could not let the land to the defendant; and the erection of structures on said land by defendant, and the continued maintenance and use thereof, constitute trespass, and plaintiff may maintain an action against him therefor.

Proprietors of Locks & Canals v. Nashua & L. R. Co. 104 Mass. 9; *Commonwealth v. Peters*, 2 Mass. 125; *Perley v. Chandler*, 6 Mass. 454.

Mr. R. W. Nason, for defendant:

Judgment for the defendant should be affirmed, because, in taking under Act 1868, chap. 223, the city of Boston acquired title in fee simple to the land in question.

Acts 1868, chap. 223; *Dingley v. Boston*, 100 Mass. 544.

Holmes, J., delivered the opinion of the court:

The power given to the city of Boston and the town of West Roxbury, by Stat. 1868, chap. 223, § 1, to "take or purchase land," is manifestly given to the city and town severally, not jointly, if we read only the first part of the section. And when, after going on to provide that "the city or town, as the case may be," shall file in the office of the registry of deeds a description of the land so taken, the section concludes: "and the title to all land so taken, shall vest in said city or town, as the case may be." The purpose of the last words is not satisfied by construing them as merely a superfluous enactment that the title shall not be joint. They plainly have the same meaning that they would have had if the city or town had been mentioned alone.

If the power had been given to West Roxbury only, a provision that the title to all land so taken should vest in the town would mean, according to the common and proper use of language, the title in fee simple to the land itself, and not merely to an easement in it. The words were so construed in *Dingley v. Boston*, 100 Mass. 544, 554, and the Act was held to be within the constitutional power of the Legislature. If it had been, as the plaintiff contends that it was, the purpose to define by what means or at what moment the town should acquire rights it did acquire, we should find some such word as "thereupon" before the provision as to the title vesting in the town; while the word "all" ("the title to all land so taken") shows that the emphasis of the sentence falls, partly at least, on the extent of the rights acquired. We see no satisfactory distinction between this case and *Dingley v. Boston*, *supra*.

Judgment for defendant.

COMMONWEALTH of Massachusetts
v.

William F. WELCH.

The authority granted by the license to sell liquor arises upon the issuing of the written license, and not upon the vote granting it, or the completion of the instrument by the signatures of the mayor and the city clerk. The license shall not be issued until the conditions prescribed by statute have been performed. Where the license was not issued until after the act complained of, and defendant had not performed the conditions precedent to its issue, or furnished a satisfactory bond, or paid his license fee, it is no protection in a prosecution for selling liquors without a license.

(Middlesex—Filed May 5, 1887.)

ON defendant's exceptions. *Overruled.*

Complaint charging defendant with keeping and exposing for sale intoxicating liquors on July 4, 1886, without license or authority. Tried in the superior court, before Thompson, J.

The facts are stated in the opinion.

Messrs. H. N. Allen and G. L. Mayberry, for defendant:

A license for the sale of intoxicating liquors takes effect from its date. The license put in evidence by the defendant must be presumed to have been regularly executed, and to have been dated upon the day of its issue. The first instruction requested should have been given.

Baldue v. Randall, 107 Mass. 121; Whart. Cr. Ev. § 348.

The record produced by the city clerk was not competent to contradict the license.

Pub. Stat. chap. 100, § 5; 1 Greenl. Ev. §§ 493, 999.

A license to keep and sell intoxicating liquors is an authority or permission, and its essential feature is the granting of such authority by the proper power. When that grant is executed by the proper authorities, and specified to cover a certain lawful period of time, it becomes a valid authority. If a licensee then fails to comply with the conditions of the grant, it becomes void; but substantial conformance with those conditions makes the grant valid from the time of its execution.

The city treasurer wrongfully refused to approve the bond deposited with him by the defendant. His authority is not arbitrary, but discretionary; and the extent of his authority is to see that the bond is properly executed and the sureties sufficient. His objection to the bond was not well taken; for a license to a partnership is in effect a license to each of the partners.

Mr. Edgar J. Sherman, Atty. Gen., for the Commonwealth:

It is well settled that where one relies upon a license as a justification for acts apparently criminal, the burden of proof is upon him to prove the license broad enough to authorize the particular act complained of.

Commonwealth v. Rafferty, 183 Mass. 574.

The defendant is charged with exposing for

sale liquor on the 4th of July, 1886. In defense he offers a fifth-class license bearing date May 15, 1886, which the presiding judge ruled was *prima facie* a justification of sale made subsequent to its date. The government then offered evidence which proved that the license was not in fact issued until July 10, 1886. This evidence was clearly competent.

It is mandatorially provided by Pub. Stat. chap. 100, § 18, that "no license shall be issued until * * * the treasurer * * * has received a satisfactory bond;" and as it is also shown by the evidence that the license was not in fact delivered until said July 10, and hence could not be "displayed on the premises," as required by chap. 100, § 9, cl. 6, it must clearly result that sales made prior to that date could not be justified by or under that license.

W. Allen, J., delivered the opinion of the court:

The defendant and his copartner in business made a joint application to the mayor and aldermen of the city of Waltham for a license to sell intoxicating liquors; an order granting such license was adopted by the aldermen, and a license was made out and signed by the mayor and city clerk on the 15th day of May, and the defendant notified thereof. The defendant's copartner refused to sign the bond required by the statute, and on the 25th day of May retired from the business. After that the defendant offered his bond with sureties, which the city clerk refused to receive unless the co-licensee should be a co-obligor. The defendant then applied to the aldermen to have the license issued to him as licensee, and it was ordered that the license granted to the copartners should be issued to the defendant upon his paying the fee and giving his bond. On the next day, July 10, the city clerk accepted and approved the bond of the defendant, identical with the bond before presented by him, except in the date; and the defendant paid the fee, and the license, dated May 15, was issued to him. The defendant was convicted of keeping liquors for sale on the 4th of July; and the question is whether he was then authorized so to do by his license. The license put in evidence by the defendant was dated the 15th day of May, and, as ruled by the court, was *prima facie* evidence of authority to sell on the 4th of July. But we think that it was clearly competent for the Commonwealth to prove that the bond was not given, and the license fee was not paid, and that the license was not issued until the 10th day of July,—after the time of the alleged offense. The authority granted by the license arises upon the issuing of the written license, and not upon the vote granting it, or the completion of the instrument by the signatures of the mayor and city clerk. The provisions of the statute make this plain. By Pub. Stat. chap. 100, licenses for the sale of intoxicating liquor may be granted by the mayor and aldermen of a city; they are to be signed by the mayor and city clerk, and recorded in the office of the clerk; they shall name the person licensed, and the building in which the business shall be carried on, and shall be expressed to be subject to various conditions, one of which is that the license, or a certified copy thereof,

shall be conspicuously displayed upon the premises. Section 13 provides that no license shall be issued until the license fee has been paid to the city treasurer, and until he has received a satisfactory bond, which, after approval, shall be filed in the office of the city clerk. The obvious intention of the statute is that the license shall take effect when it is issued, under the prescribed conditions, and that it shall not be issued until the conditions have been performed. The evidence shows not only that the license was not issued until after the act complained of, but that the defendant had not performed the conditions precedent to its issue. He had not furnished a satisfactory bond, and he had not paid the license fee.

Exceptions overruled.

COMMONWEALTH of Massachusetts

Charles E. KENDALL.

Where a **prior Act** or part of an Act is incorporated in a subsequent Act, it is as if the words of the first Act had been repeated in the second Act, so that the repeal of the first Act will not take away the effect of the words so repeated in the second Act. Hence, where the **penalties imposed by Pub. Stat. chap. 57, § 5, are made a part of the later Act of 1885, chap. 352, § 8**, defendant may be convicted for a first, second, or subsequent offense as provided for in the prior statutes.

(Suffolk—Filed May 5, 1887.)

On defendant's exceptions. *Overruled.* Complaint, under Acts 1885, chap. 352, § 8, to the Municipal Court of the city of Boston, that the defendant, on the 13th day of October, 1886, had in his possession skimmed milk, containing less than $9\frac{1}{10}$ per cent of milk solids, exclusive of fat, with intent unlawfully to sell the same.

At the trial in the municipal court, the defendant filed a motion to quash the complaint for the following reasons: (1) because the law provides no penalty for the alleged offense therein. Pub. Stat. chap. 57, § 5, was repealed by substitution of Acts 1886, chap. 318, § 2; (2) because said court has no jurisdiction of the alleged offense; (3) because said complaint sets forth no crime or offense known to the law.

In the superior court, before the jury was empaneled, defendant renewed the motion. The court, Mason, J., overruled the motion. The jury returned a verdict of guilty, and the defendant alleged exceptions.

Mr. J. A. McGeough, for defendant:

This complaint was brought under Acts 1885, chap. 352, § 8; but, by reference, Pub. Stat. chap. 57, § 5, provided the penalty.

Now, at the time of this alleged offense, Pub. Stat. chap. 57, § 5, had been repealed by substitution of Acts 1886, chap. 318, § 2.

Commonwealth v. Kenneson, 143 Mass. 418, 8 New Eng. Rep. 368; *Bartlett v. King*, 12 Mass. 537-545.

Where there is no penalty, there is no legal

offense; the court has no jurisdiction, and the complaint cannot be maintained.

Commonwealth v. Kelliher, 12 Allen, 480.

Mr. Edgar J. Sherman, Atty-Gen., for the Commonwealth:

The motion to quash was properly overruled.

Acts 1885, chap. 352, § 8, under which this complaint is brought, provides that "no person shall exchange or deliver, or have in his custody or possession with intent to sell, exchange, or deliver skimmed milk containing less than $9\frac{1}{10}$ per cent of milk solids, exclusive of fat. Whoever violates the provisions of this section shall be punished by the penalties provided in Pub. Stat. chap. 57, § 5."

Acts 1886, chap. 318, § 2, provides that "Pub. Stat. chap. 57, § 5, is hereby amended to read as follows:" etc.

Amending a statute does not repeal it. The penalty provided in Pub. Stat. chap. 57, § 5, is also provided in Acts 1886, chap. 318, § 2. See *Commonwealth v. Kenneson*, 143 Mass. 418, 8 New Eng. Rep. 368.

That the court had jurisdiction, see *Commonwealth v. Murray*, ante, p. 55.

Devens, J., delivered the opinion of the court:

The contention of defendant is that, as the complaint in the case at bar was brought under Acts 1885, chap. 352, § 8, the penalty for the offenses described in which was provided by reference to Pub. Stat. chap. 57, § 5, and further, that, as at the time of the alleged offense Pub. Stat. chap. 57, § 5, had been repealed by substitution of Acts 1886, chap. 318, § 2, there was therefore no offense for which any legal penalty had been provided, and thus that no prosecution could be maintained. *Commonwealth v. Kenneson*, 143 Mass. 418, 8 New Eng. Rep. 368; *Commonwealth v. Kelliher*, 12 Allen, 480.

If we give the defendant the full benefit of his contention that Pub. Stat. chap. 57, § 5, is repealed by necessary implication, the result that there is no legal offense under Acts 1885, chap. 352, § 8, for which any penalty has been provided, by no means follows. When the Statute of 1885, chap. 352, § 2, enacts that "whoever violates the provisions of this section shall be punished by the penalties in Pub. Stat. chap. 57, § 5, it describes the penalties by reference to that section. They are different, as the offense may be a first, second, or subsequent one; and, without recapitulating them in detail, they are thus imported into the statute of 1885. If different penalties are afterwards from time to time imposed for the offenses described in the Public Statutes, such penalties would not be imposed for the offense described in the statutes of 1885, unless there was some legislation which there applied to it. The penalties which are imposed by the Public Statutes, as they then existed, are the penalties imposed by the statute of 1885, and, for the purpose of defining them, the later statute incorporates with itself the earlier one so far as it relates to them. Where a prior Act, or as in the case at bar, part of a prior Act is incorporated with a subsequent Act, it is the same thing as if the words of the first Act had been repeated in the second Act, so that the repeal of the first Act will not take away the effect of the words

which were so repeated in the second Act by means of this incorporation. *Reg. v. Stock*, 8 Ad. & El. 405; *Reg. v. Merionethshire*, 6 Q. B. 343; *Reg. v. Smith*, L. R. 8 Q. B. 146; *Reg. v. Inhabitants of Brecon*, 15 Q. B. 818.

Difficulty may sometimes be experienced in determining whether a former Act, or a portion of it, is incorporated in the later one (*Ben den v. Smith*, 18 L. J. 121); but it does not ex lat in this case. We are of opinion that the penalties imposed by Pub. Stat. chap. 57, § 5, are made a part of the later Act (Acts 1885, chap. 352, § 8) as clearly as if they were written out at length and in terms recited in it.

Exceptions overruled.

BUSWELL TRIMMER CO.

Hannibal G. CASE.

1. In an action of replevin brought by the seller of goods against the assignee in insolvency of the purchaser, where the evidence is conflicting as to whether plaintiff delivered the machine sold on an absolute sale on four months' credit, or on a conditional sale, it was competent for plaintiff to prove that purchaser's reputation for financial ability was poor, as having some tendency to show that it was probable that credit was not given to him.
2. The fact that the purchaser was notoriously in bad pecuniary credit would have some bearing upon the question which of two orders for the goods was accepted by plaintiff.

(Essex—Filed May 5, 1887.)

ON defendant's exceptions. *Overruled.*

Replevin for a machine bought by the plaintiff, a corporation, against the defendant, who was the assignee in insolvency of the estate of Benjamin W. Morrill. Trial in the superior court before Mason J., where the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

Mr. W. H. Moody, for defendant:

Assuming that Knight, the plaintiff's president, was the proper person to determine whether the orders received by Robbins should be filled, and that the contract did not become a binding one until approved by Knight (*Finch v. Mansfield*, 97 Mass. 89); yet the terms of the contract are to be sought in the alleged conversation between Robbins and Morrill, and it was not competent for the plaintiff, for the purpose of proving the terms of the contract, to prove Robbins' statement of them to Knight, in the absence of Morrill and without his authority.

O'Kelly v. O'Kelly, 8 Met. 436; *Lucas v. Trumbull*, 15 Gray, 806; *Carrigg v. Oaks*, 110 Mass. 144; *Somers v. Wright*, 114 Mass. 171; *Short Mt. Coal Co. v. Hardy*, 114 Mass. 197, 213.

The evidence that Morrill's "reputation for financial ability was poor" was not relevant, and had a tendency to prejudice the defendant.

Walker v. Moors, 123 Mass. 501.

Although the line of separation relevant and irrelevant facts is incapable of being

exactly drawn, it is submitted that there is no common experience which leads to the inference that goods are not frequently sold on credit to persons whose reputation for financial ability is poor.

Messrs. J. P. & B. B. Jones, for plaintiff:

The question asked,—"State what that order was,"—was competent to show that the machine was not shipped under the order of July 6; and the answer was competent to show upon what terms it was shipped.

Finch v. Mansfield, 97 Mass. 89.

The testimony of Robbins that he communicated the order on July 14 stands on the same ground. It is evident that the words "financial ability" are used in the sense of financial means. The issue in this connection was whether the plaintiff shipped the machine in question upon Morrill's credit. Upon this issue it was competent to show that Morrill had no credit.

Lee v. Wheeler, 11 Gray, 236, is directly in point. See also *Bradbury v. Dwight*, 3 Met. 31; *Cook v. Mason*, 5 Allen, 212; *Parker v. Coburn*, 10 Allen, 82; *Norris v. Spofford*, 127 Mass. 85.

Holmes v. Hunt, 122 Mass. 505, simply decides that evidence that a party's financial reputation is good is not competent evidence that he made a particular purchase. Just as a man's ability to pay is not competent evidence that he has paid (*Atwood v. Scott*, 99 Mass. 177); and, on the same principle, that a person's inability to pay is competent to show that he has not paid (*Stebbins v. Miller*, 12 Allen, 591; *Winchester v. Charter*, 97 Mass. 140); or that the value of the subject-matter of a sale is competent to show what were the terms of the sale in dispute (*Bradbury v. Dwight*, 3 Met. 31; *Norris v. Spofford*, 127 Mass. 85).

A person's bad reputation for financial credit is competent to show that a sale was not made on his credit. The only difference between the legal effect of evidence of actual financial condition, and of evidence of reputation of financial condition, is that the actual condition must be brought to the knowledge of the party to be affected by it (*Allen v. Leonard*, 16 Gray, 202), while the reputation is presumed to be known to him (*Sweetser v. Bates*, 117 Mass. 466).

W. Allen, J., delivered the opinion of the court:

This was an action of replevin of a machine which, it was admitted, formerly belonged to the plaintiff, and was delivered by it to one Morrill. The defendant, the assignee in insolvency of Morrill, claims that the machine was delivered on an absolute sale to Morrill, under an order sent to the plaintiff's salesroom on July 6. The delivery was on July 17. The plaintiff contended that the delivery was under an order by which the machine was to remain the property of the plaintiff, received from Morrill at his place of business on July 13 by one Robbins, an agent of the plaintiff to solicit orders, and communicated by him the next day to Mr. Knight, the president of the plaintiff, who had authority to accept orders and make sales. The exception to the admission of testimony by Knight that he determined whether the orders solicited by Robbins should be accepted or not, has not been pressed, and is clearly untenable. The testimony of Knight and of Robbins as

to the communication of Morrill's offer of July 13, by Robbins to Knight, was admitted, not, as seems to be supposed by the defendant, as evidence of what the order given by Morrill was, but as evidence that the machine was delivered under that order.

The evidence being conflicting whether the plaintiff delivered the machine on an absolute sale on four months' credit, under the order of July 6, or as on a conditional sale under the order of July 13, it was competent for the plaintiff to prove that Morrill's reputation for financial ability was poor. It had some tendency to show that it was probable that credit was not given to Morrill.

If the plaintiff had both offers before it, and accepted one of them, the fact that Morrill was notoriously in bad pecuniary credit would have some bearing upon the question which order was accepted. *Lee v. Wheeler*, 11 Gray, 236; *Sweetser v. Bates*, 117 Mass. 456; *Brewer v. Housatonic R. R. Co.* 107 Mass. 277.

Exceptions overruled.

COMMONWEALTH of Massachusetts

v.

William DALE.

1. In **misdemeanors**, all who knowingly and intentionally participate in the offense are **principals**, and may be convicted thereof, either jointly or severally.
2. **One who has the management and control of the business**, and who could and did decide when the shop in which it was conducted should be opened and closed, may be **convicted of keeping it open on the Lord's Day**, irrespective of ownership of the property.

(Suffolk—Filed May 5, 1887.)

ON defendant's exceptions. *Overruled.*

Complaint to the Municipal Court of the City of Boston, charging the defendant with the offense of keeping open his shop on the Lord's Day, "for the purpose of doing business therein, the same not being then and there works of necessity or charity."

At the trial of the defendant in the superior court, before Mason, J., it appeared in evidence that the shop in question was a shop for the sale of periodicals; that said shop and the business thereof were owned by one Mrs. Ellor, and not by the defendant, and that the defendant was hired by said Mrs. Ellor to take charge of said shop and to manage the business thereof, and that Mrs. Ellor seldom visited said shop; that upon the said 21st day of November said shop was kept open by the defendant, and the business of selling Sunday newspapers only was carried on therein by him.

The defendant requested the court to rule: (1) that, to warrant a finding that the defendant was guilty of the charge set forth in the complaint, the jury must find that the defendant kept open his shop unnecessarily, for the purpose of doing business therein on the Lord's Day; (2) that, if the jury found that the defendant kept his shop open simply for the purpose of selling Sunday newspapers,

and that selling Sunday newspapers on the Lord's Day was a necessity, then they should return a verdict of not guilty; (3) that, unless the jury found that the defendant was the owner of the shop in question, they must return a verdict of not guilty.

The court refused to give the first and second rulings requested by the defendant, and, in place of the third, charged the jury that they found that the defendant had the charge and control of said shop, and carried on the business thereof, and that he opened said shop for the purpose of selling newspapers therein on the Lord's Day, they should return a verdict of guilty; that it was not necessary, in order to sustain the charge made in the complaint, to show that the defendant was the owner of said shop and the business thereof. The jury returned a verdict of guilty.

To this ruling, and to the refusals to rule, the defendant duly excepted.

Mr. Walter I. Badger, for defendant:

1. From the earliest time, the framers of the statutes prohibiting opening shops and doing business on the Lord's Day contemplated instances where it would be necessary to allow exceptions to the prohibition.

The preamble to the Statute of 1760, chap. 20, § 9,—"Whereas many persons are of opinion that the Sabbath, or time of religious rest, begins on Saturday evening; therefore, to prevent all unnecessary disturbance of persons of such opinion, as well as to encourage in all others a due and seasonable preparation for the religious duties of the Lord's Day,"—recognizes the fact that some disturbance by the performance of the acts prohibited in the statute following was necessary; that is, that some shops must be open and some business done.

And so in the preamble to the Statute of 1791, chap. 58, § 1, this necessity is contemplated and provided for:

Preamble.—"Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, * * * and whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same by unnecessarily pursuing their worldly business," etc.

Pub. Stat. chap. 98, § 2, is substantially the same as that enacted in 1791, chap. 58; and the preamble to the latter statute sets forth the reasons of its passage, and is applicable to the statute now in force.

Commonwealth v. Dextra, 148 Mass. 28-31, 3 New Eng. Rep. 182.

It was decided in *Commonwealth v. Dextra*, *supra*, that the words "necessity and charity," in Pub. Stat. chap. 98, § 2, are not to be taken with that portion of the statute prohibiting the keeping open shops on the Lord's Day; but it was decided in *Commonwealth v. Collins*, 2 Cush. 556, that a shop could be kept open on the Lord's Day for a lawful purpose.

The object of the present statute and of each of the preceding statutes was to prohibit the opening shops and warehouses on the Lord's Day, for the purpose of the transaction of the ordinary business carried on during the week.

Commonwealth v. Dextra, *supra*; *Commonwealth v. Collins*, 2 Cush. 556.

The defendant did not carry on the ordinary business of the week. His regular business

was to sell periodicals, but on this day he sold Sunday newspapers only.

The shop might have been kept open from necessity, to remove therefrom property threatened with destruction by fire, or it might have been open for some religious meeting, or for promoting some charitable purpose which, although against the words of the statute, could not be considered as against its true meaning:

Commonwealth v. Collins, supra.

If it be true that a shop could be opened on the Lord's Day, for a necessity or for some charitable purpose, and if selling Sunday newspapers on the Lord's Day be a necessity, then the act of the defendant was an exception to the prohibition; and he was not guilty of the offense alleged in the complaint.

II. It was open to the defendant to show that selling Sunday newspapers on the Lord's Day was a necessity; and it was a question of fact for the jury, under proper instructions, to find whether selling Sunday newspapers on the Lord's Day was a necessity.

Commonwealth v. Harrison, 11 Gray, 308, 309; *Doyle v. Lynn & B. R. Co.* 118 Mass. 195; *Gorman v. Lovell*, 117 Mass. 65; *Orooman v. Lynn*, 121 Mass. 801; *Smith v. Boston & M. R. R.* 120 Mass. 491.

III. The third ruling requested by the defendant should have been given.

The text of the statute is: "Whoever keeps open his shop."

In the statute of 1692 the word "their" was used before the word "shops;" in the statute of 1760 the word "their" was also used; in the statute of 1791 the words "his, her, or their shop" were used; and in the Revised and General Statutes the word "his" was used, from which it is fair to presume that the intention was to punish the owner of the shop, and not the employee.

Had it been the intention of the framers of the statute to punish others than the owner of the shop, some such provision as "whoever keeps open any shop" would have been made, as in Connecticut (Gen. Stat. title 52, § 1).

The complaint alleges that the defendant, Dale, kept open his shop. The word "his" alleges ownership; it is a descriptive part of the offense charged, and must be proved as alleged.

Commonwealth v. Wade, 17 Pick. 395; *State v. Noble*, 15 Me. 476, and cases above cited.

The evidence shows that Mrs. Ellor, not Dale, was the owner of the shop, and that Dale was simply her agent. This variance is fatal.

Mr. Edgar J. Sherman, Atty-Gen., for the Commonwealth:

The court properly refused to give the rulings asked for by the defendant. The case falls quite within the decision in *Commonwealth v. Dextra*, 143 Mass. 28, 3 New Eng. Rep. 132.

The ruling of the court upon the point of ownership was clearly correct.

Commonwealth v. Kimball, 105 Mass. 465; *Commonwealth v. Dowling*, 114 Mass. 259; *Commonwealth v. O'Reilly*, 116 Mass. 15.

Morton, Ch. J., delivered the opinion of the court:

The first two instructions requested by the defendant were properly refused. Upon the 2 Mass.

points raised by them, the case of *Commonwealth v. Dextra*, 143 Mass. 28, is decisive. It appeared in evidence that the shop in question was a shop for the sale of periodicals; that the shop and the business thereof were owned by one Mrs. Ellor; and that the defendant was hired by Mrs. Ellor to take charge of the shop and to manage the business thereof.

The defendant asked the court to instruct the jury that unless they "found that the defendant was the owner of the shop in question they must return a verdict of not guilty." The court rightly instructed the jury that if the defendant had charge and control of said shop, and carried on the business thereof, he might be convicted.

In misdemeanors, all who knowingly and intentionally participate in the offense are principals, and may be convicted thereof, either jointly or severally. Thus it has been held that a man who is not the owner of the house or tenement or of the business conducted therein, but manages it as the agent of another, may be convicted of keeping a bawdy house, or a liquor nuisance, or of maintaining a coal-yard which is a nuisance, or of keeping liquors with intent to sell. *Commonwealth v. Kimball*, 105 Mass. 465, and cases cited; *Commonwealth v. Dowling*, 114 Mass. 259; *Commonwealth v. O'Reilly*, 116 Mass. 15.

In the case at bar the jury have found that the defendant had the charge and control of the shop, and carried on the business thereof. This implies that he had the direction and management of it, and could and did decide when it should be opened and closed. If he kept it open on the Lord's Day, he aided and abetted in the commission of a misdemeanor, and may be convicted thereof. The defendant contends that this rule does not apply in this case, because the words of the statute—"whoever on the Lord's Day keeps open his shop" shall be punished—import that a man, to be subject to punishment, must be the owner of the shop. But this is not the necessary or natural construction. The ownership of the shop is immaterial. The offense is in keeping it open on the Lord's Day, against the public peace. If a man has the government and management of a shop and of its business, it may properly be described as his shop; and if he keeps it open on the Lord's Day, he makes an illegal use of it, and thus maintains, or aids in maintaining, a public nuisance.

Exceptions overruled.

COMMONWEALTH of Massachusetts.

v.

Eben F. PERRY.

(Suffolk—Filed May 5, 1887.)

Per Curiam:

The rulings requested by defendant and refused by the court in this and the following case were the same as the first and second rulings asked for in *Commonwealth v. Dale*, ante, p. 200.

This case is governed by *Commonwealth v. Dextra*, 143 Mass. 28, 3 New Eng. Rep. 132.

Exceptions overruled.

COMMONWEALTH of Massachusetts.

v.

Joseph OSGOOD.

(Suffolk—Filed May 5, 1887.)

Per Curiam:Entry same as in *Commonwealth v. Perry*.
Exceptions overruled.

Mary MURPHY

v.

Maria E. LEE.

A reservation in a deed cannot create an easement in a stranger. Hence, where plaintiff's deeds contained the words, "there is a passageway on the southeasterly side of the said premises which is to be used in common with the abutters thereon," they do not necessarily include defendant's land. The language may well be taken to refer only to those abutters who had rights in it.

(Suffolk—Filed May 6, 1887.)

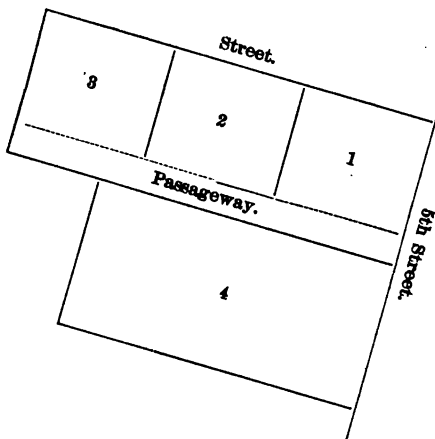
ON defendant's exceptions. *Overruled.*

Action of tort, to recover damages for cutting down a piece of fence and some posts that stood on the land of the plaintiff.

The defendant justifies her action under a plea of right of way over the land of the plaintiff, and that the fence and posts taken down by her obstructed said passageway.

The case was tried in the superior court, before Barker, J., without a jury.

The passageway in question is a part of lots 1, 2, and 3 in the accompanying sketch, and is shown by a dotted line; it touches but does not encroach upon lot 4.



The plaintiff owns lot 1, and the defendant lot 4. The defendant does not claim any right in said passageway over lots 2 and 3, but does claim an easement of way in said passageway over lot 1. Her house comes within 6 inches of the dividing line separating the two estates.

Lots 1, 2, and 3 once belonged to Terence

Lappen, who conveyed lots 2 and 3 to several grantees, by deeds in which easements of way were given over lot No. 1, along said passageway to Fifth Street. Lappen deeded lot 1 to Henry Kane, in 1872, by deed containing the following words: "There is a passageway on the southeasterly side of said premises which is to be used in common with the abutters thereon, and said Kane to have the use in common of a certain water closet at southerly end of said passageway." In 1875 said Kane conveyed lot 1 to the plaintiff by a deed containing the same words.

Lot 4 formerly belonged to William Kennedy, who got title in 1856, and by mesne conveyance it has come into the possession of the defendant "with all the privileges and appurtenances thereto belonging."

There was evidence tending to show that when Kennedy bought lot 4, in 1856, there was something said about a right of way over said passageway, but there is no deed, other than above, conveying such an easement; but from that time it was customary for him and his family, and the occupants of his house, to go to and from the back yard of his house over said passageway to Fifth Street; and there was evidence tending to show that no objection or hindrance to their so doing was made for twenty-five years or more. There was also evidence tending to show the contrary.

It was also in evidence that at the time Lappen sold lot 1 to Kane, in 1872, he told Kennedy that he had now made his (Kennedy's) right of way to Fifth Street a matter of record, so that no one could hereafter interfere with it; and it was also shown that no interference with, or obstruction to, its use was made after said deed in 1872, until the plaintiff refused and obstructed its use to the defendant and her tenants in 1883.

The defendant claimed that the intent of Lappen in the reservation in his deed to Kane was clearly to confirm and give a right of way to Kennedy over said passageway, as an "abutter thereon;" and asked the court to rule that, even if Kennedy had not acquired a right of way by prescription, yet he had acquired it by the said reservation in said deed.

The court refused so to rule, and found, as a matter of fact, that up to the time of Lappen's deed to Kane the use by Kennedy of said passageway was permissive, and after that it was used as a matter of right; and ruled that, as twenty years had not elapsed since said adverse user began, the defendant had acquired no right of way by prescription, or by the reservation in said deed.

The court found for the plaintiff, and defendant alleged exceptions.

Mr. Charles P. Gorley, for defendant:

I. The plaintiff takes her estate coupled with a servitude or easement of a right of way "to be used in common with the abutters thereon." She holds her estate subject to said servitude, and in the same manner as it was held by her grantor.

Hills v. Miller 3 Paige, 254, 257; 8 Kent, Com. 420.

The plaintiff, by accepting the deed of her estate and taking possession under it, becomes bound by all the restrictions, limitations, reservations and exceptions contained in it.

Shaw, *Ch. J.*, in *Bowen v. Connor*, 6 Cush. 136; *Newell v. Hill*, 2 Met. 181; *Goodwin v. Gilbert*, 9 Mass. 510.

Therefore the plaintiff is estopped from denying said servitude or easement.

Stockbridge Iron Co. v. Hudson Iron Co. 107 Mass. 321.

II. If the said easement of way over the estate of the plaintiff is appendant or appurtenant to the estate now held by the defendant, it has passed to her with said estate, under the phrase "with all the privileges and appurtenances thereto belonging," and would pass even if no such express words were used.

3 Kent. Com. 420; 2 Washb. Real. Prop. 4th ed. p. 308; *Kent v. Waite*, 10 Pick. 188; *Underwood v. Carney*, 1 Cush. 285; *Barnes v. Lloyd*, 112 Mass. 233; *Peck v. Conway*, 119 Mass. 549.

III. Easements, being interests in land, can be acquired ordinarily only by deed, or what is deemed to be equivalent thereto. A reservation or exception in a deed is deemed to be equivalent thereto, and an easement, such as a right of way, may be created by reservation.

White v. Crawford, 10 Mass. 188; *Pettee v. Hawes*, 18 Pick. 823; *Peck v. Conway*, 119 Mass. 549; *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 321.

IV. The phrase used in Lappen's deed to Kane, "There is a passageway on the southeasterly side of said premises which is to be used in common with the abutters thereon," is clearly a reservation or exception out of this grant to Kane, reserved not for his own use or benefit, but for the use of the contiguous or abutting estate of Kennedy, now the defendant's. That this was his intent is shown, not only by the words used in said reservation, but by what he told Kennedy at the time, that "he had now made his (Kennedy's) right of way to Fifth Street a matter of record."

This intent, then, must govern, if consistent with rules of law; and courts are bound to effectuate the intention of the parties.

Bridge v. Wellington, 1 Mass. 237; *Wallis v. Wallis*, 4 Mass. 136; *White v. Crawford*, 10 Mass. 188; *Frost v. Spaulding*, 19 Pick. 446; *Trafton v. Hawes*, 102 Mass. 541; *Bowen v. Connor*, 6 Cush. 132, 136.

V. The intent of Lappen, as expressed in his deed and as shown by the evidence, is consistent with the rules of law. It has all the elements of a deed. The estate out of which the easement is excepted is definitely stated, the location of the easement is defined, and the estate for whose use the easement is reserved is definitely stated.

By the use of the term "abutters" he must mean the abutters on the 4-foot strip over which the right of way was to be exercised. There are only two abutters on this strip, to wit, estates No. 2 and No. 4. He could not mean by "abutters" the estates numbered 1, 2, and 3, to the exclusion of lot No. 4, for it is absurd to say that a parcel of land abuts on a part of itself. And if he meant by abutters those that abut on estate No. 1, then estate No. 4 would still be included.

He intended to make this right of way appurtenant to an estate, to wit, an abutter, and not a right of way in gross. Such an easement is never presumed to be personal when

it can fairly be presumed to be appurtenant to some other estate.

Dennis v. Wilson, 107 Mass. 592; *Washb. Easem.* 28, 29, 161.

The question whether such an easement is a personal right or is to be construed to be appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances.

Peck v. Conway, 119 Mass. 549.

There is no doubt that a grantor of an estate can create or except a right of way over the same in his own favor, or can impose an easement on his own estate; and it is immaterial whether such easement is technically considered as founded on an exception, reservation, or implied grant.

Bowen v. Connor, 6 Cush. 132; *Peck v. Conway*, 119 Mass. 549.

It is equally true that an easement may be created in favor of one estate, and a servitude imposed upon another, without regard to any privity or connection of title or estate in the two parcels or their owners.

2 Washb. Real Prop. 4th ed. p. 308; *Stockwell v. Couillard*, 129 Mass. 233; *Pettee v. Hawes*, 18 Pick. 823.

Messrs. Crowley & Maxwell, for plaintiff:

The defendant and her grantors were entire strangers to the deeds of the lots Nos. 1, 2, and 3, under which she claims a right of way. There never has been any privity of estate between the owners of lot 4, on the one hand, and lots 1, 2, and 3, on the other.

W. Allen, J., delivered the opinion of the court:

This is an action of trespass for breaking and entering the plaintiff's close. The defendant set up a right of way over the *locus*. The only exception is to the ruling of the court that a right of way over the plaintiff's land was not reserved as appurtenant to the defendant's land by the deeds under which the plaintiff claims. The plaintiff derives her title from one Lappen, who in the year 1872 conveyed the lot now owned by her to one Kane, who subsequently conveyed it to the plaintiff. Both deeds contained the words "there is a passageway on the southeasterly side of the said premises which is to be used in common with the abutters thereon." The defendant's land abuts on the southeasterly side of the plaintiff's land, and the contention of the defendant is that a right of way in favor of the defendant's land was reserved in the deed. At the time of the conveyance from Lappen to Kane there was a passageway 4 feet wide, over which a right of way had been granted by Lappen, as appurtenant to adjoining land which he had before that time conveyed. The deed refers to an existing passageway, and the natural construction of it is that it excepts from the grant the existing right of way, and not that it creates a new right. The words "which is to be used in common with the abutters thereon," do not necessarily include the defendant's land. The passageway abutted upon the two lots in the rear which Lappen

had sold, and the language may well be taken to refer only to those abutters on the way who had rights in it. But if there had been an express reservation of the rights of way to the defendant's grantor, it would not have created an easement in him. He was not a party to the deed, and a reservation in a deed cannot create an easement in a stranger to it. *Stockwell v. Couillard*, 129 Mass. 231, 233; *Young, Petitioner*, 11 R. I. 637; *Bridges v. Pierson*, 45 N. Y. 601; *Hornbeck v. Westbrook*, 9 Johns. 73.

In *Wickham v. Hawker*, 7 Mees. & W. 63, a lease by indenture, executed by three lessors, two of whom had the legal title and the third the beneficiary interest, contained a reservation of liberty to hawk, hunt, fish and fowl upon the land. It was held that it could not operate as a reservation to the three, because one of them was not a conveying party; but as the indenture was executed by the lessee, it might operate as a grant from him to the three.

The declarations of Lappen at the time of his deed to Kane are not competent to affect the deeds.

Exceptions overruled.

COMMONWEALTH of Massachusetts,

v.

David STARR.

The facts that one is a Hebrew, who conscientiously believed that the seventh day of the week ought to be observed as the Sabbath, and that he actually refrained from secular business on that day, will not excuse the violation of the statute against desecration of the Lord's Day, by keeping open his shop for the sale of meat, in the usual course of business.

(Suffolk—Filed May 5, 1887.)

ON defendant's exceptions. *Overruled.*

Complaint for the violation of the statute for the observance of the Lord's Day, charging that the defendant, "on the 21st day of November, in the year of our Lord 1886, that being the Lord's Day, and between the midnight preceding and the midnight succeeding the said day, at Boston aforesaid, and within the judicial district of said court, did keep open his shop there situate, and numbered 51 in Salem Street, for the purpose of doing business therein, the same not being then and there works of necessity or charity."

At the trial in the Superior Court before Mason, J., there was evidence by the government tending to show that the defendant was proprietor of a meatshop at No. 51 Salem Street, in said city; that he resided in the rear part of said place; that on Sunday, November 21, 1886, at about the hour of 8 o'clock A. M., the defendant's shop aforesaid was open, and the defendant cut and furnished certain meat to women and children, who went into and came out of said shop; that he was seen to take something, supposed to be money, from said persons, to whom meat was delivered. It further appeared from the government wit-

nesses that the defendant was a Hebrew, and the persons who got meat there this Sunday morning were Hebrews; that the shop was not open after 10 o'clock in the forenoon of that day.

The defendant and other witnesses were called, and evidence was offered that the defendant was a Hebrew, a preacher in the Hebrew synagogue, and especially designated and appointed by the High Rabbi to slaughter and prepare meat for food after the law and manner of the religion of the Hebrew people; that he conscientiously believed that the seventh day of the week ought to be observed as the Sabbath, and that he actually refrained from secular business on that day; that he did not, on account of his religious belief, supply meat on Sunday, and that the people of his synagogue could not obtain the same on that day; that he did not on this Sunday keep open his place to do business with the public; that the shop door was closed, but not locked; that this building in which he lives was open this morning for the sole purpose of supplying necessary meat prepared and furnished by him in compliance with the law and manner of the religion of the Hebrew people, and was supplied to Hebrews, members of his congregation, and to no others; but the presiding judge excluded this evidence, and ruled that it was immaterial for what purpose the shop was open; that it was no defense under this complaint to show that the defendant's place was necessarily open; that the question of necessity or charity was not open to the defendant, and he excluded all evidence on that point.

The counsel for the defendant asked the court to rule:

1. Keeping a shop open on Sunday morning for the sole purpose of supplying necessary meat to Hebrews, who, on account of their religious belief, are obliged to obtain the same on Sunday morning, prepared in a special manner, is not a violation of the Sunday law.

2. If the jury find the defendant, a preacher in the Hebrew synagogue, and specially designated to slaughter and prepare meat for food after the law and manner of the religion of the Hebrew people, had the place where he lives open on Sunday morning to supply necessary food to members of his congregation, and to no others, the jury must bring in a verdict of "not guilty."

3. If this defendant did not keep open his place to do business with the public, but to supply meat, in accordance with and in compliance with the religion of the Hebrews, to his own people only, he is not guilty of violating the Sunday law.

All of which rulings the court refused. To all the aforesaid exclusion of evidence, rulings, and refusals to rule, the defendant then and there excepted.

Mr. Francis S. Hesseltine, for defendant:

I. If the defendant could show that his shop was open from necessity, it was a good defense. *Commonwealth v. Dextra*, decided that the exception of "works of necessity or charity" has no reference to the keeping open a shop; but my point is that necessity is a good defense, independent of any provision of the statute. Necessity releases one from the obligations and

penalties of law,—even the Sabbath law. Necessity may take life. Necessity may take the property of another,—may commit a trespass. The law recognizes a way of necessity. It recognizes the defense of necessity in violation of law. Necessity has no law. Indeed necessity is itself a law which cannot be avoided. If it was necessary to open his shop to save property, health, or life, it was justifiable by a law higher and more sacred than the statute.

Bac. Max. Reg. 5; Mark, ii. 25.

II. A person may open his shop on the Lord's Day to do a deed of charity. He may open it to clothe the naked and care for the suffering. If shipwrecked sailors were cast upon the coast on Sunday morning in winter, he might open his place to supply their needs. He might do so to feed the hungry and starving, to preserve life, or save it. It does not require a statute provision to legalize a deed of charity by him on the Sabbath day, whether in the street or store. "The Sabbath was made for man, not man for the Sabbath." "Wherefore it is lawful to do well on the Sabbath day."

Mark, ii. 23-28; Matthew, xii. 1-13.

III. The defendant should have been allowed to show that he conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day; that this was his only secular business, labor, or work; so that he might claim as a defense that he was observing and obeying the command of God, which was his religion; that he was serving and worshipping according to the dictates of his own conscience and the plain command of the Bible. "Six days shalt thou labor and do all thy work, but the seventh day is the Sabbath of the Lord thy God; in it thou shalt not do any work." The command to labor the six days is as imperative and obligatory, and as much a part of the religious duty, service, and worship of a conscientious Hebrew, as the refraining from work on the seventh day. "Work, as well as rest, is worship."

Exodus, xx. 9.

And it was to preserve the rights guaranteed by the Declaration of Rights (Const. art. 2) that Rev. Stat. chap. 50, § 10, Gen. Stat. chap. 84, § 9, and Pub. Stat. chap. 98, § 13, were enacted.

The Legislature never intended that a conscientious Hebrew or Seventh-Day Baptist should be restricted in his secular business to five days, provided he disturbed no other person; but did intend that he might perform his legal secular business or labor, whatever that was (the words are general, without limitation), six days, if he conscientiously and actually refrained on the seventh. The evidence offered by the defendant should have been admitted, and the rulings requested should have been given. The court erred in the rulings given to the jury. The jury understood by such ruling, that it was immaterial for what purpose the shop was open, that the mere fact that the shop was open was sufficient to convict the defendant. This cannot be law.

Mr. Edgar J. Sherman, Atty. Gen., for the Commonwealth:

The court properly refused to admit the evidence offered by the defendant as to the kind of business done, and also properly refused 2 Mass.

to give the rulings asked for by the defendant. The offense was proven when the fact of the keeping open was established.

Commonwealth v. Has, 123 Mass. 40; *Commonwealth v. Deatra*, 143 Mass. 28.

Morton, Ch. J., delivered the opinion of the court:

The evidence shows that the defendant, who is a Hebrew, kept open his shop on the Lord's Day, for the purpose of selling meat to the Hebrews. The court correctly held that the facts that he was a Hebrew who conscientiously believed that the seventh day of the week ought to be observed as the Sabbath, and that he actually refrained from secular business on that day, were immaterial. This point was fully considered and decided in *Commissioners v. Has*, 123 Mass. 40.

The court also correctly held that it was not competent for the defendant to prove that he kept open his shop for the sole purpose of selling meat to Hebrews, and that this was a work of necessity or charity. The statute prohibits keeping open a shop for any purposes of business; and the exception of "works of necessity and charity" do not apply. This was decided in *Commonwealth v. Deatra*, 143 Mass. 28, 8 New Eng. Rep. 182, which is conclusive of the case at bar.

Exceptions overruled.

M. A. LEWIS

v.

James R. AUSTIN.

When the beneficial owner of a judgment brings a suit upon it in a name not of the legal owner, whether that of an existing person or not, the court would have the authority to allow him to substitute for it the name of the legal owner. It is no objection that there is no person in being, of the name in which the suit is brought.

(Suffolk—Filed May 6, 1887.)

ON defendant's exceptions. *Overruled.*

Action of contract upon a judgment of the Supreme Court of New York in favor of Marshall A. Lewis against James R. Austin. Defendant was defaulted at the April Term, 1885, of the Superior Court. Judgment was entered and execution issued against him November 16, 1885.

The defendant filed a petition to vacate the judgment; and the court, finding that Marshall A. Lewis died in May, 1883, before the commencement of this suit, vacated the judgment and cancelled the execution. The defendant thereupon filed a motion to dismiss the action, on the ground that, at the time of the date of the writ, the plaintiff was not in existence, having died in May, 1883. Plaintiff moved to amend the writ and pleadings by inserting in place of the name M. A. Lewis, as plaintiff, the name Mary A. Lewis, executrix of the will of Marshall A. Lewis, etc., for the benefit of Samuel W. Spofford, assignee of the judg-

ment declared on in said suit; so that the writ and pleadings might show that the suit was brought in the name of Mary A. Lewis, as executrix aforesaid, and for the benefit of Spofford as assignee.

At the trial in the superior court before Brigham, *Ch. J.*, the following facts appeared:

Marshall A. Lewis obtained said judgment in New York for the benefit of Samuel W. Spofford, Lewis never having any beneficial interest therein. In May, 1883, after the date of said judgment, Marshall A. Lewis died, and, before the present action was begun, his wife, Mary A. Lewis, was duly appointed executrix of his will. July 30, 1883, Mary A. Lewis assigned all her right, title, and interest as executrix in or to said judgment to Samuel W. Spofford, with the right to bring suit thereon in her name. This action was begun by the attorney of Samuel W. Spofford in the name of M. A. Lewis, intending thereby Marshall A. Lewis. At the time of bringing the action, all the facts above recited were known to Samuel W. Spofford and to said attorney; but the death of Marshall A. Lewis was not known to defendant or his attorneys until November, 1885.

The defendant contended that as Marshall A. Lewis had deceased before the beginning of this action, and there was no party plaintiff therein, the court had no jurisdiction, and the action ought to be dismissed; and as neither Mary A. Lewis nor Samuel W. Spofford were parties plaintiff, and the sole original plaintiff was dead when the action was begun, the court had no jurisdiction to entertain, or authority to grant, the motion to amend. But the court ruled otherwise, and allowed the motion, and defendant duly excepted.

Mr. W. O. Kyle, for defendant:

The defendant contends that the writ was a nullity; that all proceedings in the suit were void; that the superior court never had jurisdiction of the parties or of the subject-matter; and that no amendment can cure the defect so that a valid judgment can be rendered.

At common law, death of plaintiff before purchase of writ was ground for abatement.

Comyn, Dig. *Abatement*, E, 17.

The general rule to be observed is that where the writ is *de facto* a nullity, so that judgment thereupon would be erroneous, there the writ is *de facto* abated.

Bacon's Abridg. *Abatement*, K.

It has been held by this court that, "when a substantial defect in the writ appears on the record, the court ought *ex officio* to abate it."

Parsons, *Ch. J.*, *Hart v. Fitzgerald*, 2 Mass. 509-512; *Tingley v. Bateman*, 10 Mass. 843.

If it be suggested that the defendant should have pleaded this objection in abatement, the answer is that it never came to his knowledge until after judgment; and moreover, that, as it affects the jurisdiction of the court, it could be taken after judgment.

Elder v. Dwight Mfg. Co. 4 Gray, 204.

It is provided in Pub. Stat. chap. 167, § 82, that "a judgment shall not be arrested for a cause existing before the verdict, unless such cause affects the jurisdiction of the court. And where the defendant has appeared and answered to the merits of the action, no defect in the writ or other process by which he has

been brought before the court, or in the service thereof, shall be deemed to affect the jurisdiction of the court." But the defendant contends: (1) that there was no writ here; (2) that his objection is based, not on a defect in the writ, but rather on the fact that there was never a party plaintiff in the suit.

In order to give any court jurisdiction of the subject-matter, so as to enable it to make orders, or issue process even, a suit must be instituted therein.

Wells, Jur. 2; *Ex parte Cohen*, 6 Cal. 318.

It must appear that a complaint has been preferred, before a court can have jurisdiction.

Sheldon's Lessees v. Newton, 3 Ohio St. 494.

If it appears to the court that they have no jurisdiction of an action before them, they will not proceed in the suit, but will stay all proceedings, although the objection is not taken by a plea to the jurisdiction.

Lawrence v. Smith, 5 Mass. 362.

The defendant had waived no right, for his appearance and answers were made while in ignorance of the fact of the plaintiff's nonexistence. Appearance does not give jurisdiction.

Osgood v. Thurston, 28 Pick. 110; *Nye v. Liscombe*, 21 Pick. 268.

The court had authority to vacate the judgment and cancel the execution only on the ground that the proceedings were void; and if they were void, no further action could properly be taken but to dismiss the suit.

Reid v. Holmes, 127 Mass. 326-328; *Loring v. Folger*, 7 Gray, 505; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87-95.

Pub. Stat. chap. 167, § 42, gives authority to introduce a party "necessary to be joined as plaintiff," but grants no power to introduce by amendment a sole plaintiff where none has before existed.

A court may permit amendments to be made to the extent of discontinuing the action as to any joint plaintiff or joint defendant, and changing the form of the action, so long as any one or more of the original plaintiffs and defendants remain parties to the action; but no amendment can be permitted which will make an entirely new case against entirely new parties to the record.

Douglas v. Newman, 5 Bradw. 518-520.

And it is not permissible to strike out the name of a sole party, either plaintiff or defendant, and substitute the name of another person.

Davis Ave. R. R. Co. v. Mallon, 57 Ala. 168; *Dubbers v. Gouz*, 51 Cal. 154; *Davis v. Mayor of N. Y.* 14 N. Y. 526; *Marsh River Lodge of F. & A. M. v. Inhab. of Brooks*, 61 Me. 586.

It is to be observed that Samuel W. Spofford, who now claims to have been the party for whose benefit the suit was brought, was not mentioned in the original writ or any part of the record; and his name first appears in the motion of Mary A. Lewis, executrix, to be admitted as a party, and amend the writ and declaration. The defendant contends therefore that said Spofford has never been in court, and that the introduction of his name—the proposed amendment—cannot be considered as material in determining the rights of the defendant and the jurisdiction of the court.

See *Hurst v. Fisher*, 1 Watts & S. 438.

A case precisely in point as to the jurisdiction of the superior court to allow the amendment is that of *Clay v. Oxford*, 4 H. & C. 690, decided in 1886 in the English Court of Exchequer, also reported in L. R. 2 Ex. 54.

It should be noted that the English statutes as to introducing parties and allowing amendments are quite as broad and liberal as our own.

See 15, 16 Vict. chap. 176; Stat. at L. vol. 71.

Mr. H. J. Edwards, for plaintiff:

1. When, on the defendant's petition, the judgment was vacated and the action brought forward, the court had the same power to allow the amendment "as if the judgment had not been rendered."

Pub. Stat. chap. 167, § 17.

2. That the court had power to allow the amendment by substituting the executrix's name for that of M. A. Lewis, see:—

Pub. Stat. chap. 167, § 42; *Winch v. Hoemer*, 123 Mass. 438; *Jennings v. Collins*, 99 Mass. 29, 32; *Costello v. Crowell*, 134 Mass. 280; *Pierce v. Charter Oak Ins. Co.* 138 Mass. 151, 164; *Buckland v. Green*, 133 Mass. 421; *Hutchinson v. Tucker*, 124 Mass. 240; *Emery v. Osgood*, 1 Allen, 244; *Inhabitants of Winthrop v. Farrar*, 11 Allen, 398; *Crafts v. Sikes*, 4 Gray, 194; *Cain v. Rockwell*, 132 Mass. 193, 194; *Fenton v. Lord*, 128 Mass. 466, 469.

3. As Samuel W. Spofford owned the claim and was the real plaintiff, and Marshall A. Lewis, if he had been alive, would have been a mere nominal plaintiff, just as his executrix was after her name was inserted, the mistake was a mere clerical one which injured no one, occasioned probably by their initials being the same. The case for amendment is therefore stronger than those cited under our second point.

4. If the court had no jurisdiction of the nominal plaintiff before the amendment, it certainly had after the amendment. The case therefore is not unlike that where the court has no jurisdiction by reason of the *ad damnum* being too large or too small, but has jurisdiction after allowance of an amendment reducing or enlarging it.

Hart v. Waitt, 3 Allen, 532 and cases.

W. Allen, J., delivered the opinion of the court.

A judgment was obtained in New York in favor of Marshall A. Lewis for the benefit of one Spofford, Lewis having no beneficial interest in it. Lewis died soon after, and his widow, Mary A. Lewis, was appointed his executrix, and assigned the judgment to Spofford. Spofford afterwards commenced an action in the superior court on the judgment, in the name of M. A. Lewis, intending Marshall A. Lewis. The only question of law is whether it was in the power of the superior court to allow an amendment substituting the name of Mary A. Lewis, and stating that the action is brought for the benefit of Spofford. We think that the court had authority to allow the amendment.

Spofford was the real plaintiff, and if he had brought the action in his own name, the case would have come within the cases of *Costello v. Crowell*, 134 Mass. 280; *Winch v. Hoemer*, 123 Mass. 438; and *Pierce v. Charter Oak Ins. Co.* 2 Mass.

138 Mass. 157. It would have been allowed even in England. *Blake v. Done*, 7 H. & N. 465; *La Bancosibazionale v. Hamburger*, 2 H. & C. 829. So, if the legal right of action had been in him, and he had brought the action in another name, whether there was or was not a known person of that name, he would have been allowed to substitute his own name as plaintiff. *Crafts v. Sikes*, 4 Gray, 194; *Cain v. Rockwell*, 132 Mass. 193. As the legal owner of a demand, who brings a suit upon it in another name, or the name of another person, can be allowed to substitute his own name; and as the beneficial owner who brings a suit in his own name can be allowed to substitute the name of the legal owner,—it would seem to follow that when the beneficial owner brings a suit in a name not of the legal owner, whether that of an existing person or not, the court would have authority to allow him to substitute for it the name of the legal owner. It is no objection that there is no person in being of the name in which the suit is brought. In *Crafts v. Sikes*, *supra*, it was regarded as an argument against the power to allow the amendment, that there was a person of the name of the plaintiff named in the writ, living in the town in which the plaintiff was alleged to reside. The death of Marshall A. Lewis could have no greater effect than to put in another the legal right of action which had been in him, and to show that there was no person of that name in being. The latter is immaterial except as involving the former. The only difference between the action in the name of Lewis after his decease, and the action in the name of a stranger, is that in the latter case the record would show the error which would have to be cured in the former.

Spofford was the real plaintiff, and brought the action for his own benefit. That this is not set out in the writ is immaterial. He seeks to amend by substituting the name of the proper nominal plaintiff for the name improperly inserted in the writ. If the name to be struck out had been that of Spofford himself, or a name not connected with the cause of action, whether of a person in being or not, the cases cited above are in point, to the authority of the court to allow the amendment. The case at bar,—where the name is that of a person not in being, but in whom, when in life, the cause of action was vested,—cannot be distinguished in principle from those supposed.

The case comes within the meaning, if not the letter, of the statute which authorizes amendments in any matter which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought. Pub. Stat. chap. 167, § 42.

Exceptions overruled.

Linus M. CHILD

v.

CHRISTIAN SOCIETY in the City of Boston.

1. The committee of a society has no authority except that given to it by the by-laws of the society, which define its power and authority; and the

authority to employ counsel on the credit of the society is expressly excluded by the clause providing for "expending only such sums of money as the society shall place at its disposal."

2. This prohibition is also a prohibition against incurring debts without the action of the society.

(Suffolk—Filed May 9, 1887.)

APPEAL by plaintiff from a judgment of the Superior Court of Suffolk County in favor of defendant in an action to recover for services as an attorney at law. *Affirmed.*

Services were rendered by plaintiff in pursuance of a request from the standing committee of defendant society under a vote at a meeting of defendant society, held November 15, 1881, as follows:

"Voted: That the standing committee be, and they are hereby, authorized to examine into, and take such action, by legal advice or otherwise, in relation to the suit and injunction now pending against this society and Edward L. Goodwin, its clerk, as the committee may deem for the best interests of the society; and the expense in relation thereto, for counsel or otherwise, shall be paid from any funds in the hands of the treasurer, whenever the same may be due and payable."

The following facts were agreed upon by the parties: The services were rendered in defense of the suit of *Gray v. Christian Society*, reported in 187 Mass. 329, which was a bill in equity brought by one Gray and others, members of defendant society, to enjoin one Goodwin, his associates and confederates, and defendant society, its officers and agents, from selling the church of the defendant in accordance with certain votes passed at a special meeting of the society held October 13, 1881, and, by adjournment, on October 28, 1881. In that suit a decree was entered for complainants.

At the meeting held October 13, six persons, associates of said Goodwin, were illegally admitted into said society as members, and were illegally permitted to vote at said meeting, and at said subsequent meetings of October 28 and November 15, and voted at all said meetings, in conjunction with Goodwin and others, in favor of all votes which were passed, and against all votes which were defeated, at said meetings. At all said meetings, there were illegally excluded from voting, by said Goodwin and his associates and such six illegally-admitted members, a sufficient number of legal members who were entitled to vote to have changed the result of any vote passed at all of said meetings.

Plaintiff in this suit relied on by-laws of 1880, art. 5, which he claimed authorized the standing committee to employ him without a previous vote of the society; and also on the vote passed at the meeting of November 15, 1881.

The court ordered judgment for the defendant, and plaintiff appealed to this court.

Mr. Marcellus Coggan, for plaintiff:

The affairs of this society were, by its by-laws (which they had a right to make), duly put into the control of the standing commit-

tee, and they attended to all the business of the society.

"Generally, to manage the business of the society" required of this standing committee that they should defend any suits that were brought against the society. They had the right, and it was their duty, to use their judgment in the defense of such suits; and for that purpose they had the right, in behalf of the society, and without any vote whatever, to employ counsel.

Osborn v. Bank, 9 Wheat. 788 (22 U. S. bk. 6, L. ed. 244); *Am. Ins. v. Oakley*, 9 Paige, 500; *Field v. Proprs. Com. Land Co.* 1 Cush. 11.

The above citations show beyond question that, in corporations of ordinary character, represented by directors or officers, the employment by such officers of counsel binds the corporation without any special authority from the corporation on the subject. And, also, municipal corporations may, by their officers, employ counsel to represent them in court or otherwise.

Field v. Proprs. Com. Land Co., *supra*; 40 Mo. 419; 40 N. J. L. 486; 5 Den. 355.

Messrs. W. E. L. Dillaway and H. E. Bolles, for defendant:

The by-laws of 1880, art. 5, confer no such authority upon the standing committee.

By its own terms, it excludes any implication of such authority; for it expressly limits the authority of the committee to "expending only such sums of money as the society shall place at their disposal."

The plaintiff is bound by the limitations contained in the by-law. The rule that certain officers of a corporation "have the authority which their designations imply" relates "to a manufacturing and trading corporation under the laws of Massachusetts, and of course is to be limited to such corporations, and has no application to corporations of a different character."

Ray v. Noble, 12 Cush. 1, 16, 17.

The agents of religious societies have no implied authority. "Cases of trading and manufacturing corporations * * * furnish no analogy for cases of parishes or religious societies."

Packard v. Universalist Society, 10 Met. 490.

Upon the same principle it has been held that the mayor of a city and the selectmen of a town have no authority, by virtue of their office, to employ counsel to defend suits.

Fletcher v. City of Lowell, 15 Gray, 103; *Butler v. Charlestown*, 7 Gray, 12-16.

No authority was conferred by the vote of November 15, 1881, because that meeting was illegal and the vote void.

Gray v. Christian Society, 187 Mass. 329.

W. Allen, J., delivered the opinion of the court:

The plaintiff admits that the vote of the defendant society, of November 15, authorizing its standing committee to employ counsel, and under which the committee employed him, was void, and gave no authority to the committee; and that the committee had no authority except what was given to them by the by-law of the society. The by-law, after specifying certain particular powers and duties of the committee, none of which affect this case, pro-

ceeds. "And generally to manage the business of the society, expending only such sums of money as the society shall place at their disposal." Whatever authority the committee might have had by implication, from their general powers or from their charge to generally manage the business of the society, to employ counsel on the credit of the society, is expressly excluded by the last clause. The prohibition against spending any sums of money except such as the society shall place at its disposal is also a prohibition against incurring debts without the action of the society. It is not contended that the society has consented to the services. Although rendered nominally for it, they were without its authority and adverse to it.

Judgment affirmed.

John T. LANGFORD

BOSTON & ALBANY R. R. Co.

1. Where a **nolle prosequi** is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot maintain an action for malicious prosecution. Hence, where, by procurement of defendant's attorney, the district attorney entered a *nolle prosequi* on defendant's appeal to the superior court, an action for malicious prosecution could not be maintained.
2. The mere entry of a complaint before a trial justice, and the issue thereon of a warrant of arrest, will not render the complaining party or his principal liable in trespass for the acts of the officer in serving the warrant.
3. An act done by legal authority does not constitute an assault.

(Middlesex—Filed May 9, 1887.)

On plaintiff's exceptions. *Overruled.*

Action of tort against the Boston & Albany Railroad Company; the declaration being in two counts, one for malicious prosecution, and the other for false imprisonment.

The prosecution complained of was a complaint before a trial justice for Norfolk County, made by one Sargent, a conductor of the defendant, that the plaintiff, at a certain date and place in said Norfolk, "did then and there, being in the cars of the Boston & Albany Railroad, unlawfully refuse to pay or give an equivalent for his fare from Natick to Wellesley;" on which complaint a warrant was issued, defendant arrested and brought before the trial justice, tried, convicted, fined, and recognized upon his appeal to the superior court, where the district attorney entered a *nolle prosequi* of the complaint upon the record, in the following form:

"I will no further prosecute this complaint.
Everett C. Bumpus, Dist. Atty."

The foregoing facts constituted the imprisonment complained of in the second count. The record of said proceedings was in evidence.

At the trial in the superior court before Thompson, J., the plaintiff introduced evi-

dence tending to show that on the day referred to he purchased a ticket from Natick to Newton on the Boston & Albany Railroad, paying twenty-five cents therefor; that the ticket so purchased was apparently an unlimited and unrestricted ticket, and was in the following form:

BOSTON & ALBANY RAILROAD.		
14	NATICK TO NEWTON.	14
G. M. GRIGGS, G. T. A.		
		7831

The plaintiff purchased it, intending to stop over on said ticket at Wellesley station, which is between Natick and Newton, and supposing that he had a right to stop over on it, but did not communicate his purpose to stop over to the station-master, from whom he purchased the ticket. Upon the train he presented the ticket and asked for a stop-over check at Wellesley. The conductor took the ticket into his possession, and returned it again to the plaintiff, and refused to give him a stop-over, and demanded that he should pay a cash fare from Natick to Wellesley, or give up the whole ticket to Newton. The plaintiff tendered said ticket to the conductor to be punched, which the conductor refused to do, stating that that would destroy its value upon the next train. The plaintiff said he would take his chances on that. The plaintiff said to the conductor that he had purchased the ticket supposing he had a right to stop over on it. Plaintiff refused to pay a cash fare for the distance ridden, and refused to surrender his ticket except upon the terms aforesaid. The conductor said to the plaintiff that he was a new conductor, and had never had a case of the kind before, and did not know but the plaintiff was right. If plaintiff would give him his name and address (which plaintiff did), he would refer the case to the officers of the railroad, and if plaintiff was in error, they would notify the plaintiff of the error, and he could come in there and make good the deficiency. If plaintiff was in error, plaintiff said he would pay what he owed the road. Plaintiff claimed he made a "contract," by this conversation with the conductor, to refer it to the officers of the road.

Plaintiff got off from the train at Wellesley without having paid any cash fare or ticket, and later in the same day continued his journey from Wellesley to Newton, then surrendering said ticket, in the condition in which he bought it, to the conductor on the later train.

The former conductor told the plaintiff that it was against the rules to issue a stop-over check, but did not show the rules. Said conductor was named Sargent, and was the same person who made the complaint to the trial justice. He was requested to show the printed rules, both at said conversation on the cars and before the trial justice, but did not have them.

The next thing the plaintiff heard of the matter, after said occurrences on the cars, he received a letter requesting his appearance, from the officer who served the warrant, and thereupon, October 17, wrote a letter to the general manager of the railroad company, and stated his view of the facts, to which he re-

ceived a reply dated October 19, received the day after his conviction before the trial justice. The letter from the plaintiff to the general manager was received by him, and referred to the general traffic manager to take such action as he saw fit.

Said general traffic manager of the railroad testified that this matter was referred to him; that such reports came under his general charge; that he gave conductor Sargent instructions to go to the justice and state the facts to him, and ask the justice to take action in the way of bringing this Mr Langford to a prosecution.

In the printed book of the regulations of the road, giving directions to the conductors as to their duties in regard to stop-over checks, was the regulation, "No stop-overs will be issued on tickets sold at rates less than fifty cents;" and it was the duty of the conductor to refuse to give such stop-over; and he had no authority to punch said ticket and leave it in possession of plaintiff.

The plaintiff testified that, after his conviction by the trial justice upon said complaint, he employed George W. Morse, Esq., as his attorney, to attend on his behalf to any further proceedings in the said complaint upon appeal in the superior court; that he himself never personally appeared in said superior court; but that he learned from his said attorney that said George W. Morse, acting as attorney for the plaintiff, got the district attorney to enter said *nolle prosequi*.

The court ruled that the facts as proved by the plaintiff did not entitle him to recover in this action, and instructed the jury to return a verdict for the defendant, to which ruling the plaintiff excepted.

Messrs. Morse & Lane and William Webster, for plaintiff:

Maliciously complaining of another, without probable cause, renders one liable for the injury, even though the complaint is defective or the court has no jurisdiction; and this is so, even though the complainant does not participate in the arrest.

Barker v. Stetson, 7 Gray, 53, 54; *West v. Smallwood*, 8 Mees. & W. 418; *Elaee v. Smith*, 1 Dowl. & R. 97.

Whatever the name or form of the action is, malice is the gist of it; and proof of malice in complaining, and of injury resulting, makes out a case.

The plaintiff purchased his ticket "supposing he had a right to stop over upon it," and claimed this right when he offered the ticket to the conductor. There was nothing upon the ticket to show that it was a limited ticket. The conductor denied the plaintiff's claim, insisting that the plaintiff could not stop over upon the ticket, but said he was a new man, and "did not know but the plaintiff was right." They mutually agreed to refer the question to the general traffic manager. The plaintiff agreed to abide his decision, and the conductor took his name and address, and agreed to notify him if he was in error, that he might pay the deficiency. The rules of the company limiting stop-over checks to tickets costing fifty cents or over were not exhibited; and these rules are addressed to the conductors, and not to the public.

The form of the complaint also indicates that the conductor did not believe the plaintiff was fraudulently evading his fare, for there was no charge of fraudulently evading, as required by the statute (Pub. Stat. chap 112, § 197), but simply that he "unlawfully refused to pay," etc. The language of the statute is: "Whoever fraudulently evades, or attempts to evade, the payment of a toll or fare lawfully established," etc.

Plaintiff, as appears by the reported facts, did not "fraudulently evade, or attempt to evade," his fare, because he acted under a claim of right. No prudent and reasonable man could have believed him guilty, and an arrest, under such circumstances, conclusively implies malice. If the defendant complained of the plaintiff, with a view to his arrest, believing or having reason to believe him innocent of crime, defendant was guilty of express malice.

Bobson v. Kingsbury, 188 Mass. 538; *Krulevitz v. Eastern R. R. Co.* 140 Mass. 573, 2 New Eng. Rep. 87; *S. C.* 143 Mass. 228, 3 New Eng. Rep. 310.

An action of trespass or false imprisonment lies where a complainant participates in, or directs or instigates, the arrest.

Denman, *Ch. J.*, in *Carratt v. Morley*, 1 Ad. & E. N. S. 18, 29; *Krulevitz v. Eastern R. R. Co.* *supra*; *Barker v. Stetson*, 7 Gray, 53.

Malicious prosecution, or an action in the nature of malicious prosecution,—that is, a special action on the case, stating the scienter and other special facts,—will lie, notwithstanding the defect in the warrant.

Elaee v. Smith, 1 Dowl. & R. 97, 103, 105; *Barker v. Stetson*, 7 Gray, 53, 54; *West v. Smallwood*, 8 Mees. & W. 418; 2 Greenl. Ev. § 449; *Gibbs v. Ames*, 119 Mass. 60; *Frierson v. Hewitt*, 2 Hill (S.C.), 499; *Jones v. Gwynn*, 10 Mod. 214; *Wicks v. Fentham*, 4 T. R. 247; *Goslin v. Wilcock*, 2 Wils. 802, 307; *Grainger v. Hill*, 4 Bing. (N. C.) 212.

Suits for malicious prosecution, or in the nature thereof, have been maintained upon defective complaints and indictments in the following, among other cases:—

Gibbs v. Ames, 119 Mass. 60; *Frierson v. Hewitt*, 2 Hill (S. C.), 499; *Jones v. Gwynn*, 10 Mod. 214; *Pippet v. Hearn*, 5 Barn. & Ald. 634; *Wicks v. Fentham*, 4 T. R. 247; *Chambers v. Robinson*, 1 Strange, 691; *Dennis v. Ryan*, 63 Barb. 145; *Anderson v. Buchanan*, Wright (Ohio), 725; *Stancliff v. Palmeter*, 18 Ind. 821; *Collins v. Love*, 7 Blackf. (Ind.) 416; *Shaul v. Brown*, 28 Iowa, 37.

A *nolle prosequi* alone would not operate as an acquittal (*Bacon v. Towne*, 4 Cush. 217, 235; *Parker v. Farley*, 10 Cush. 279; *Brown v. Lakeman*, 12 Cush. 482; *Parker v. Huntington*, 7 Gray, 86; *Coupal v. Ward*, 106 Mass. 289); for without other circumstances it is not equivalent to one. With such circumstances, it is sufficient (*Graves v. Dawson*, 180 Mass. 78, 183 Mass. 419).

In fact, the dismissal, by a *nolle prosequi*, of a complaint upon which no legal conviction can be had for want of jurisdiction over the offense charged, is equivalent to, and a virtual acquittal. The proceeding did not even require to be quashed, for it came from a court of limited jurisdiction, and showed on its face that it was void.

Failure to enter is a sufficient termination in a civil suit.

Cardinal v. Smith, 109 Mass. 158.

A virtual acquittal is sufficient in a criminal suit.

Bohn v. Kingsbury, 188 Mass. 538.

A discharge, where a court has power neither to acquit nor convict, but simply to bind over, is sufficient.

Sayles v. Briggs, 4 Met. 421; *Stone v. Crocker*, 24 Pick. 81; *Moyle v. Drake*, 141 Mass. 288.

In *Grainger v. Hill*, 4 Bing. (N. C.) 212, Tindall, Ch. J., held that termination was not necessary; but if necessary, in the case at bar, the plaintiff has been virtually acquitted.

Mr. Samuel Hoar, for defendant:

It appears from the exceptions that the *nolle prosequi* was entered at the request of the plaintiff's attorney, after the plaintiff had been convicted upon a complaint before a trial justice, and had appealed to the superior court. It does not appear that he was discharged by order of court. The *nolle prosequi*, entered with the consent or at the request of the party prosecuted, after he had been convicted by a court of competent jurisdiction and had appealed, is not such a termination of complaint as is necessary to sustain an action for malicious criminal prosecution, especially when it does not appear that he was discharged by order of court.

Parker v. Farley, 10 Cush. 279; *Brown v. Lakeman*, 13 Cush. 482; *Cardinal v. Smith*, 109 Mass. 158; *Knott v. Sargent*, 125 Mass. 95; *Graves v. Dawson*, 180 Mass. 78, 188 Mass. 419.

The subject-matter of the complaint against the plaintiff comes under Pub. Stat. chap. 112, § 197, and was within the jurisdiction of the trial justice before whom he was convicted.

A conviction by a trial justice having jurisdiction of the subject-matter of the complaint is conclusive evidence of probable cause.

Whitney v. Peckham, 15 Mass. 243; *Parker v. Huntington*, 7 Gray, 86; *Cloon v. Gerry*, 18 Gray, 201; *Payson v. Caswell*, 22 Me. 212.

It appears by the exceptions that the plaintiff was arrested on a warrant issued on the complaint made by the defendant. It does not appear that the defendant had anything further to do with the arrest. When a person does no more than to prefer a complaint to a magistrate, he is not liable in trespass for the acts done under the warrant which the magistrate thereupon issues, however groundless the complaint may be.

Barker v. Stetson, 7 Gray, 53; *Coupal v. Ward*, 106 Mass. 289.

Morton, Ch. J., delivered the opinion of the court:

The first count of the plaintiff's declaration is, in substance, a count for malicious prosecution; and it cannot be maintained, because the evidence fails to show such a determination of the prosecution alleged to be malicious as will entitle the plaintiff to maintain this action. The entry of *nolle prosequi* by the district attorney, of his own motion, followed by a discharge of the accused party by the court, may be such a termination of the prosecution as will enable the party to maintain an action for malicious prosecution. *Graves v. Dawson*, 188 Mass. 419.

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But our cases uniformly hold that where a *nolle prosequi* is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot have an action for malicious prosecution. *Parker v. Farley*, 10 Cush. 279; *Coupal v. Ward*, 106 Mass. 289; *Graves v. Dawson*, 180 Mass. 78.

In the case at bar, after the complaint against the plaintiff was entered in the superior court upon his appeal, a *nolle prosequi* was entered by the district attorney, by the procurement of the attorney of the plaintiff. No discharge was ordered by the court. The superior court rightly ruled that the plaintiff could not maintain his count for malicious prosecution.

The second count is for assault and false imprisonment. One of the agents of the defendant made a complaint to a trial justice against the plaintiff for unlawfully refusing to pay his fare; and the magistrate thereupon issued his warrant in due form for the arrest of the plaintiff. Neither the defendant nor any of its agents did anything except to enter the complaint. It is well settled that where a person does no more than this, he is not liable in trespass for the acts done by the officer in serving the warrant, even though the magistrate has no jurisdiction to issue the warrant. *Barker v. Stetson*, 7 Gray, 53.

In the case before us, the magistrate had jurisdiction of the subject-matter and of the parties. Although the complaint was defective, the warrant was good on its face; and an arrest under it was an act done by virtue of legal authority, and does not constitute an assault. *Coupal v. Ward, ubi supra*.

Exceptions overruled.

Leonard MORSE

v.

William H. CHAMBERLAIN.

1. The statute which makes the deposit in the postoffice notice, to the party to a negotiable instrument, of nonpayment or nonacceptance, contemplates two modes of its delivery to him—at the postoffice where it is deposited, and by a letter carrier; and requires that it shall be sufficiently directed to his residence or place of business, for both modes.
2. The provision is intended to cover and be applied to all kinds of places, and all circumstances; to large cities, where houses on streets are numbered, and where there are postal carriers, and to small towns, where there is no postal delivery, except at the postoffice, where people resort to receive their letters.
3. In the case of a small town or village, a direction to the postoffice of such town is sufficient. Even if another person of the same name living in the same town, or the same street, or the same house, received it, it must be deemed notice to the party intended.

ON defendant's exceptions. *Overruled.*
Action against the indorser of a promissory note; tried in the superior court, before Thompson, J., without a jury.

The facts appear from the opinion.

Messrs. W. F. & W. S. Slocum, for defendant:

Previous to Stat. 1871, chap. 239, § 1, where the party to be notified of the dishonor of a promissory note lived in the same town, and received his letters from the same postoffice as the party bound to give the notice, a notice of dishonor deposited in the postoffice directed to the party to be notified was insufficient, unless it was shown that the notice was duly and seasonably received.

Shelburne Falls Nat. Bank v. Townsley, 107 Mass. 444, 447; *S. C.* 102 Mass. 177; *Cabot Bank v. Warner*, 10 Allen, 524.

In large towns and cities, where there is a letter-carrier who carries letters daily from the postoffice, and delivers them at the houses or places of business of the parties who are accustomed to receive their letters by him there, if the notice is left at the postoffice early enough in the day to go by such letter-carrier on the same day to the party entitled to notice, it will be deemed sufficient; for in such cases the letter-carrier is treated as an agent for the purpose, because it is the usual mode of conveyance.

Story, Prom. N. § 323.

In this condition of the law, Stat. 1871, chap. 239, § 1, was passed (the same as is codified in Pub. Stat. chap. 77, § 16). The former statute is referred to, as it was the law at the maturity of the note declared on. This statute is merely declaratory of the law as it was, and intended to make it more certain. It provides for the two classes of cases mentioned in the exceptions to the general rule, that due diligence required the party giving the notice, where the party to receive it resided in the same town, to give it personally, or by delivering it at the place of abode or of business of the party to be notified: (1.) where there are two postoffices in the same town between which there is a regular course of the mails, and the party to be notified resides or receives his letters at one, and the party to give the notice is at the other; (2.) where there is a letter-carrier, or penny-post, who carries the letters daily from the postoffice and delivers them at the houses or places of business of the parties to receive them. The statute provides for no other case.

1. The statute provides that the letter must be deposited in the postoffice, "sufficiently directed to the residence or place of business of the party for the usual course of mails within the limits of said city or town." This applies only to cases where there are two or more postoffices in the same town and a usual course of mails between them. This is declaratory of the law as mentioned in *Shaylor v. Mix*, 4 Allen, 351, 352.

2. That the letter must be deposited in the postoffice "sufficiently directed to the residence or place of business of the party * * * for the usual course of delivery by postal carriers." This is declaratory of the law as stated in Story on Promissory Notes, § 323, and ap-

plies to cases where there are postal carriers, and no other.

3. The law merchant requires the party giving the notice to give it, where the party to be notified resides in the same town, at farthest, on the day following the dishonor of the note. Story, Prom. N. § 320.

This would be practically ensured in a place where there was a usual course of delivery by letter-carriers. But otherwise,—and especially in case where the party to be notified had not much mail or seldom visited the postoffice,—days might elapse before he received his notice, if he received it at all.

4. If the statute was intended to cover all cases where the party to be notified resided in the town, or received his mail at the postoffice in the place where the dishonor of the paper occurred, so much of the two last lines of the statute as follow the word "party" are unnecessary, and the presumption is that they would not have been used, especially in the careful revision of the Public Statutes where all unnecessary and redundant words are omitted.

5. Statutes are not to be construed as altering the common law, or making any innovation therein, further than their words import.

Shaw v. R. R. Co 101 U. S. 557 (Bk. 25, L. ed. 892); *Melody v. Reab*, 4 Mass. 473, Parsons, Ch. J.; 1 Kent, Com. 12th ed. 464.

Statutes in derogation of the common law are to be construed strictly.

Brown v. Barry, 3 Dall. 365 (3 U. S. bk. 1, L. ed. 638).

6. In this case the notice was not directed as required by the statute. The statute requires that the notice shall be "sufficiently directed to the residence or place of business of the party." As the statute is applied to notices given to a party in the same town or village with the party giving them, the term "to the residence or place of business" must mean something more than the name of the town or postoffice, where the streets are named, or named and numbered. Where the street upon which the party resides has a name, as in this case, it is necessary to direct it to his residence, giving the name of the street. In this case the defendant's residence was upon a street having a name; the streets in the village were named; but the notice was not directed to his residence as required by the terms of the statute.

7. This being so, the plaintiff cannot recover unless he shows that the defendant actually and seasonably received the notice.

Story, Prom. N. 11th ed. § 322; *Shelburne Falls Nat. Bank v. Townsley*, 107 Mass. 447; *Cabot Bank v. Warner*, 10 Allen, 524.

Mr. P. H. Cooney, for plaintiff:

Before Stat. 1871, chap. 239, it is conceded that the notice in the case at bar would be insufficient to charge the defendant, without proof that he actually received it.

Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177; *S. C.* 107 Mass. 444.

But that statute, passed after the decisions in that case were made, was designed to change the rule established by those decisions, and to authorize the giving of such notice by depositing it in the postoffice in said city or town, with the postage thereon prepaid, and sufficiently directed to the residence or place of business

of the party for the usual course of mails within the limits of said city or town, and for the usual course of delivery by postal carriers therein.

Pub. Stat. chap. 77, § 16.

Prior to the passage of that statute, a notice sent by mail to another postoffice in the same town had been held to be sufficient.

Shaylor v. Miz, 4 Allen, 351.

The notice was sufficiently directed.

True v. Collins, 8 Allen, 488.

The mode adopted of giving the notice being that pointed out by the law and conformable to it, it is of no consequence whether it actually reached the party or not; nor is it of any consequence, under the facts in this case, that there was another person of the same name in the same town. It does not appear that either the plaintiff or the notary knew that said other person resided in said town, and as said other person did not receive said notice, his residence therein made no difference in its transmission. Furthermore, if the defendant had desired anything more than the usual directions added in address of the notice, he should have so specified, either in the indorsement or the date of the note. The note was dated generally at Natick, and the indorsement was in blank. The notice sent with the same direction was therefore sufficient to charge him.

Barlett v. Robinson, 89 N. Y. 187.

W. Allen, J., delivered the opinion of the court:

By Stat. 1874, chap. 404 (Pub. Stat. chap. 77, § 16), the defendant was entitled to notice the same as an indorser. Stat. 1871, chap. 239 (Pub. Stat. chap. 77, § 16), provided that whenever a party to a negotiable instrument is entitled to notice of nonpayment or nonacceptance, and the instrument is payable in any city or town where such party has his residence or place of business, "such notice may be given by depositing the same, with the postage thereon prepaid, in any postoffice in said city or town, sufficiently directed to the residence or place of business of the party for the usual course of mails within the limits of said city or town, and for the usual course of delivery by postal carriers."

The notice in this case was duly deposited in the postoffice of Natick, directed to "Mr. William H. Chamberlain, Natick, Mass." The only question is whether it was sufficiently directed.

The statute makes the deposit in the postoffice a notice to the party; but it contemplates two modes of its delivery to him,—at the postoffice where it is deposited, and by a letter-carrier; and requires that it shall be sufficiently directed to his residence or place of business for both modes. The provision is general, and is intended to cover and to be applied to all kinds of places and all sorts of circumstances; to the large city, where the streets are numbered, and there are postal carriers, and where some persons receive their letters exclusively at the postoffice, and others exclusively by carriers at their residences or places of business; and to small towns where street numbers and letter-carriers are unknown, and where everybody goes to the postoffice.

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In the case at bar, the defendant lived in a village in Natick, in which the postoffice was located, and he lived on a street; but there is no evidence that the houses on it were numbered, and there was no postal delivery. He received his letters at the Natick postoffice, and he had no other residence known to the postoffice than Natick; and an address to him there was, in effect, an address to him at the Natick postoffice. It insured that the letter would be ready there for delivery to him, and to that end any description of the house he lived in would be superfluous. There could be no more sufficient direction to his residence to insure the delivery of the notice. Was it insufficient in not providing against its delivery to another person of the same name? We think clearly not. The place was not so populous, and the name of the defendant so common, as to call for any further identification of him by describing his personal appearance, or his occupation, or the house in which he lived. *True v. Collins*, 8 Allen, 488.

The facts that the defendant did not receive the notice, and that another person of the same name lived in the town, who did not receive it, are immaterial. If the direction was sufficient, the defendant is affected by the notice; and it would make no difference if another person of the same name, who lived in the same town, or the same street, or the same house, received it. If the defendant had desired a more particular direction than his residence and postoffice address, he should have added it to his name when he signed the note.

Exceptions overruled.

Simon SIMMONS

v.

Joseph WOODS.

1. It is only under the provisions of Pub. Stat. chap. 161, §§ 74, 79, *et seq.*, that **mortgaged personal property** can be **attached or taken on execution** as the property of the mortgagor.
2. **Where the trustee, who was summoned because his name appeared as mortgagee in the record of what purported to be a mortgage, answered that he had been informed that the debtor executed a mortgage to him, but that he never saw the mortgage, and it was never delivered to him, and he never paid any consideration for it, there was no occasion for any further examination or for any order of the court. Nothing remained but to discharge the trustee; but such discharge did not dissolve the attachment so that it cannot be set up against the debtor and purchaser from him. It is not necessary that there should be any finding of facts by the court, or any recital of facts in the order of discharge. When the record shows that the trustee has no interest in the matter, his discharge, in whatever form effected, will be presumed to be for that reason. The only order contemplated by the statute is**

the order for a sum found due to the trustee as mortgagee; and the attachment is valid until vacated by neglect to comply with such an order.

(Suffolk—Filed May 7, 1887.)

ON plaintiff's exceptions. *Sustained.*

Action of tort, brought by plaintiff, a constable of the city of Boston, against the defendant, to recover for the conversion of certain personal property.

At the trial in the superior court before Baker, J., without a jury, it appeared that the plaintiff, as such constable, attached the goods upon writs issuing out of the Municipal Court of the City of Boston, wherein the Tahanto Manufacturing Company, a corporation, was plaintiff, and William O'Neill was defendant, and John W. Cobb was trustee. At the time of said attachment on each of said writs there stood of record an undischarged mortgage in the office of the city clerk of the city of Boston; said mortgage purporting to cover said property, and to have been executed and delivered by said O'Neill to said Cobb; and the plaintiff in those writs, knowing these facts, summoned said Cobb, the mortgagee, as trustee therein.

Said actions were duly entered in said court, and said Cobb, trustee, appeared and filed answers thereto, in which he denied that he had, at the time of the service of the writ, any goods or effects of the defendant in his possession. "And said Cobb, further answering, says that he is informed that he, the said O'Neill, executed a mortgage upon certain personal property to him, which mortgage he, said Cobb, never saw, and that the same was never delivered to him, and he never paid any consideration for said mortgage."

The plaintiff, at the time of bringing those writs, had no reason to believe and did not believe that said Cobb had any other property in his hands belonging to said O'Neill, or had any interest in any other property of said O'Neill, beyond the mortgage herein mentioned, and he was made trustee in said writs because he was named as mortgagee in said mortgage.

The plaintiff, after filing of said answers by said trustee, and without further proceedings thereon, voluntarily discharged said trustee in both actions, and no other proceedings having relation to said mortgage or to said trustee were ever had thereon.

The defendant purchased the goods mentioned in said declaration and took possession of the same. Executions against O'Neill, the defendant in those actions, were duly issued, and demand for the goods was made upon this defendant by this officer, for the purpose of levying the executions thereon; but the defendant refused to surrender the goods to the officer for that purpose, and thereupon he brought this action.

At the trial the defendant asked the court to rule:

1. That the plaintiff's right to recover depended upon the existence and validity of the attachment at the time of said demand, and at the time of the bringing of this action.

2. That the discharge of said Cobb as trustee, under the circumstances, operated as a dis-

charge of the attachment, if any existed, and that the plaintiff could not recover.

3. That, upon the facts proven and admitted, no valid attachment existed at the time of the demand, or at the time of the bringing of this action, and that, the plaintiff's right to recover depending upon the validity of such attachments and their existence at those times, he had not such an interest in this property as would entitle him to recover in this action.

But the court ruled that the discharge of the trustee, under the circumstances, discharged the attachments, and that the officer's right to possession as bailee resting upon such attachment was vacated thereby, and that, no valid attachment existing upon said writ at the time of the demand and at the time of the bringing of this action, the plaintiff could not recover; and found for the defendant. To such rulings the plaintiff excepted.

Mr. Charles Steere, for plaintiff:

The trustee's answer must be accepted and taken as true.

Croswan v. Croswan, 21 Pick. 21.

The answer shows that no mortgage ever existed:

1. Because there was no consideration paid for the mortgage; the mortgage was never delivered or accepted,—in fact, said John W. Cobb never saw the mortgage.

2. Recording a paper does not operate as delivery or as acceptance.

Jones, Chat. Mort. § 106; Dole v. Bodman, 8 Met. 139.

Delivery by the mortgagor and acceptance by the mortgagee are necessary to constitute a mortgage.

Jones, Chat. Mort. §§ 104, 106, 108, 118, ¶ 2.

3. Nor is this case controlled by *Allen v. Wright*, 186 Mass. 193, because in that case, and the case of *Allen v. Wright*, 184 Mass. 347, there was a valid mortgage; the defendant admitted it to be valid in the trials of the first three cases, which are reported in 184 Mass. 347, because he did not contest its validity, and, throughout both trials, both plaintiff and defendant treated the property as mortgaged property.

In this case we do not think that the discharge of the trustee dissolved the attachment. The object of the statute is to make the attachment effectual.

Cochrane v. Rich, 142 Mass. 16, 2 New Eng. Rep. 367.

The defendant, O'Neill, had attempted by fraud to part with his title to the property, but had not succeeded. Therefore only the attachment took effect.

The case of *Martin v. Bayley*, 1 Allen, 881, is the leading case of all the decisions on this statute; but in that case, as in every case which has been decided by this court, there has been always (1) a valid mortgage; (2) in almost every case the action has been brought by the mortgagee for his own benefit.

Messrs. D. D. Corcoran and Joseph Bennett, for defendant:

The only course open to the parties, if they desired to hold their attachment, was an adjudication by the court as to the validity or invalidity of the mortgage.

The voluntary discharge of the trustee operated as a discharge of the attachment.

Martin v. Bayley, 1 Allen, 381; *Jackson v. Colcord*, 114 Mass. 60; *Porter v. Warren*, 119 Mass. 535; *Allen v. Wright*, 134 Mass. 347; *S. C.* 136 Mass. 183; *Goulding v. Hair*, 133 Mass. 78.

An attachment of personal property made in this way is valid only, and continues so long only, as proceedings are had in accordance with the provisions of Pub. Stat. chap. 161, §§ 79-83.

Flanagan v. Cutler, 121 Mass. 96; *Brown v. Neale*, 3 Allen, 74.

The discharge of the attachment determined the bailment of the officer.

W. Allen, J., delivered the opinion of the court:

Pub. Stat. chap. 161, § 74, provides that personal property of a debtor that is subject to a mortgage, and of which the debtor has the right of redemption, may be attached and held as if it was unincumbered, if the attaching creditor pays to the mortgagee the amount of the debt for which it is liable, within ten days after the same is demanded. Section 79 provides that personal property of a debtor subject to a mortgage, and being in the possession of the mortgagor, may be attached in the same manner as if unincumbered; and the mortgagee summoned, as the trustee of the mortgagor, to answer such questions as may be put, touching the consideration of the mortgage and the amount due thereon. There are further provisions for the trial, between the plaintiff and the mortgagee, of questions concerning the validity of the mortgage and the amount due upon it, and declaring the attachment void unless the amount found due be paid. It is only under these provisions that mortgaged personal property can be attached or taken on execution as the property of the mortgagor.

In this case the writ and service was such that the attachment of the property in question was valid under § 79, until avoided by nonpayment, if the property was mortgaged to Cobb, who was summoned as trustee; and it was equally valid if there was no mortgage, as an attachment of unincumbered property. Pub. Stat. chap. 183, § 6; *Belknap v. Gibbons*, 13 Met. 471.

The case differs from *Allen v. Wright*, 134 Mass. 347; *S. C.* 136 Mass. 194. In that case there was no jurisdiction of the trustee, and there was not, and could not have been, such service of the writ as to make a valid attachment.

The only question is, whether the attachment was dissolved by the discharge of the trustee, so that it cannot be set up against the debtor and purchaser from him. If Cobb were not mortgagee, his discharge as trustee clearly could not affect the attachment. The only effect of inserting his name in the writ as trustee would be to require service on him and on the defendant by copy of the original writ instead of by a separate summons. In the second of these suits, Cobb, who was summoned because his name appeared as mortgagee in the record of what purported to be a mortgage, answered that he had been informed that the debtor executed a mortgage to him, but that he never saw the mortgage, and it never was

delivered to him, and he never paid any consideration for it. There was no occasion for any further examination, or for any order of the court. Nothing remained but to discharge the trustee. By the statute, the attachment was valid until the attaching creditor failed to pay a sum found due on the mortgage, and ordered by the court to be paid. There is no provision for any order where nothing is found due; and when the trustee answers that he is not mortgagee, or that there is nothing due to him, and has answered all questions which the plaintiff desires to put to him, the court can make no order for the payment of money to him, and he is entitled to be discharged. If the trustee is in fact the mortgagee, and if he claims that there is anything due on the mortgage, he has a right to have the questions whether anything, and how much, is due, determined, and an order made for the payment of what is due; because the attachment is valid against him until such an order is made; and therefore, if he is discharged before that question is determined, the attachment is dissolved; and this, whether he has discharged the mortgage and stated the amount due upon it in his answers, as in *Martin v. Bayley*, 1 Allen, 381, and *Hayward v. George*, 13 Allen, 66; or has made original answer denying effects in his hands, which is in effect appearing for examination, as in *Goulding v. Hair*, 133 Mass. 78.

Whether, when a trustee failed to appear (see *Flanagan v. Cutler*, 121 Mass. 96), or appeared and submitted to examination by filing a general answer denying assets, and was discharged, the creditor, to sustain the attachment against the debtor, might show that in fact the mortgage was fraudulent and void as to creditors, or had been fully paid, we need not consider. It is enough that when the answer of the trustee disclaims all right as mortgagee, and shows that there is no mortgage and no debt, and the trustee is thereupon discharged, such discharge cannot avoid or dissolve an attachment otherwise valid. When the answer or examination of the trustee shows that he has no interest in the property as mortgagee or otherwise, the whole purpose for which he was summoned is accomplished, and there is no propriety in his remaining longer a party to the suit. It is not necessary that there should be any finding of facts by the court, or any recital of facts in the order of discharge.

When the record shows that the trustee has no interest in the matter, his discharge, in whatever form effected, will be presumed to be for that reason. The only order of the court contemplated by the statutes is the order for the payment of a sum found due to the trustee as mortgagee; and the attachment is valid until vacated by neglect to comply with such an order. When the answer or examination of the trustee shows that such an order cannot be made, and that the attachment cannot be avoided under the statute, and that the trustee is entitled to be discharged, it cannot be that the attachment will be dissolved by the discharge of the trustee, or the discontinuance of the proceedings against him.

Exceptions sustained.

Albert H. EMERY

v.

Fred. H. SEAVEY.

Where, upon a finding in favor of the plaintiff, judgment was postponed to await the disposition of another action, and after such disposition the defendant indorsed upon the plaintiff's motion for judgment the words, "It is agreed that the motion may be filed and allowed," such indorsement will not render the judgment thereafter rendered a **judgment by consent**, from which the defendant cannot appeal.

(Suffolk—Filed May 7, 1887.)

ON defendant's exceptions. *Sustained.*

Action of tort to recover the value of certain personal property attached and sold by defendant as a deputy sheriff, brought in the municipal court, tried upon the merits; finding for plaintiff, and damages assessed; and cause ordered to be continued to await disposition of another suit. Judgment was subsequently entered. Defendant's appeal to the superior court was dismissed on motion of plaintiff, and defendant alleged exceptions.

The facts are further stated in the opinion.

Mr. H. J. Edwards, for defendant:

The allowance of the motion to dismiss, filed in this case, deprived defendant of his statute rights under Pub. Stat. chap. 154, § 39, and subsequent sections.

Powell v. Turner, 139 Mass. 97.

The agreement to the allowance of the motion for the entry of judgment in this case is not an agreement for judgment, and should not be so construed, but is simply an agreement for the entry of a judgment already found by the court appealed from after a trial, and was made simply for the purpose of enabling the clerk to complete his records; and to which the plaintiff was entitled without any consent of this defendant, and to which this defendant could not object.

Messrs. Moulton, Loring, & Loring, for plaintiff:

This was an action of tort to recover for personal property illegally attached and sold by defendant, as the plaintiff claimed. When the plaintiff, after the trial, moved for judgment, the defendant agreed in writing to judgment.

I. Whether the court would entertain a motion to dismiss at this stage of the case was a matter of discretion simply; and this court will not interfere with that discretion, provided this was a motion within the 16th rule of the superior court.

It does not appear that this court did not entertain this motion to dismiss for good cause shown, and therefore there was no violation even of said rule of the court.

II. As we understand the law, the plaintiff had a right to move to dismiss this case at any stage of it, on the ground that the superior court had no jurisdiction because the defendant had no right of appeal to it, as appeared from the papers in the case.

Cheahire v. Adams & C. Reservoir Co. 119

Mass. 356; *Custy v. Lowell*, 117 Mass. 78; *Riley v. Lowell*, Id. 76; *Ashuelot Bank v. Pearson*, 14 Gray, 521; *Gray v. Thrasher*, 104 Mass. 375.

III. Pub. Stat. chap. 154, provides that any person aggrieved by the judgment of the Municipal Court of the City of Boston may appeal to the superior court. Therefore the whole right to appeal depends on whether he is aggrieved or not.

IV. It cannot be said that the defendant was or could be aggrieved after he had consented to judgment against himself.

Powell v. Turner, 139 Mass. 97.

W. Allen, J., delivered the opinion of the court:

After a trial in the municipal court on the merits in an action of tort, and a finding for the plaintiff in damages, the case was continued for judgment to await the disposition of another action. After the disposition of that action, the plaintiff filed the following motion: "And now comes the plaintiff, and moves to have judgment entered in the above-entitled action;" on which motion was indorsed the words, "It is agreed that this motion may be filed and allowed," signed by the defendant's attorney. Judgment was entered, and the defendant appealed to the superior court. In that court the plaintiff moved that the appeal be dismissed on the ground that the judgment appealed from was rendered by consent of the defendant. The court dismissed the appeal, and the defendant excepted. See *Powell v. Turner*, 139 Mass. 97; *Doole v. Doole*, 8 New Eng. Rep. 889.

The judgment of the municipal court was not a judgment by the consent of the defendant, such as to show that he was not aggrieved by it and could not appeal from it. It was not founded upon his consent, but upon the adverse finding of the court. The case was contested by him through the trial and the finding of the court, and was ripe for judgment, and the plaintiff was entitled, on motion, to have the judgment entered without the consent of the defendant. The plaintiff did not ask that a judgment founded on his motion should be rendered; but his motion was, in effect, that, in accordance with the order of the court, judgment on the finding should now be entered. His motion did not relate to the substance of the judgment, but only to the time of its entry; and the defendant's agreement that the motion might be allowed only recognized and submitted to the unquestionable right of the plaintiff that the entry should be then made. If the defendant had appeared to the motion, and stated in open court that it was true that the other suit was disposed of, and that he had no objection to make to the allowance of the motion, he would as much have consented to the judgment as he did by agreeing that the motion might be filed and allowed. Objections to the motion would have been frivolous, and consent to it was immaterial. The defendant was aggrieved by the judgment; and his appeal is from that, and not from the allowance of the motion; and no question relating to the time of the entry of the judgment is brought up by the appeal.

Exceptions sustained.

Thomas J. JOHNSON

v.

Daniel W. RUSSELL.

1. Where an answer offered in evidence carries with it the presumption that it was made under the instruction of the defendant, the testimony of the defendant that he had never seen the answer and did not know its contents, without denying that he had given instructions for it, will not overcome the presumption which authorizes its introduction in evidence.
2. Where evidence was offered for a purpose for which it was competent, and was excluded for reasons that applied equally to an offer for another purpose, the plaintiff is not bound, when he reaches the other part of his case, to again tender the evidence which was rejected.
3. Evidence offered to prove an agreement between the attorneys in a former suit, to affect the defendant in the pending suit, is properly rejected, where it is not sufficiently definite and certain to show any admission by the defendant's attorney.
4. Where a judgment offered in evidence was *res inter alios*, it was properly excluded.

(Suffolk—Filed May 7, 1887.)

ON plaintiff's exceptions. *Sustained.*

Action of contract upon an order drawn upon defendant by one John Campbell in favor of the plaintiff, of which the following is a copy:—

"\$600. Boston, March 13, 1883.

"Mr. D. W. Russell:

"Dear Sir,—Please pay to the order of Thomas J. Johnson six hundred dollars, and charge the same to my last payment.

John Campbell.

"Dear Sir:—This order is for amount due on work done and furnished for your house.

E. A. P. Newcomb."

At the trial in the superior court, before Mason, J., without a jury, it appeared that, when this order was drawn, Campbell was building a house for defendant, and Campbell was indebted to plaintiff for materials used in the construction of said house. Subsequently to the drawing of the order, Campbell brought suit against Russell, claiming a balance due him on account of said building. His answer filed in that suit, with other defenses, set up the order above described, with others drawn by said Campbell, alleging that he had "promised to pay them out of any funds of the plaintiff in his hands," and claimed that "the amount of said orders should be deducted from plaintiff's claim." Russell testified that he had never seen the answer and did not know its contents.

At the trial herein, the plaintiff offered in evidence the answer of said Russell, above mentioned, for the purpose of showing a conditional acceptance of said order. This evidence was excluded by the court, and the plaintiff excepted.

Plaintiff also offered to show an agreement

made in open court at the trial of said suit of *Campbell v. Russell*, by the respective attorneys of said Campbell and said Russell, that the amount of the Johnson order, with others, should be deducted from any verdict recovered in favor of said Campbell, and judgment entered for the remainder; but it did not appear that Russell knew anything about said agreement, this action not having been brought at that time. This was excluded by the court, and the plaintiff excepted.

Plaintiff also offered in evidence the judgment in said suit of *Campbell v. Russell*, for the purpose of showing that the verdict therein against said Russell was sufficient in amount to cover this and the other orders before mentioned; that execution issued for an amount more than enough to cover the Johnson order, and was returned satisfied in full. No other evidence except the foregoing was offered by either party as to whether or not anything was due from defendant to Campbell. This was excluded by the court, and plaintiff excepted.

The court found for the defendant, and found specially "that there was nothing due from the defendant to Campbell;" and plaintiff alleged exceptions.

Messrs. John Herbert and George B. Upham, for plaintiff:

Defendant's answer in the Campbell suit was competent evidence against him in this suit; and it makes no difference whether he had seen the answer or knew its contents.

Gordon v. Parmelee, 2 Allen, 212; *Currier v. Silloway*, 1 Allen, 19; *Bliss v. Nichols*, 12 Allen, 44.

The cases of *Walcott v. Kimball*, 18 Allen, 461, and *Phillips v. Smith*, 110 Mass. 61, can be distinguished from these cases, for there the point decided was that the declaration and answer were not evidence against the parties filing them, in the cases in which they were filed.

A parol acceptance is good.

Pierce v. Kittredge, 115 Mass. 874.

If it had been mutually agreed between Russell and Campbell, in person, that in case Campbell should obtain a verdict sufficient in amount, Russell should pay Johnson the order which Campbell had drawn on Russell, the amount of such order to be deducted from the verdict, and judgment entered for the remainder, such an agreement would have been based on a good consideration, viz.: the release of Russell by Campbell to the amount of such order, and the assumption by Russell of Campbell's liability to Johnson; and such promise would have been admissible in evidence in a suit brought by Johnson against Russell, and would render a verdict and judgment in Campbell's favor, in the suit of *Campbell v. Russell*, admissible against Russell in Johnson's suit against him.

Felton v. Dickinson, 10 Mass. 287; *Arnold v. Lyman*, 17 Mass. 400; *Carnegie v. Morrison*, 2 Met. 881; *Fitch v. Chandler*, 4 Cush. 254; *Perry v. Swasey*, 12 Cush. 86.

The agreement of counsel to the same effect, made at the trial, in the conduct of a suit between their clients, with reference to the subject-matter thereof and the issues therein raised, was clearly binding upon the parties. It was the agreement of defendant's "agent while em-

ployed and acting within the scope of his agency."

Gordon v. Parmelee, 2 Allen, 215.

This agreement was effective to prevent litigation and to fix the rights of the parties.

Johnson might have sued Campbell and summoned Russell as his trustee, and he had the right, under the statute, to come in and have the Campbell-Russell suit continued, so that the Campbell judgment should not include any amount for which Russell might be adjudged a trustee in this trustee suit. Pub. Stat. chap. 188, §§ 40-42.

The bill of exceptions shows that the defendant offered no evidence upon the question whether anything was due from him to Campbell; and the finding of the court for defendant upon the ground "that there was nothing due from the defendant to Campbell" clearly bases such finding upon a want of evidence on that point by the plaintiff.

Messrs. Charles T. Gallagher and Jesse F. Wheeler, for defendant:

I. It does not appear that the exceptions set forth all the evidence (*Commonwealth v. Bacon*, 185 Mass. 525); nor is there enough shown to show that excepting party was prejudiced (*Sherley v. McCormick*, 185 Mass. 127). The court having specially found "that there was nothing due from defendant to Campbell," the finding of the court is final.

Turner v. Wentworth, 119 Mass. 459.

II. The answer in *Campbell v. Russell* was not evidence. Pleadings are not admissions.

Buckmaster v. Meiklejohn, 8 Exch. 684-687; *Boileau v. Rutlin*, 2 Exch. 665; *Dennis v. Williams*, 185 Mass. 80.

Even if admissible, it could have no greater effect than a declaration or admission of defendant; and it must be shown that the admissions were inserted in pleadings with his knowledge and sanction, or by his direction. In this case defendant had never seen the answer, and did not know its contents.

Suits in equity, where the party sought to be charged with the admission has himself sworn to answer, may be considered a solemn admission on his part.

So, too, where one has made an affidavit on a writ. These are exceptions to the general rule.

Dennis v. Williams, 185 Mass. 80.

The parties to the former suit were different from those in this, and as this plaintiff could not be prejudiced by that suit, he ought not to receive any advantage by using against the defendant, his adversary, such part of the proceedings as made against this defendant, when this defendant could not use the proceedings against this plaintiff, because this plaintiff was not concerned in the former suit.

Hudson v. Robinson, 4 Maule & Sel. 475; *Wenman v. Mackenzie*, 5 El. & Bl. 458.

A judgment can be offered as evidence only when it is of such a nature that parties would be concluded by it, so it could be pleaded as *res judicata*; and such judgment can have an effect only on parties or their privies.

Mercereau v. Pearsall, 19 N. Y. 108; *Dennis v. Williams*, 185 Mass. 80.

The question here was, at most, a collateral matter in the suit of *Campbell v. Russell*. And so the judgment in that suit would not have

been evidence even between the parties to that suit upon this question.

W. Allen, J., delivered the opinion of the court:

Having proved the order, it lay upon the plaintiff to prove the acceptance of it by the defendant, and that there was something due from him to Campbell. For the purpose of proving the acceptance, he offered in evidence the answer of the defendant in a former suit brought against him by Campbell, to recover the payment, in which the order was set up, and which alleged that the defendant had promised to pay it out of any funds in his hands, and claimed that the amount of it should be deducted from Campbell's claim. This was rejected by the court, solely for the reason, as was assumed at the argument, that it was a statement made in the course of pleading. The rule that the pleadings in a cause are not evidence on the trial, but allegations only, is limited to the suit in which they are pleaded; outside of that, admissions and declarations of a party in his pleadings are competent against him; but they must appear to be the act of the party, and not merely of his attorney. When it is his personal act,—as, in an answer in chancery sworn to by him,—it is competent. When it is a pleading by attorney, of formal allegations which may be presumed to have been made without special instructions from his client, it is not competent. But particular and specific allegations of matters of action or defense which cannot be presumed to have been made under the general authority of the attorney, but are obviously from specific instructions of the party, are competent. *Dennis v. Williams*, 185 Mass. 80, and cases there cited. The answer offered in evidence carries with it the presumption that it was made under the instructions of the defendant; and the testimony of the defendant, that he had never seen the answer and did not know its contents, without denying that he had given instructions for it, does not overcome the presumption, especially in view of the fact that the cause proceeded to trial and verdict under the answer. We think that the evidence should have been admitted.

It is contended for the defendant that the evidence was immaterial, because the finding of the court that there was nothing due from the defendant to Campbell made acceptance of the order immaterial. After the rejection of the evidence, in the course of the trial the plaintiff offered other evidence, which was incompetent and was properly excluded, for the purpose of proving that there was enough due from the defendant to Campbell to meet the order. There was no other evidence offered by either party upon the question whether anything was due from the defendant to Campbell; and there was no evidence before the court that anything was due. Hence the special finding. Upon this question the evidence of the answer of the defendant in the former suit was competent, and, if it had been considered by the court, might have led to a different finding; and it would have been before the court but for the erroneous ruling excluding it. If it should be argued that the finding rendered the evidence immaterial for the purpose for

which it was offered, the answer is that it was material for that purpose, and competent as evidence in the case, until the finding was made, and the defendant had the right to have it before the court until then, and to have it considered by the court on the question of the finding. The fact that the evidence was not offered for that particular purpose is not material. It was offered for a purpose for which it was competent, and was excluded for reasons that applied equally to an offer for the other purpose. It was offered to prove an acceptance of the order when the plaintiff was proving that part of his case; and the ruling excluding it was in effect a ruling that it was not competent for either purpose. When the plaintiff reached the other part of his case, and attempted to prove that there was something due from the defendant to Campbell, a renewed offer of the rejected evidence, for the purpose of proving that fact, would have only been asking for a reversal of the former ruling, and at least was unnecessary.

The offer to prove an agreement between the attorney in the former suit seems to have been properly excluded. It is not sufficiently definite and certain, to show any admission by the defendant's attorney. It appears to have been an agreement by the plaintiff's attorney to deduct from any verdict in his favor the amount of the orders, and to take judgment only for the balance. It does not appear that the defendant's attorney did anything more than to receive the voluntary promise of the plaintiff's attorney. It is not sufficient to prove any admission by defendant's attorney; much less any by which the defendant himself should be affected. The judgment offered was *res inter alios*, and was properly excluded.

Exceptions sustained.

GEORGE WOODS COMPANY *et al.*

v.

William N. STORER.

1. A bill is demurrable which asks that the defendant be enjoined from further prosecuting his suit after he has obtained a verdict against a corporation where the suit was brought in attachment, which was dissolved by the plaintiffs giving a bond under the statute,—the ground upon which the relief is claimed being that the corporation is insolvent, and has no estate which can be taken on execution; that the defendant is the treasurer of the corporation, and, by reason of having made a false certificate that the capital stock of the corporation had all been paid in, is liable for the debts of the corporation, under the provisions of Pub. Stat. chap. 100, and it would be inequitable that he should require the plaintiffs to pay a judgment, the payment of which instantly created a liability upon him, under the statute, to refund to them the sum paid. The fact that plaintiffs have a defense to a suit upon the bond, or can establish a set-off in such a suit, gives them no right to prevent

the defendant from obtaining a judgment against the corporation in the action in which the bond was given. Their liability upon the bond is but one incident of a judgment in it; and the defendant cannot be deprived of his right to a judgment against the corporation because it may be inequitable for him to enforce the liability upon the bond.

2. Nor would the facts stated in the bill entitle the plaintiffs to a contingent injunction, to prevent the defendant, who has no right of action against the plaintiffs, from commencing an action against them, if he should acquire the right. As the liability of the defendant to pay the debts of the corporation is of such a nature that it could not be alleged as a defense, either legal or equitable, in a suit upon the bond, it cannot, under Stat. 1863, chap. 223, § 14, afford grounds for an injunction against such a suit.

3. Pub. Stat. chap. 106, § 63, restricts the liability of an officer of the corporation, which is declared by § 60, for its debts or contracts, to a case where the corporation has neglected to pay or disclose property for thirty days after judgment and demand made on execution. Section 64 modifies the liability so that it becomes, not a debt to each creditor, but a general liability to all creditors of the class. The statute does not give the plaintiffs rights which they can in any method enforce, except for the equal benefit of other creditors who seek to enforce their rights. The official act of the defendant in signing the certificate was fraudulent toward the public, and the plaintiffs can claim no rights over other creditors in consequence of it.

(Suffolk—Filed May 7, 1887.)

APPEAL by plaintiffs from a decree of the Superior Court for Suffolk County sustaining a demurrer to a bill to enjoin the further prosecution of a suit at law. *Demurrer sustained. Bill dismissed.*

The facts are stated in the opinion.

Mr. Thomas Weston, Jr., for complainants:

The bill sets forth such a fraudulent act on the part of the defendant that a court of equity will interfere to prevent the said Storer from taking advantage of his fraud, and will relieve the sureties on the bond from paying a debt to him, which, by the terms of the statute, on account of his fraud, he would be bound to pay.

Habitzel v. Latham, 35 Iowa, 550.

The complainants are entitled to the relief prayed for. It is within the jurisdiction of this court to enforce a set-off of such counterclaims and liabilities as are alleged in this bill. The bill "shows such peculiar equities, which entitle the complainant's sureties to be protected against the defendant's claim."

2 Story, Eq. Jurisp. 18th ed. § 1457; *Spaulding v. Backus*, 122 Mass. 534; *Walker v.*

Brooks, 125 Mass. 247; *Blake v. Langdon*, 19 Vt. 485; *Habitzel v. Latham*, 85 Iowa, 550; *Wood v. Steele*, 68 Ala. 436.

If it should be urged that the subject-matter of the bill should have been set up in defense to the action at law of *W. N. Storer v. George Woods Company* in the superior court, under the Acts of 1883, chap. 223, § 14, we reply that:

1. The complainant corporation was not obliged to set up this defense in answer to the suit at law against it. A defendant may, if he so elects, bring a separate bill in equity therefor. Section 14 is not obligatory on a defendant.

2. The complainants' sureties were not parties to that suit, and could not have set up this defense in answer.

3. The liability and the remedy provided in Pub. Stat. chap. 106, are, for the purposes of any remedy, to be taken together; and having expressly provided that the remedy shall be by bill in equity, brought in the manner provided in §§ 62, 64, such a defense cannot be set up in answer to a suit at law, under § 14.

4. This defense could not be set up in an action at law, as it involves bringing in additional parties plaintiff and additional parties defendant, and passing such orders and decrees as would be entirely inconsistent with proceeding in a suit at law in such a cause of action.

Pub. Stat. chap. 106, §§ 64, 65.

5. So far as the bill seeks to enforce a set-off of these counterclaims and liabilities, they could not have been set up as a defense, because Storer's liability is a statute liability, and is so closely connected with the remedy that the remedy and liability cannot be separated, and can only be enforced by a bill in equity.

Mr. Thomas J. Emery, for defendant:

I. No liability upon the officers of a corporation to pay its debts exists at common law.

Gray v. Coffin, 9 Cush. 199; *Pollard v. Bailey*, 20 Wall. 526 (87 U. S. bk. 22, L. ed. 876).

The liability does not rest on equity, but is strictly of statute imposition.

Priest v. Essex Mfg. Co. 115 Mass. 382.

Officers were first made liable by Acts of 1829, chap. 53, and the remedy was determined by the same Act that created the liability. This course has been followed in every change since, including said chap. 106.

Denny v. Richardson, 4 Gray, 277.

II. When a statute confers a right and prescribes a remedy, that remedy, and that only, can be pursued.

Knollton v. Ackley, 8 Cush. 97; *Priest v. Essex Mfg. Co. supra*; *Cambridge Water Works v. Somerville*, 4 Allen, 239; *Erickson v. NeSmith*, 4 Allen, 235; *Moore v. Reynolds*, 109 Mass. 473.

The method prescribed by said chap. 106 is as follows: Judgment against the corporation, demand made on execution, neglect for thirty days to pay amount due, return of execution unsatisfied, and then a bill in equity by a creditor.

Pub. Stat. chap. 106, §§ 62, 64.

This bill seeks to prevent final judgment, the very first step in the statute remedy.

III. The insolvency of the company, even though an adjudication had been made, which

is not alleged in this bill, would not prevent obtaining final judgment under the statute.

Bank of Barre v. Hingham, 127 Mass. 563, 566; *Chamberlin v. Huguenot Mfg. Co.* 118 Mass. 586.

As against the corporation, this defendant has the same rights and the same power to enforce them as a creditor who is not an officer.

Thayer v. Union Tool Co. 4 Gray, 79; *Pierce v. Partridge*, 3 Met. 48.

IV. The debts of a corporation for which an officer is liable are not his private debts; it is only a collateral and contingent liability.

Bangs v. Lincoln, 10 Gray, 600, 604.

The conclusive answer to the whole bill is that there is not even a contingent liability to the corporation, but only to the creditors.

If there was a legal or equitable liability to the corporation, it should have been set up in the suit at law. Paragraph 5 of the bill alleges that the facts were known during the trial of said suit at law.

Acts 1883, chap. 223.

W. Allen, J., delivered the opinion of the court:

The bill alleges that the defendant brought an action against the George Woods Company in the superior court for the County of Suffolk, in which the property of the George Woods Company was attached, and that the attachment was dissolved by giving a bond under the statute, in which that corporation is principal and the other plaintiffs are sureties; that a verdict has been rendered in said action against the corporation; that the corporation has become insolvent, and has no estate which can be taken on execution; that this defendant is about to proceed to obtain final judgment in said suit, and to enforce the same by action upon the bond; that the defendant is the treasurer of said corporation, and, by reason of having made a false certificate that the capital stock of the corporation had all been paid in, is liable for the debts of the corporation, under the provisions of Pub. Stat. chap. 160.

The prayer of the bill is that the defendant may be enjoined from further prosecuting said suit; and that any final judgment he may obtain in said suit may be offset by his liability to pay the same; that, upon entry of final judgment in said suit, he may be enjoined from enforcing payment of the same; that when final judgment shall be entered in said suit, it shall be entered as fully satisfied, and for general relief. The bill is demurred to for the cause that it does not state a case for any relief.

It is not suggested that the George Woods Company is entitled to any relief; but the other plaintiffs ask that the defendant may be enjoined from acquiring and prosecuting a right of action against it, upon the ground that, if acquired and successfully prosecuted, the defendant would thereby become liable to reimburse them the amount they should pay.

The only interest of these plaintiffs is that they are sureties upon a bond to pay the judgment. The fact that they have a defense to a suit upon the bond, or can establish a set-off in such a suit, surely gives them no right to prevent the defendant from obtaining judg-

ment in the action in which the bond was given. The personal plaintiffs are not parties to that suit, and their liability upon the bond is but one incident of a judgment in it, and one defendant cannot be deprived of this right to a judgment against the corporation because it may be inequitable for him to enforce the liability upon the bond. The other relief prayed for is, in effect, a contingent injunction, to prevent the defendant, who has no right of action against the plaintiffs, from commencing an action against them, if he should acquire the right; and for reasons which are of validity only so far as they show that there would be a defense to such an action. Stat. 1883, chap. 223, § 14, provides that in actions at law "the defendant shall be entitled to allege as a defense any acts that could entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action, or against a judgment obtained by the plaintiff in such an action." If the facts do not show such a defense, they cannot show reason for an injunction against bringing a suit upon an existing cause of action, much less before a cause of action has arisen. If the liability of the defendant to pay the debts of the corporation is of such a nature that it could not be alleged as a defense, either legal or equitable, in a suit upon the bond, it is difficult to see how it can afford ground for an injunction against such a suit. These considerations would be enough to dispose of the case; but, as the question of the sufficiency of the facts to afford relief to the plaintiffs from liability upon the bond has been argued by the parties without reference to the form in which it is presented in the bill, we have considered it as if the liability of the plaintiffs upon the bond had been fixed by a judgment against the corporation, and an action commenced to enforce that liability. The objection that the defendant has not obtained judgment is, in fact, somewhat technical, as the bill alleges that he had obtained a verdict, and is about to proceed to obtain final judgment, and to enforce it by an action on the bond.

The plaintiffs contend that a payment on the bond by them to the defendant will create a debt from the corporation to them, for which the defendant will be liable to them, and that it will be inequitable to allow him to compel the payment of money by them, the very receipt of which by him will make it his duty to return it to them; that he ought not to be permitted to take money from them at law which becomes equitably theirs by his act in receiving it. Pub. Stat. chap. 106, § 60, provides that the officers of corporations shall be liable for their debts and contracts in certain cases, but the liability thus generally declared is modified by subsequent provisions. Section 62 provides that no officer of a corporation shall be liable for its debts or contracts, unless after a judgment recovered against it, and its neglect to pay or disclose property for thirty days after demand made on the execution. Section 64 provides that, after execution is returned, any creditor may file a bill in equity in behalf of himself and all other creditors of the corporation, against all officers liable for its debts and contracts, for the recovery of sums due from the corporation.

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to himself and the other creditors, for which the officers may be personally liable. This is the only remedy for the right given by the statute, and limits it. It is contended for the plaintiffs that these provisions affect only the remedy,—to enforce by action against the officers a liability that arises when the debt against the corporation is created,—and are not applicable when the question is whether it is equitable to allow him, by compelling the defendants to pay a debt of the corporation to him, to create a debt from the corporation to them, for which he will be liable to them under the provision of the statute. But we think that the latter provision of the statute enters into and determines the character of the liability. It does not create a debt to each creditor, but a general liability to all creditors of the class. The statute does not give the plaintiffs a right which they can in any way enforce, except for the equal benefit of other creditors who may seek to enforce their rights.

The plaintiffs further contend that they are entitled to relief on the ground of fraud of the defendant in signing the certificate. But this was not fraud toward the plaintiffs more than to all creditors. It was an official act, fraudulent toward the public, and from which the general liability of the officers to creditors of the corporation arose. The plaintiffs can claim no rights over other creditors in consequence of it.

Demurrer sustained. Bill dismissed.

POST & CO.

v.

TOLEDO, CINCINNATI & ST. LOUIS R.
R. CO. *et al.*

1. A bill in equity for discovery only is within the jurisdiction of the court. Although statutory provisions making parties competent witnesses, and authorizing discovery through interrogatories filed, may affect the exercise of this jurisdiction in suits pending in our own courts, they have not taken away the jurisdiction of the court to entertain bills for this purpose.
2. The jurisdiction which courts of equity exercise as ancillary to that of other courts is not confined to courts of the same State. Where a bill is filed here, by a creditor who has obtained judgment in Ohio against a railroad corporation of that State, against the officers and a majority of the board of directors of the corporation, who reside in Boston, all the stockholders being nonresidents of Ohio, to compel a discovery of the names of the stockholders, who are each liable, under the Constitution and laws of Ohio, in addition to his stock, to an amount equal to his stock "for the amount of the debts and liabilities of the corporation,"—the fact that all the officers and the books of the corporation are without the State of Ohio making it impossible for the plaintiff to obtain

discovery in the Ohio courts, the plaintiff is entitled to discovery from the officers of the corporation, and the bill may be maintained here, where the officers and books of the corporation are, for discovery of the names and residence of the persons who, as stockholders, are liable, by the laws of Ohio, to contribute towards the payment of the plaintiff's judgment, and of the amount of stock held by each, so far as this appears on the books of the corporation, or has become officially known by the defendants while they were acting as such officers. The bill may be maintained against the officers and directors of the corporation, although it is not alleged therein that the defendants at any time were stockholders, or that the law of the State of Ohio requires that the officers and directors of the corporation should be stockholders.

(Suffolk—Filed May 5, 1887.)

ON report. *Demurrer overruled.*

Bill in equity for discovery by Post & Co., a corporation organized under the laws of the State of Ohio, against the Toledo, Cincinnati, & St. Louis R. R. Co., a corporation organized under the laws of said State of Ohio, and Edward B. Phillips, president; Willard White, vice-president, and Herbert Stewart, Oliver Ames, Henry D. Hyde, W. D. Hobbs, Pliny Nickerson, and Chas. W. Pierce, directors of said company. The bill set forth, in substance, that the plaintiff brought an action in the State of Ohio against the said railroad company, and recovered a judgment; that said company is insolvent, and no property can be found with which the plaintiff can satisfy the judgment; that by the Constitution and laws of the State of Ohio it is provided that the stockholders of a corporation shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed or otherwise acquired, to the creditors of the corporation, and that the term "stockholders" shall apply, not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another; that the plaintiff intends to bring an action against the stockholders of the said railroad company; and that in order to bring such action it is material for the plaintiff to know the names and residences of the stockholders of the said railroad and the amount of stock held by each; that the plaintiff has made diligent inquiry, but it is unable to discover the names of such stockholders; that the plaintiff is informed and believes that the defendants, or some of them, are able to give the plaintiff the discovery which it needs concerning the stockholders of said railroad company; but all of said officers reside in Boston, within the jurisdiction of this court; that the said railroad company has its only office for the transfer of stock in said Boston; that all the books for the transfer of stocks, and all books which show the shareholders in said railroad company, are in said Boston, and are in possession or under the control of the defendants, or some

of them; that the plaintiff has applied to the said White, vice-president, and to said Hyde, director, and has requested them to inform him who such shareholders are, but both of said officers have refused to give the plaintiff any information; that the plaintiff is informed and believes that the defendants, or some of them, are in fact the equitable owners of a large amount of said stock, and are aware who are the other equitable owners of said stock. The prayer of the bill was that the court order the defendants to disclose the names and residences of all of the stockholders of said railroad company. Hearing in the supreme court upon demurrer, which was overruled by Holmes, J., who reported the case to the full court for a determination of the questions of law involved.

Mr. Joseph B. Warner, for plaintiff:

That a bill for discovery only, though seldom used, is still within the jurisdiction of this court, will hardly be disputed. It is expressly recognized by the Statute of 1883, chap. 223, § 10. By this Act discovery is abolished as a part of bills for relief, since the answer need not be sworn to, and the discovery is thus obtainable only by interrogatories; but bills for discovery only are expressly retained, and, though little used, are recognized as a part of our judicial machinery.

Emery v. Bidwell, 140 Mass. 271, 1 New Eng. Rep. 231; *Walker v. Brooks*, 125 Mass. 241; *Ward v. Peck*, 114 Mass. 121.

The fact that parties may not be witnesses cannot deprive this court of its original equity jurisdiction in matters of discovery, where the common-law process is not adequate, especially since Stat. 1877, chap. 178, §§ 1, 2.

Nudd v. Powers, 136 Mass. 273, 278; *Dole v. Woodledge*, 135 Mass. 140; *Bray*, Disc. 618; *Shotwell's Admr. v. Smith*, 20 N. J. Eq. 79.

This is a proper case for discovery in aid of an intended action. The plaintiff cannot make even an effectual beginning of his suit, not knowing the name of a single stockholder.

I. *The rule that discovery may not be had from a witness.*

The practice of compelling discovery in equity undoubtedly arose from the impossibility of getting evidence at law from a party to the suit.

Langd. Eq. Pl. § 167.

The primary purpose was to obtain admissions which could be used in evidence, and upon this purpose principally the system was built, and for this its rules were chiefly framed. The thing aimed at was evidence, and evidence to be used against the person who was compelled to disclose. Hence it was an invariable rule that the discovery, when obtained, could not be offered as evidence against any other person than the one giving it.

Hare, Disc. 48; *Mitford*, Pl. *188.

From this followed, as the converse of the rule, that a person whose position was merely that of a witness could not be compelled to give discovery. Such discovery, if given, could not be read against the party to the suit, and it would therefore be useless. It was also given as a reason that it would be mischievous

to enable a party to discover what would be the testimony of his opponent's witnesses by *ex parte* proceedings before trial.

Hare, Disc. 54; *Plummer v. May*, 1 Ves. Sr. 436; *Fenton v. Hughes*, 7 Ves. 287; *Queen of Portugal v. Glyn*, 7 Cl. & F. 486.

To this rule, however, there were exceptions to prevent a failure of justice; and in several cases where the identity of interest was strong, the plaintiff was allowed to obtain discovery from one not a party, notwithstanding the facts that he could be summoned as a witness, and that his evidence could not be read against the defendant. Thus, where discovery is sought of the acts of a bankrupt before he became bankrupt, he must answer to assist the plaintiff in obtaining evidence, though his answer could not be read against his assignees.

Mitford, Pl. *161.

Hare, Disc. 59; *Gilbert v. Lewis*, 1 De G. J. & S. 88.

And where a person, having had an interest in the subject of a bill, has assigned that interest, he may yet be compelled to answer with respect to his own acts before the assignment.

Mitford, Pl. *161; Hare, Disc. 59.

The most important exception, however, is that which covers corporations, and which is directly applicable to the present case. Whenever you can have discovery against a corporation, you may have it against its officers and members, though their answers are not evidence against the corporation.

Mitford, Pl. *168.

This was allowed in the original case, on the ground that the plaintiff was entitled to an answer from some one who could be held liable for perjury, and also on the ground that "it may be of use to direct the plaintiff how to draw and pen his interrogatories towards obtaining a better discovery," and that it may be very mischievous and injurious "to deprive the plaintiffs of that discovery to which in common justice they are entitled."

Wych v. Meal, 8 P. Wms. 310.

This was followed by Lord Eldon, who compelled discovery from the members of a corporation on the ground that "there will be a gross failure of justice if the plaintiff cannot have a discovery of the matters charged."

Dummer v. Corp. of Chippenham, 14 Ves. 245.

The question came squarely before this court in *Wright v. Dams*, 1 Met. 237. The plaintiff there alleged that one to whom he had conveyed lands in trust had conveyed them to the defendant, the South Wharf Corporation, and alleged that the members knew of the trust. The members were made parties defendant for discovery. The court relied upon *Wych v. Meal*; approved the reasoning in that case; pointed out that the members were the real parties in interest, that they might be the only ones who knew the facts sought to be discovered, that this proceeding was more beneficial than an examination of the persons as witnesses, and that, though the answers would not be evidence against the corporation, they might be, nevertheless, "of the utmost use to the plaintiff in the further prosecution of the cause." And such is the established rule.

Glaucott v. Copper Miners Co. 11 Sim. 805.

In these cases we have ample authority for this bill. It seeks to compel discovery from a 2 Mass.

corporation and its directors, to be used in a proceeding in which the corporation is a necessary party. The discovery is needed, as in *Wright v. Dams*, 1 Met. 237, to enable the plaintiff to proceed against the corporation and others, and here, as there, although the answers will not be evidence against the corporation, they "may be, nevertheless, of the utmost use to the plaintiff in the further prosecution of his cause."

II. A discovery is not confined to evidence.

Discovery may be had, from parties, of names of other persons to be joined.

Finch v. Finch, 2 Ves. Sr. 491; *Atty. Gen. v. Ellison*, 4 Sim. 288; *Union Bank v. Manby*, L. R. 13 Ch. Div. 239; *Hambrook v. Smith*, 17 Sim. 209; *Hopcock's Ears. v. Canal Co.* 27 N. J. Eq. 286.

Discovery may be had of names of persons to be made parties in other proceedings.

Dixon v. Fraser, L. R. 2 Eq. 497; *Bovill v. Cowan*, 15 W. R. 608.

Bills may be brought solely to discover names of parties to be sued.

Story, Eq. § 1488; Bray, Disc. pp. 40, 19, 612; *Orr v. Diaper*, L. R. 4 Ch. Div. 92; *Dixon v. Enoch*, L. R. 18 Eq. 894; *The Murillo*, 28 L. T. N. S. 874; *Heathcote v. Fleets*, 3 Vern. 442; *Morse v. Buckworth*, 2 Vern. 443; *Moodaly v. Moreton*, 2 Dick. 652; *Stauden v. Bullock*, Toth. 9; *Brown v. Wales*, L. R. 15 Eq. 142; *Howell v. Ashmore*, 9 N. J. Eq. 82; *Peck v. Ashley*, 12 Met. 478.

The only cases which, so far as we can discover, can be relied upon by the defendants, are cases where discovery was sought from one who could be summoned as a witness in a suit which could be brought without difficulty.

Dineley v. Dineley, 2 Atk. 394; *Stapleton v. Sherrard*, 1 Vern. 212; *Sherborne v. Clerk*, 1 Vern. 273; *Mayor of London v. Levy*, 8 Ves. 398; *Twells v. Costen*, 1 Pars. Sel. Cas. 873; *Raymond v. Crown & Eagle Mills*, 2 Met. 819; *Ballin v. Ferst*, 55 Ga. 546.

III. When discovery is to be granted as a sort of relief.

If any technicality in the old law of discovery were found to stand in the way of this bill, it is submitted that a court of equity would procure for the plaintiff such information as he is entitled to have in order to secure his rights; and this, if there were any objection to calling it discovery, might be called relief.

Hare, Disc. p. 52; *Day v. Drake*, 8 Sim. 64; *Mountford v. Taylor*, 6 Ves. 788; *Smither v. Lewis*, 1 Vern. 398; *Angell v. Draper*, Id. 399; *Kennedy v. Wakefield*, 39 L. J. Ch. N. S. 827; *Brown v. Eastern State Co.* 184 Mass. 590, 592.

IV. No objection to aiding Ohio court.

The objection was made, at the former argument, that this court will not give discovery at all in aid of a foreign court, and certainly will not give it in aid of a court which can itself give discovery. The objection that the courts of one of our States will refuse to aid that of another State can hardly be seriously urged, and it is contrary to all the authority which there is.

Burgess v. Smith, 2 Barb. Ch. 276; *Mitchell v. Smith*, 1 Paige, 287; Story, Eq. § 1495; Cooper, Eq. Pl. 191; Pom. Eq. § 196.

There are two English cases in which discovery was refused in aid of foreign tribunals. *Bent v. Young*, 9 Sim. 180; *Reiner v. Salisbury*, 2 Ch. D. 378; but see *Daubigny v. Davallon*, 2 Anstr. 462. These cases rest upon very special circumstances, and it is not probable that such a position toward the courts of Ohio would be for a moment thought of.

V. *No objection to aiding a suit against stockholders.*

It can be nothing to the prejudice of this bill that it is in aid of a proceeding in Ohio to enforce stockholders' liability. The cases in which this court has refused to undertake itself to enforce such a liability under a foreign statute rest upon the lack of jurisdiction over the necessary parties, not upon any settled policy to discourage such actions wherever brought.

Erickson v. Nesmith, 15 Gray, 221; *Same v. Same*, 4 Allen, 233; *Halsey v. McLean*, 12 Allen, 438.

Treating this liability of stockholders as one of the remedies for the enforcement of the debt of the corporation (*Brown v. Eastern State Co.* 184 Mass. 590, 592), there is no reason why the creditor of the corporation should not learn from its officers how that remedy may be made effectual.

The liability is certainly, in a general sense, contractual, and not penal within any principle that could disincline a court to assist in enforcing it.

Hathorn v. Calef, 2 Wall. 10 (69 U. S. bk. 17, L. ed. 776); *Flash v. Conn*, 109 U. S. 371 (Bk. 27, L. ed. 966); *Cuykendall v. Miles*, 10 Fed. Rep. 342.

In *Aultman's Appeal*, 98 Pa. 505, the court enforced the very statute of Ohio now under discussion.

Messrs. W. G. Russell and Jabes Fox, for defendants:

It is plain that this bill does not satisfy any of the usual definitions of a bill of discovery.

"The modern authorities relating to this jurisdiction, with perhaps one exception, recognize no other object in compelling an answer than its use as evidence in some judicial proceeding."

Hare, Disc. 2d Am. ed. p. 111.

The one possible exception to which Hare refers is the case of officers of a corporation, which will be dealt with hereafter.

"The object of a court of equity in compelling discovery is to enable itself, or some other court, to decide on matters in dispute between the parties, and the right to discovery is limited by the purpose with reference to which alone it is conferred, and will not, for that reason, extend beyond the exigencies of the question or questions about to be tried."

Wigram, Disc. p. 35.

"As the object of the court in compelling a discovery is either to enable itself or some other court to decide on matters in dispute, between the parties, the discovery sought must be material, either to the relief prayed by the bill, or to some other suit actually instituted or capable of being instituted. If, therefore, the

plaintiff does not show by his bill such a case as renders the discovery which he seeks material to the relief, if he prays for relief; or does not show a title to sue the defendant in some other court, or that he is actually involved in litigation with the defendant, or liable to be so; and does not also show that the discovery which he prays is material to enable him to support or defend a suit,—he shows no title to the discovery, and consequently a demurrer will hold."

Mitford, 6th Am. ed. p. 226. See also Langd. Sum. Eq. Pl. § 126.

This bill does not seek to obtain evidence to be used in any suit; its sole object is to find out whom to sue. Is this a legitimate object of a bill of discovery?

The authorities relied upon in support of this contention are,—

Stauden v. Bullock, Tothill, Ch. 9 (1597); *Heathcote v. Fleete*, 2 Vern. 442 (1702); *Morse v. Buckworth*, Id. 443 (1703); *Moodaly v. Moreton*, Dickens, 653; 1 Brown, 469 (1785).

It is to be noticed that in these cases there is nothing but the meagre statement of facts to show what was intended to be decided, except in *Moodaly v. Moreton*, where the short opinion of Kenyon, *M. R.*, deals merely with the question whether a bill of discovery will lie before action brought; and Mitford, Wigram, Hare, and Maddock cite these cases solely to this point, or not at all.

Hare, Disc. 51, 85, 187; Madd. Ch. Pl. 279. See also comment of Lord Abinger on *Moodaly v. Moreton*, in *Glyn v. Soares*, 1 Y. & C. 676.

It is entirely clear that these eminent writers did not regard these cases as establishing any exception to the general rule that the object of discovery is merely to obtain evidence.

Hare, Disc. p. 111.

On the other hand, we have, during this early period,—

Stapleton v. Sherrard, 1 Vern. 212 (1683).

To the same point is *Sherborne v. Clerk*, 1 Vern. 278 (1684); *Dineley v. Dineley*, 2 Atk. 394 (1742).

So stood the authorities at the beginning of the present century, when the precise point presented by the plaintiff's bill was directly raised and decided in *Mayor of London v. Levy*, 8 Ves. 398 (1802).

The decision in the latter case has never been questioned except in Story, Eq. Jur. § 1483.

See, on the other hand,—

Mitford, 6th Am. ed. 223, 224, 226; Wigram, Disc. 25, 165; Hare, Disc. 2d Am. ed. 111, 161; Kerr, Disc. 38; Langd. Eq. Pl. § 133.

The question remains whether the rule, as settled by Lord Eldon and universally accepted for seventy-five years, can be considered as having been abrogated by the recent decision of *Orr v. Diaper*, L. R. 4 Ch. D. 92 (1876). This was an action against shipowners who had shipped goods bearing counterfeits of plaintiff's trademarks, for discovery of the names of the consignors. Demurrer overruled. Hall, V. C., in giving the opinion, cited but a single case, *Dixon v. Enoch*, L. R. 13 Eq. 394, which, as he admitted, turned upon the construction of a statute, and based his decision purely on the ground of hardship.

Opposed to this we have in this country,—

Twells v. Costen, 1 Pars. Sel. Cas. (Pa.) 373

(1849); *United N. J. R. R. & Canal Co. v. Hop-
pack*, 28 N. S. Eq. 261 (1877), reversing the de-
cision in 27 N. J. Eq. 286.

The cases allowing officers or members of a corporation to be joined with the corporation in a bill for discovery, to be used in an action to be brought against the corporation, rest on grounds wholly inapplicable to the present case. In such cases discovery is sought against the corporation. The adverse party being entitled to disclosure under sanction of an oath, and the corporate answer affording no such sanction, the courts have held the corporators, as component parts of the corporation, and as the parties actually in interest, to make the disclosure.

Story, Eq. Juris. § 1501.

This is the principle on which this exception to the rule that discovery can only be had from a party is sustained, as clearly stated in *Wright v. Dame*, 1 Met. 287, 289; and on this rest the cases there cited.—*Wych v. Mead*, 3 P. Wms. 311; *Dummer v. Corp. of Chippenhams*, 14 Ves. 245. In the last-named case the defendants were also personally implicated in the wrong charged against the corporation, and, through the corporation, were the wrongdoers.

It is true that the answer of an individual corporator cannot be used against the corporation itself, and furnishes, therefore, an admitted exception to the general rule.

Hare, Disc. p. 111.

The cases of corporations, however, have always been treated as wholly anomalous. *Lord Eldon*, though admitting their authority, doubted the principle, and refused to extend the rule so as to allow discovery in aid of a defense at law from an interested person not a party to the suit, although the suit had been brought at his instance.

Fenton v. Hughes, 7 Ves. 287; *Queen of Portugal v. Glynn*, 7 Cl. & F. 466.

There appears to be no reported case, in this State, in which a bill for discovery alone has been sustained, since 1849.

Haskell v. Haskell, 3 Cush. 540.

The plaintiff is seeking to enforce against citizens of this State a liability imposed upon them by the statutes of Ohio.

We submit that the plaintiff should be remanded to his remedies under those statutes of which he is seeking to avail himself.

The question has been considered thus far independently of the fact that the bill seeks discovery in aid of a court of foreign jurisdiction, which is itself able to compel discovery. Except so far as the bill shows that the defendants are outside the territorial jurisdiction of the Ohio courts, there is no pretence that those courts have not as full powers of discovery as our own. It was a settled principle in England, that the court of chancery would not grant discovery for a court which could itself compel discovery. Hence a bill of discovery would not lie in aid of proceedings in the ecclesiastical court.

Mitford, Pl. 6th Am. ed. p. 221; Bray, Disc. p. 613.

It seems, however, that the recent Acts giving powers of discovery to courts of common law have not diminished the early jurisdiction of chancery in aid of those courts.

Bray, Disc. p. 613.

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This court has refused to entertain a bill for discovery, on the ground that it does not appear that the discovery sought could not be had by interrogatories under the statute.

Ahrend v. Odiorne, 118 Mass. 261, 269.

But it is not necessary to inquire whether a bill of discovery would now lie in this State in aid of a common-law proceeding. We have a right to assume, upon this demurrer, that the action to be brought is an equitable proceeding in some court having full chancery powers, and that it is to be brought in Ohio.

It seems to be settled in England that the court of chancery will not entertain a bill for discovery in aid of proceedings before a foreign tribunal.

Bent v. Young, 9 Sim. 180; *Reiner v. Salisbury*, 2 Ch. D. 378; Mitford, Pl. 6th Am. ed. p. 221.

In *Mitchell v. Smith*, 1 Paige, 287, a bill of discovery was allowed in New York in aid of the defense to a common-law action in Connecticut. The court, however, took pains to leave open the question whether such aid would have been given if the suit in Connecticut had been on the equity side of the court.

But whatever may be the general doctrine as to the obligation of comity resting on our courts to entertain a bill of discovery in aid of proceedings in the tribunals of a foreign or a sister State, no such obligation exists in this case. The liability intended to be enforced in the suit to be brought in Ohio is one arising under a statute of that State of such a nature that our courts would not enforce it here.

Erickson v. NeSmith, 15 Gray, 221; *Erickson v. NeSmith*, 4 Allen, 233; *Halsey v. McLean*, 12 Allen, 438; *Smith v. N. Y. Mut. L. Ins. Co.* 14 Allen, 386, 343; *New Haven H. N. Co. v. Linden Spring Co.* 142 Mass. 349.

Field, J., delivered the opinion of the court:

This is a bill in equity for discovery only, and there is no doubt that such a bill is within the jurisdiction of the court. Pub. Stat. chap. 157, § 1, cl. 4 and § 4; chap. 198, § 16; Stat. 1888, chap. 223, § 10.

The statutory provisions whereby parties are made competent witnesses, and are permitted, in suits at law or in equity, to obtain from each other the discovery of facts and documents by filing interrogatories, have not taken away the jurisdiction of the court to entertain bills of discovery, although they may affect the exercise of this jurisdiction in reference to suits brought in our own courts. These provisions are not inconsistent with the statutes relating to bills of discovery, or with the general equity jurisdiction of the court over such bills; and the remedies afforded by interrogatories, or by calling the parties as witnesses, are manifestly inapplicable to the present suit, as no relief is sought in it.

Although in *Aultman's Appeal*, 98 Pa. 505, the court of Pennsylvania apparently took full jurisdiction over an Ohio corporation and its stockholders, to enforce the liability of the stockholders under the statutes of Ohio, we assume, as was substantially conceded by all the parties at the argument, that our courts would decline to exercise any such jurisdiction. See *Erickson v. NeSmith*, 15 Gray, 221; *S. C.* 4 Allen, 233; *Halsey v. McLean*, 12 Allen,

438; *Smith v. New York Mut. L. Ins. Co.* 14 Allen, 836; *New Haven H. N. Co. v. Linden Spring Co.* 142 Mass. 349.

The object of the bill is to obtain a discovery, from the defendants, of the stockholders of an Ohio corporation, in order that the plaintiff may institute a suit in the courts of Ohio against the corporation and its stockholders, to collect a judgment which the plaintiff has obtained against the corporation. The liability of the stockholders is imposed by the Constitution and statutes of Ohio. The Ohio corporation has been made a defendant to the bill here, but has not appeared in the suit, and no service has been made upon it, and we are not aware that any effectual service could have been made upon it. The other defendants are alleged to be the officers and directors of the corporation, who reside in Massachusetts; and they have been personally served with process and have appeared. The case would perhaps have been presented more satisfactorily if the bill had contained a fuller statement of the law of Ohio, and had set out the statutes of that State in terms; because the law of Ohio is a fact, although the construction of its statutes is for the court, and, whatever knowledge we may have of that law beyond the allegations of the bill, we cannot use it for the purpose of deciding the case.

It appears by the bill that, in the proceedings in the Ohio courts, the corporation and all its stockholders who are liable must be made parties defendant, and that the stockholders who are liable are not only those who appear on the books of the corporation to be stockholders, but those who are equitable owners of the stock; and that each of such stockholders is liable, in addition to his stock, to an amount equal to the stock, "for the payment of the debts and liabilities of the corporation." The bill does not allege that those only who were stockholders on the day when the judgment was rendered, or at any other time, are liable, but it asks that the defendants may be compelled to disclose the names and residences of all persons who are stockholders, legal or equitable, before or on the day when the judgment was rendered, and of all persons who have become stockholders since that day, with the amount of stock held by each, and "how long each held the same." The bill does not allege that the defendants at any time were stockholders, or that the law of the State of Ohio requires that the officers and directors of a corporation should be stockholders. It does not allege that the courts of Ohio have not power to compel disclosure from the defendants, if they could be brought before the court of that State; or what, if any, provisions are made by the laws of that State for the purpose of ascertaining the stockholders who are liable. The bill alleges that "there is no officer of the defendant corporation, or person, or book, or paper, within the jurisdiction or control of any of the courts of Ohio, from whom or from which the information sought by this bill, or any part thereof, can in fact be obtained;" "that all of said officers"—by which are meant all of the defendants—"reside in Boston, within the jurisdiction of this court; that said railroad company has its only office for the transfer of stock in said Boston; that all the books

for the transfer of stock, and all books which show the shareholders in said railroad company, are in said Boston, and are in the possession or under the control of the aforesaid officers, or some of them; that a majority of the board of directors of said railroad company reside in said Boston; and that all the directors and the other principal officers of said railroad company reside outside the State of Ohio."

Taking all the allegations of the bill together, we think it appears that the sole difficulty which the plaintiff encounters is that the courts of Ohio are powerless to compel the disclosure it seeks, because all the officers of the corporation reside without that State, and all the books of the corporation are in the possession of the officers, or some of them, and are also without that State. The obligation imposed by the statutes of Ohio upon the stockholders for the purpose of securing the payment of the debts of the corporation is *quasi ex contractu*. It must be taken that all persons who become stockholders in an Ohio corporation know the law under which the corporation is organized, and assent to the liability which that law imposes upon stockholders; and that all persons who deal with the corporation rely upon the liability of the stockholders as security for the payment of whatever debts may be due them from the corporation. It is for the People or the Legislature of each State to determine to what extent, if at all, the stockholders of corporations created by the laws of that State shall be liable for the debts of such corporation. It was early the policy of Massachusetts to make every stockholder liable to have his property taken to satisfy a judgment against a Massachusetts corporation of which he was a member. See *Child v. Boston & Fairhaven Iron Works*, 187 Mass. 576. And, although this policy has now been changed, and the liability restricted to specific cases, and to corporations of a particular character, yet there is nothing in the laws of Ohio, as stated in the bill, that is so opposed to the general policy of our law, that even citizens of Massachusetts who voluntarily have become stockholders in Ohio corporations should not be held to perform the obligations imposed by those laws. The difficulty which courts find in dealing with foreign corporations in matters relating to their internal affairs and management; the impossibility of compelling persons to perform their obligations unless either the body or the property of such persons can be attached; the intimate relations existing between the States of the United States; and the well-known fact that corporations are frequently organized by the citizens of one State under the laws of another, and the principal office of the corporations kept in a State other than that of their creation,—all induce us to give whatever aid the principles of law permit to persons who are endeavoring to enforce the obligations which attach to stockholders in foreign corporations.

Our statutes, in cases where the stockholders are liable for the debts of a Massachusetts corporation, require that the clerk or other officer having charge of the records, shall furnish to a judgment creditor of the corporation a certified list of the names of the stockhold-

ers (Pub. Stat. chap. 106, §§ 63, 88; Id. chap. 105, § 26); and if the officers and records were beyond the reach of the process of our courts, the aid of courts of other jurisdiction might be necessary to make the remedy provided by our statutes effectual.

This court does not take jurisdiction of a suit to enforce this liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws; but because it is a suit against a foreign corporation, which involves the relation between it and its stockholders, and in which complete justice only can be done by the courts of the jurisdiction where the corporation was created. The procedure is in the nature of a partial liquidation of the affairs of a corporation under the statutes of the State which created it; and it resembles the proceedings under our statutes for enforcing the liability of the officers or members of manufacturing corporations, or for winding up insolvent banks and mutual insurance companies. If an assessment is to be laid upon, or a contribution enforced from, the members or stockholders, according to the law of the State under which the corporation is created, the court of that State alone can afford complete and effectual judicial relief.

The question is whether plaintiff's bill states a case in which "a discovery may be lawfully required, according to the course of proceedings in equity." Pub. Stat. chap. 151. § 1, cl. 14.

It is conceded that the primary object of discovery was to obtain admissions from a party, which could be used as evidence against him; and that the general rule was that discovery could not be had from a person who had no interest in the litigation, and could be called as a witness. In suits against a corporation, as it answered under its common seal, and not under oath, the practice was early established of making one or more of its officers or members codefendants, and of compelling them to make disclosure of such facts within their knowledge as the corporation, if a natural person, could have been compelled to disclose, although their answers could not be used as evidence against the corporation. Their answers enabled the plaintiff to ascertain in advance of a trial what the facts within their knowledge were, and to propound proper interrogatories to them or to other persons as witnesses. *Wright v. Dams*, 1 Met. 287.

In *Queen of Portugal v. Glyn*, 7 Cl. & F. 466, Soares had brought an action against Glyn and others on certain bills of exchange, and the defendants in that action brought a bill in equity against Soares and the Queen of Portugal for discovery, to aid them in the defense of the action, and alleged, among other things, that Soares held the bills as the agent of the Queen. The Queen demurred to the bill, and the demurrer was allowed on the ground that discovery could not be had from persons interested in the subject of a pending action at law, who were not parties of record in that action; and a distinction was taken between bills for relief and discovery, and bills for discovery only. It was, however, there said by Lord Chancellor Cottenham that "the cases of officers of corporations stand on prin-

ciples entirely peculiar to themselves, and have obviously no application to the present case.

In bills for relief, persons other than the principal defendants, who are connected with the subject of the suit, or are in possession of documents which concern the litigation, have sometimes been made parties for the purpose of obtaining a discovery of facts and documents from them; and discovery is also had from the defendants of the names of other persons who are interested in the subject of the suit, if it is necessary to make them parties in order that the decree may be complete and effectual; and in bills in equity to collect a judgment obtained at law, on which an execution has been returned unsatisfied, discovery has been had of the property of the defendant, and, incidentally, of persons in whose possession the property is, in order to subject it to the payment of the plaintiff's judgment. Under recent British statutes, this jurisdiction is exercised liberally by interrogatories to parties, or by orders in the suit. *Dixon v. Fraser*, L. R. 2 Eq. 497; *Sherlock v. Disney*, 13 Ir. Eq. 233; *Hambrook v. Smith*, 17 Sim. 209; *Ravilins v. Dalton*, 3 Y. & C. 447; *Earl of Macclesfield v. Davis*, 3 Ves. & B. 16; *Hancocks v. Demerick*, 3 C. P. D. 197; *Boeill v. Cowan*, 15 W. R. 608; *Meador v. Isle of Wight Ferry Co.* 9 W. R. 750; *Bay State Iron Co. v. Goodell*, 39 N. H. 223.

The present case must be determined by the principles declared in the few cases where the plaintiff does not know the names of the persons against whom he intends to bring a suit, and brings a bill against persons who stand in some relation to them or to their property, in order to discover who the persons are against whom he may proceed for relief.

It seems to be settled that a bill will lie against a corporation and its officers to compel a discovery from the officers to aid a plaintiff or a defendant in maintaining or defending a suit, brought against or by the corporation alone. *Republic of Costa Rica v. Erlanger*, 1 Ch. D. 171; *McComb v. Chicago, St. L. & N. O. R. R. Co.* 19 Blatch. 69; *Glasscott v. Copper Miners Co.* 11 Sim. 305; *Moodalay v. Morelon*, 1 Bro. C. C. 469; *McGregor v. East India Co.* 2 Sim. 452; *Bolton v. Corporation of Liverpool*, 1 M. & R. 88. See *Colgate v. Compagnie Française du Telegraph*, 28 Fed. Rep. 82.

It is settled that a bill of discovery may be maintained to aid the plaintiff in a suit which he intends immediately to bring, as well as in a suit already brought, if the bill discloses a cause of action; and the difficult question is, Under what circumstances may such a bill be maintained for the purpose of ascertaining the proper parties against whom the suit should be brought?

In *Mayor of London v. Levy*, 8 Ves. 398, upon demurrer to the bill, the argument was upon the question whether the facts stated would subject the defendant to an indictment or a penalty: and the demurrer was allowed on the ground that the bill did not "state who are the persons against whom the action is to be brought;" nor was it a bill stating "such circumstances as may enable the court, which must be taken to know the law, and therefore the liabilities of the defendants, to judge,—but stating circumstances and averring that you

have a right to an action against the defendants, or some of them." But the facts of that case were not such as required the court to overrule the old cases of *Stauden v. Bullock*, Tothill, Ch. *9; *Heathcote v. Fleete*, 2 Vern. 442; *Morse v. Buckworth*, 2 Vern. 443; and *Moodaly v. Moreton*, 2 Dick. 653; *S. C.* 1 Bro. C. C. 499; nor were these cases noticed in the opinion. Whether these decisions would now be followed in like cases need not be determined. The recent decision of *Vice Chancellor Hall*, in *Orr v. Draper*, 4 Ch. D. 92, shows that under some circumstances discovery may be had for the purpose of ascertaining the persons against whom the plaintiff may bring a suit, although he does not allege that he has a cause of action against or intends to sue the persons who are the defendants in the proceedings for discovery. See *The Murillo*, 28 L. T. N. S. 374, and *Hoppeck's Eers. v. Canal Co.* 27 N. J. Eq. 286; *S. C.* 28 N. J. Eq. 261.

It is clear that courts do not compel discovery from persons who sustain no other relation to the contemplated litigation, or to the subject of the suit, than that of witnesses; and it is also clear that a bill for discovery cannot be used to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendants. See *Twells v. Costen*, 1 Pars. Sel. Cas. 373. But when a plaintiff has a cause of action against persons who are defined, either by statute, or by their relations to property or a business by the management of which the plaintiff has suffered injury, and the names and residences of these persons are unknown to him, it is not clear that there may not be such a state of facts that a court ought to compel a discovery of the names and residences of these persons, from their agents in charge of the property or business; and the decisions recognize that this may sometimes be done. In the present case it is the duty of the corporation to pay the plaintiff's judgment, if it have sufficient assets; a part of its assets for that purpose is the liability of its stockholders; the corporation acts only through its directors and other principal officers; and it is necessary that the plaintiff, in order to enforce the liability of the stockholders, and thus obtain satisfaction of its judgment, should bring suit against the corporation and all its stockholders; and the plaintiff, except by discovery, cannot ascertain who these stockholders are. We can have no doubt that if the principal suit could be brought here, the plaintiff could, either in that suit or by a bill for discovery, obtain from the officers of the corporation a discovery of what, from the books of the corporation or their own official knowledge, they could disclose of the names and residences of the stockholders who were liable to contribute towards the payment of the plaintiff's judgment. A court of equity would not permit the remedy intended by the statutes to be made unavailing by the refusal of the corporation, acting through its officers, to disclose who its stockholders were, even if the officers were not expressly required by statute to disclose them.

But it is argued by the defendants that this court will not compel discovery in aid of a foreign tribunal; and they rely upon *Bent v.*

Young, 9 Sim. 180, and *Reiner v. Salisbury*, 2 Ch. D. 378. *Bent v. Young* was apparently decided on three grounds: first, that it did not appear that the plaintiff could not obtain relief by filing a bill for that purpose in the English courts; second, that it did not appear that the court in Surinam could not compel the discovery sought; and third, that "in the contemplation of the court of chancery every foreign court is an inferior court," and therefore the case was within the rule that the court of chancery will not compel discovery in aid of an action in the inferior courts of England; and it was suggested that although the defendant was a resident of England, and had never been resident in Surinam, "*non constat*, therefore," that he "may not be in Surinam when the suit there is commenced." The first two reasons are cogent; the last reason and suggestion do not require serious consideration.

Reiner v. Salisbury was decided on the ground that the suit for the recovery of the land must be brought in India, and that the defendant, the Secretary of State for India in Council, was in India as well as in England, and could be sued in India; and that the plaintiff would have the same right to discovery from him in India as in England.

In *Mitchell v. Smith*, 1 Paige, Ch. 286, a bill was maintained in the Court of Chancery of New York for the discovery of matters in aid of the defense of an action at law brought in Connecticut. In *Burgess v. Smith*, 2 Barb. Ch. 276, it is said that "this court has jurisdiction, and will entertain a bill of discovery in aid of the prosecution of a civil suit in a sister State, or in a foreign tribunal, or in a court of the United States." In modern times it is the policy of States to afford aid to foreign tribunals in the taking of testimony to be used in suits pending there. Our statutes make provision for compelling a witness to give his deposition in a cause pending in a court in "any other State or government." Pub. Stat. chap. 169, § 44. See 13 U. S. Stat. at L. 769; Stat. 1863, chap. 95; *Ponsford v. O'Connor*, 5 M. & W. 678.

The jurisdiction which courts of equity exercise as auxiliary to that of other courts is not, on either principle or authority, confined to other courts of the same State. A receiver has been appointed to collect or to preserve property pending litigation in a foreign court, and an injunction has been granted against transferring property until the title could be determined in a foreign court. *Transatlantic Co. v. Pietroni*, Johns. Ch. (Eng.) 604. In the present case, the fact that all the officers and all the books of the corporation are without the State of Ohio makes it, as the bill alleges, impossible for the plaintiff to obtain discovery in the Ohio courts, and as we think the plaintiff is entitled to discovery from the officers of the corporation, we are of opinion that a bill for discovery may be maintained here, where the officers and books of the corporation are. The defendants demur to the whole bill, and if the plaintiff is entitled to any of the discovery it seeks, the demurrer must be overruled. We think that at least a case is stated for the discovery of the names and residences of the persons who, as stockholders, are liable, by the laws of Ohio, to contribute towards the

payment of the plaintiff's judgment, and of the amount of stock held by each, so far as this appears on the books of the corporation or has become officially known to the defendants while they were acting as such officers. *McComb v. Chicago, etc. R. R. Co. supra.*

Demurrer overruled.

Elizabeth H. PINGREY
v.
NATIONAL LIFE INS. CO.
Cara L. PINGREY v. SAME.

An endowment policy made payable to the mother of the assured, under an understanding to that effect existing between the mother and son, and toward the payment of the premium on which the mother and a sister of assured contributed, and in which no power of changing the beneficiary was reserved,—cannot be surrendered without the consent of the mother, and a new policy, expressed to be in continuation of the original policy, substituted for the benefit of the wife to the assured, when she paid no part of the premium, and had no knowledge of such substitution. The fact that the policy might have become payable to the assured in a certain contingency which did not happen is immaterial.

(Suffolk—Filed May 6, 1887.)

APPEAL by defendant in the first action from a judgment of the Superior Court of Suffolk County in favor of plaintiff, and appeal by plaintiff in the second action from a judgment in favor of defendant, in actions on policies of life insurance. *Affirmed.*

The case was heard in the court below on agreed facts substantially as follows: The defendant, May 25, 1874, issued a "life-rate endowment policy" of insurance on the life of Franklin A. Pingrey, upon his application, payable to his mother, Elizabeth H. Pingrey. The policy was in the following form:

"This policy of insurance witnesseth that the National Life Insurance Company, in consideration of the statements made in the application for this policy (which application is hereby made a part of this contract), and of the premium of \$55 to them paid, by Franklin A. Pingrey, of Boston, in the County of Suffolk and State of Massachusetts, being the assured in this policy, and of a like sum to be paid to them by said assured, on or before the 25th day of May in every year during the continuance of this policy, do insure the life of Franklin A. Pingrey, of Boston, in the County of Suffolk and State of Massachusetts, to the amount of \$3,000, from the date hereof at noon.

"As soon as the premiums paid, together with such other sums as he may choose to pay, improved annually at the average rate of interest received by the company, after deducting *pro rata* expenses and losses, shall amount to the sum insured, the company agrees to

pay to Franklin A. Pingrey the amount of \$3,000.

"In case of prior death, the said company do hereby promise to and agree with the assured, his executors, administrators, and assigns, well and truly to pay at their office the said sum insured to his mother, Elizabeth H. Pingrey, within ninety days after due notice and proof of the death of the said Franklin A. Pingrey, during the continuance and before the termination of this policy.

[Then followed several clauses relating to occupation and residence of the insured, death by suicide, etc., default in payment of premiums, falsity of statements in application, etc.]

"After two full annual premiums shall have been paid, this policy shall not lapse for non-payment of premiums, but shall continue in force for the full amount insured until all the assets belonging to the assured in the hands of the company at the time of the nonpayment shall have been exhausted; or, if the assured shall so elect, he may receive a paid-up policy for an equitable amount, or the company will purchase this policy at its equitable value.

"Notice must be given within sixty days from the time when such payment shall have become due, as to the choice of the three plans above mentioned. If no notice is given, a paid-up policy will be issued, and the original policy cancelled.

"In case of this policy becoming null and void, the holder of the same will not be entitled to a return of any part of the premium paid thereon.

"This policy shall not take effect until the first premium is actually paid, nor, if any change has taken place in the state of health of the life to be insured, between the date of application and that of the payment of the first premium.

January 25, 1882, Franklin A. Pingrey surrendered this policy to the defendant, which at his request issued to him another policy, payable to Cara L. Pingrey, his wife, which was numbered the same as the preceding policy, and similar to it in its conditions.

No new application for insurance was made by Franklin A. Pingrey, but, upon the surrender of the first policy for cancellation, the second policy was issued, with the following indorsement upon it: "Original Pol. No. 9873 was issued May 25, 1874, of which this is a continuation, and is entitled to all its benefits." Elizabeth A. Pingrey never consented to the surrender of the first policy. All the premiums on both policies were paid by Franklin A. Pingrey, the assured, when they came due; his mother, the said Elizabeth A. Pingrey, and his sister, together, furnishing him with all, or nearly all, the money necessary to pay the first premium on the first policy. No sums besides the premiums were paid upon either of said policies.

Some time after taking out the first policy, Franklin A. informed his mother that he had taken it out, but she never saw it until about two years after the time of its issue, when one day he took it from the box where he had always kept it, as he was putting away other papers, and, holding it up, folded, told her

that it was the policy; she never read the policy or knew its provisions, except that she understood from her son that he had taken out a policy for her benefit. The insured always kept possession of said original policy until he surrendered it to the company to be cancelled as aforesaid, and he never delivered it to his mother.

On February 26, 1880, the assured married Cara L. Pingrey, and on September 30, 1882, he died without issue.

At the time when the first policy was applied for, the assured, being then just twenty-one years of age, was living at home with his father and mother, with whom he had lived up to that time and continued to live until his death,—the family at that time consisting of his father, mother, sister, and himself. His father was an invalid, and so continued until his death, which was subsequent to the death of the assured, and the household expenses were paid principally by his mother, who took boarders. The assured paid no board before May, 1876; from that time until October, 1880, he paid \$3 per week to his mother, and after October, 1880, until his death, he paid her \$8 per week. From the time of his marriage, on February 26, 1880, until his death, his wife lived with him at his parents, and assisted in the affairs of the house, and lived as one of the family. The first policy was obtained after consultation between the assured and the other members of the family, with the intention of giving his mother the benefit thereof, he at that time being unmarried.

It was agreed that any objection that this action should be brought in the name of the administratrix of Franklin A. Pingrey, and not in the name of this plaintiff, is waived, and if an action would lie in any name for the benefit of this plaintiff, she shall have judgment in this action.

The court held that the action by Cara L. Pingrey could not be maintained, and ordered judgment for defendant therein. In the action by Elizabeth H. Pingrey judgment was ordered for plaintiff for \$3,569.70. Cara L. Pingrey and the defendant appealed to this court.

Mr. Henry G. Nichols, for Cara L. Pingrey, appellant:

The questions are: Was the surrender of the first policy valid, leaving the company liable only on the second? If not, is the company liable upon both policies?

A policy of insurance is a contract between the assured and the insurer, and is to be considered and treated as such. In the case under consideration the contract is in terms an agreement "with the assured, his executors, administrators, and assigns."

Tripp v. Vermont Life Ins. Co. 55 Vt. 100.

In the case at bar, the contract was, in the first instance, for the payment of the sum to the assured. The consideration was to move from him, and he was to have the benefit of the promise. Only in a certain contingency was the company to pay the amount to his mother. This plainly gave her no legal right against the company. She could not sue upon the contract.

Mollen v. Whipple, 1 Gray, 817; *Exchange Bank v. Rice*, 107 Mass. 37; *Tweedle v. Atkin-*

son, 1 Best & S. 398; *Bailey v. New England Mut. L. Ins. Co.* 114 Mass. 177; *Burroughs v. State Mut. L. Assur. Co.* 97 Mass. 359.

Nor will it be contended that, had the son paid sufficient premiums to make the policy payable at once to him, and had the company so paid it, the mother would have had any claim upon the fund. It is therefore clear that the mother had no vested interest, and it is submitted that it was a mere possibility of interest, liable to be defeated by any modification or change in the contract that the parties thereto might agree upon. The contract was between the company and the assured, and they alone had any legal right under it; and they had the right to annul, modify, or change the contract as they saw fit. That this is the true view of the nature of a policy of insurance is maintained in the well-considered case of *Johnson v. Van Epps*, 14 Bradw. 201; aff'd, 110 Ill. 551, and also by—

Hencken v. U. S. L. Ins. Co. 11 Daly, 282; *Clark v. Durand*, 12 Wis. 248; *Kerman v. Howard*, 23 Wis. 108; *Foster v. Gile*, 50 Wis. 608; *Gamb v. Covenant Mut. L. Ins. Co.* 50 Mo. 44; *Garner v. Germania Life Ins. Co.* 33 Alb. L. J. 91.

It should be noted that this is a policy payable directly to the assured; and the other beneficiary named is made such upon the happening of a certain contingency; until the happening of which the assured had the whole vested right therein; and before such contingency happened, he, with the consent of the insurer, the only other party to the contract, had varied and changed, if not wholly abrogated, the contract under which the mother claims.

Johnson v. Van Epps, *supra*; *Swift v. Mutual Aid Assn.* 96 Ill. 303.

It is further contended by us that the cases which will probably be relied upon by counsel for the mother are not really authorities against the view we now maintain, because:

(a) No case that we have been able to find holds that, where the policy is payable directly to the assured during his lifetime, upon the payment of a certain sum by him, and only to the third party upon a contingency,—in other words, where the policy is what is known as an endowment policy,—the assured cannot, with the assent of the insurer, vary or modify the policy, or surrender it and take out a new policy in place thereof. Such a doctrine would be, we submit, contrary to the well-established principles of the law of contracts.

(b) We believe that all the cases where the courts have held that, by the issuing of the policy, a person therein named—other than the assured—as the payee in case of death of the assured acquires an indefeasible right, with which the assured and insurer can in no way thereafter interfere, can be divided into two classes: (1) those which are governed by statutory provisions; (2) those where the courts have not carefully considered the real nature of the rights created by a policy of insurance, and have endeavored to make the company a sort of trustee for the benefit of such third party, and have relied upon the cases decided by virtue of some statutory provisions, or where delivery of the policy was made to the beneficiary, which clearly should have been distinguished.

1. Under the first class are to be put such cases as *Timayenis v. Union Mut. Ins. Co.* 21 Fed. Rep. 223; and the Connecticut case of *Chapin v. Fellowes*, 36 Conn. 132, which was shortly afterward followed by the same court in *Lemon v. Phoenix Mut. L. Ins. Co.* 38 Conn. 294.

2. In the second class of cases above mentioned may be placed the cases already cited from Connecticut, *supra*, and the case of *Landrum v. Knowles*, 22 N. J. Eq. 594, where the court seemed to go upon the theory of an executed gift or trust.

It is submitted that there is nothing in the nature of a trust in a policy of insurance as such. It is purely of a contractual nature, a promise to pay a certain sum of money in consideration of the performance by the assured of the conditions of the contract. Clearly, no trust exists until the policy becomes payable. There is no subject-matter of a trust, and no trustee.

In all the following cases it was held, even where the policy was payable directly to the third person, and not in the first instance to the assured, that, by agreement between the assured and the insurer, the policy could be surrendered and canceled, and a new one in favor of a different person issued, without the consent of the person in whose favor the first one ran.

Johnson v. Van Epps, *supra*; *Union Mut. L. Ins. Co. v. Stevens*, 19 Fed. Rep. 671; *Swift v. Benefit Assn.* 96 Ill. 309, 314, and cases in Wisconsin cited *supra*; *Garner v. Germania L. Ins. Co.* 32 Alb. L. J. 91; *Bickerton v. Jaques*, 12 Abb. N. C. 25; *Whitehead v. New York L. Ins. Co.* 3 Cent. Rep. 34.

A fortiori, in the case of an endowment policy, the parties to the contract have a right to alter, modify, or annul the contract.

In *Pilcher v. New York L. Ins. Co.* 38 La. Ann. 322, the company was held to be liable upon both policies upon the ground of estoppel; and in some cases it has been held that the amount of the policy should be divided among the contestants, but upon just what basis the cases do not agree.

Landrum v. Knowles, *Lemon v. Phoenix Mut. L. Ins. Co.* *supra*.

It will therefore be seen that the courts before whom has come the question of the rights of parties under policies where there has been an assignment, or a surrender of the original and an issue of a new policy, have not been governed by any definite rule or doctrine, which, it is submitted, arises from the fact that the true nature of the doctrine of the rights of the parties interested has not been carefully considered by such courts, as well as from a consideration of the special facts in each case.

Union Mut. L. Ins. Co. v. Stevens, 19 Feb. Rep. 671.

If the principles of contracts be applied to the contract of insurance, as we contend that they should be, the question is divested of all difficulty, and the rights of the parties can be easily determined. A policy of insurance is nothing more or less than a contract, both in terms and effect. In the case at bar it is not, in the first instance, even for the benefit of a third party. But a contract for the benefit of

a third party cannot be enforced by such third party.

1 Hill. Cont. 427.

As has been said by an eminent writer on the law of contracts: "In truth a binding promise to A to pay \$100 to B confers no right upon B in law or equity. It confers an authority upon the promisor to pay the money to B, but that authority may be revoked by A at any moment."

Langd. Cas. Cont. 2d ed. pt. II.; Summary, p. 1021, § 62.

This principle is now well settled by authority; and that it is applicable to the policies of insurance seems plain upon principle, and is supported by very recent cases upon this subject, namely,—

Johnson v. Van Epps, 14 Bradw. 201, affirmed, 110 Ill. 551; *Tripp v. Vermont*, 55 Vt. 100; *Swift v. Benefit Assn.* 96 Ill. 309, 314; *Hencken v. U. S. L. Ins. Co.* 11 Daly, 282.

Although no case directly in point has been decided by this court, nevertheless the following cases seem to support the views contended for by us:

Wason v. Colburn, 99 Mass. 342. See also *Brigham v. Home L. Ins. Co.* 181 Mass. 319; *Burroughs v. State Mut. L. Assur. Co.* 97 Mass. 359; May Ins. 8d ed. § 390, and cases cited.

In the case at bar, the assured not only had the right to, but did, retain possession and control of the original policy up to the time of its surrender. The circumstance was admitted to be sufficient to give him the right to surrender it for cancellation and take out another with a different beneficiary, in—

Lemon v. Phoenix Mut. L. Ins. Co. 38 Conn. 294. See also *Palmer v. Merrill*, 6 Cush. 292.

Nor is this case affected by the statutes of Massachusetts or Vermont as to policies for the benefit of married women. The statutes being substantially the same in both States, it becomes immaterial to consider which, if either, should be looked to in construing the rights under this contract. But it is evident that both statutes were intended to cover only the case of an insurance for the benefit of a married woman upon the life of her husband. The purpose of the statutes is not to determine what the married woman is entitled to, but to make sure that what she is found to be entitled to shall go to her as her separate property, free from her husband and his creditors.

Vt. Rev. Stat. § 2343; Mass. Pub. Stat. chap. 119, § 167; *Hencken v. U. S. L. Ins. Co.* 11 Daly, 282.

And as has already been argued, the policy under consideration was not expressed to be for the benefit of a married woman,—at all events, except upon the happening of a contingency which had not happened at the time of the surrender of the first policy.

The insured paid the premiums. The fact that his mother and sister let him have the money to pay the first premium does not alter the case. It gives the mother no more right than the sister. The voluntary payment of premiums gives the payer no interest in the policy.

Hovess v. Prudential Ins. Co. 47 L. T. 183.

Nor is the mother helped by the fact that, at the time of taking out a policy, the son intended it to be for the benefit of his mother

in case of his death before the necessary amount to make the policy payable had been paid. By the terms of the policy, as well as by retaining possession and control of the policy, the assured had a right to change his intention, and cancel, alter, or modify the contract, with the assent of the insurer, and also to change and revoke his original intention.

Johnson v. Van Epps, 14 Bradw. 201, 110 Ill. 551; *Union Mut. L. Ins. Co. v. Stevens*, 19 Fed. Rep. 671.

The assured could, by the terms of the contract, after the payment of two premiums, surrender it and take a paid-up policy; or sell the policy to the company for its equitable value; or he could cease to pay premiums and allow the policy to be forfeited, in part at least. Can any sound reason be given why he could not equally well surrender it and take in exchange for it, not money or a paid-up policy, but what he presumably preferred, a policy under which rights would accrue to his wife, for whom it was then his duty to provide. His circumstances having changed, his intention changed; and it is submitted that he had a right to do just what he did do, and that the wife is entitled to the whole of the amount of the policy.

But it is not necessary to destroy the validity of the first policy in order to establish that of the second. The company may well be held liable upon both policies.

Pilcher v. New York L. Ins. Co. 83 La. Ann. 322.

The company, by its voluntary act, induced the assured to pay sufficient consideration for the second policy for the benefit of his wife, for whom he evidently wished and intended to provide. There can be no doubt that the second policy rests upon sufficient consideration. It would certainly be highly inequitable and contrary to all principles of contract to allow the company to escape liability upon a contract induced by its own act, and for which it received the full consideration demanded, which, but for such act and inducement of the company, the assured would not have paid. It is immaterial that the company, by reason of ignorance or carelessness, failed to cancel another contract which it intended to cancel at the time it assumed the new liability. *Ignorantia legis neminem excusat.*

Messrs. Perry & Creech, for defendant, appellant:

The question raised by these two cases is, To which one of these plaintiffs shall the amount of this insurance be paid? To one or the other of them defendant admits its liability. It cannot be liable to both.

There is no double liability, and only one insurance, whoever may be found entitled to it.

Lemon v. Phoenix Mut. L. Ins. Co. 38 Conn. 294; *Chapin v. Fellowes*, 36 Conn. 132; *Barry v. Brune*, 71 N. Y. 261; *Dutton v. Willner*, 52 N. Y. 812; *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 198; *Pilcher v. New York Ins. Co.* 10 Ins. L. J. 312.

Mr. Richard Stone, for Elizabeth H. Pingrey, appellee:

This case turns on the validity of the surrender of the policy declared on in this action. The policy contains two alternative promises on the part of defendant. The first

contingency never happened, and therefore it is unnecessary to consider it.

See the law as stated in *Billis*, Life Ins. 2d ed. 554, § 337; *May*, Ins. 2d ed. 589.

The doctrine, that, with the execution and delivery of the contract, the beneficiary's interest becomes vested and passes beyond the control of the insured, is supported by the great weight of authority.

Chapin v. Fellowes, 36 Conn. 132; *Conn. Mut. L. Ins. Co. v. Burroughs*, 34 Conn. 305; *Landrum v. Knowles*, 22 N. J. Eq. 594; *Conn. Mut. L. Ins. Co. v. Baldwin*, 1 New Eng. Rep. 126; *Glantz v. Gloeckler*, 104 Ill. 573; *Norwood v. Guerdon*, 60 Ill. 253; *Drake v. Stone*, 58 Ala. 183; *Pilcher v. New York L. Ins. Co.* 83 La. Ann. 322; *Wilmasser v. Continental L. Ins. Co.* 23 N. W. Rep. (Iowa) 903; *Estate of Malone*, 9 Ins. L. J. (Pa.) 787; *Pence v. Makepeace*, 65 Ind. 345; *Wilburn v. Wilburn*, 83 Id. 55; *Ins. Co. v. Burke*, 12 Ins. L. J. (Va.) 337; *Ricker v. Charter Oak Ins. Co.* 27 Minn. 192; *Weston v. Richardson*, 47 L. T. N. S. 514; *Manhattan L. Ins. Co. v. Smith*, 15 Ins. L. J. (Ohio) 334; *Nat. L. Ins. Co. v. Haley*, 15 Ins. L. J. (Me.) 611.

The policy which was surrendered is within the letter of the General Statutes which were in force when it was issued.

Gen. Stat., chap. 58, § 63.

If the case is governed by statute, the surrender was valid.

Swan v. Snow, 11 Allen, 224; *Burroughs v. State Mut. L. Assur. Co.* 97 Mass. 359; *Gould v. Emerson*, 99 Mass. 154; *Knickerbocker L. Ins. Co. v. Weitz*, Id. 157; *Unity Mut. L. Assur. Assn. v. Dugan*, 118 Mass. 219; *Ruppert v. Union Mut. Ins. Co.* 7 Robertson (N. Y. Super. Ct.) 155; *Fraternal Mut. L. Ins. Co. v. Applegate*, 7 Ohio St. 292; *Barry v. Brune*, 71 N. Y. 261; *Timayenis v. Union Mut. L. Ins. Co.*, 22 Blatchf. C. C. 403.

The statutes of Vermont relating to this subject are substantially the same as those of Massachusetts.

Gen. Stat. chap. 71, § 19-25.

It is not essential to the mother's right that the policy should have been delivered to her.

See *Ricker v. Charter Oak L. Ins. Co.* and *Weston v. Richardson*, *supra*. See also *Landrum v. Knowles*, *supra*.

If a valid trust had been created in favor of Elizabeth H. Pingrey, then defendant had notice of the trust, and was not released, by the surrender, from its liability to account for her benefit.

Loring v. Salisbury Mill, 125 Mass. 138, 151. *Perry*, Tr. § 242.

A trust for the benefit of the plaintiff arose from the fact that the first premium was paid with her money.

Farrelly v. Ladd, 10 Allen, 127.

A trust for the mother would also have been created upon the agreed facts, if the son had paid all the premiums with his own money.

Richards v. Delbridge, L. R. 18 Eq. 11; *Warriner v. Rogers*, L. R. 16 Eq. 340. *Perry*, Tr. §§ 98-99.

The intention to make a gift or create a trust is a fact to be established by all the evidence.

Gerrish v. New Bedford Sav. Inst. 128 Mass.

139; *Eastman v. Woronoco Sav. Bank*, 186 Mass. 308; *Brabrook v. Boston Five Cent Sav. Bank*, 104 Mass. 228; *Clark v. Clark*, 108 Mass. 622; *Sherman v. New Bedford Five Cent Sav. Bank*, 138 Mass. 581.

The form of the action is immaterial.

C. Allen, J., delivered the opinion of the court:

The objection that the actions ought to have been brought in the name of the legal representatives of the assured, if valid, is waived. *Bailey v. New England Mut. L. Ins. Co.* 114 Mass. 177.

Under the agreed facts, it does not appear that there is any statute of Vermont applicable to the case. The question presented, therefore, is to be decided on general principles, and is an open one in this Commonwealth. *Gould v. Emerson*, 99 Mass. 154.

It appears that, before the first policy was issued, there was an understanding between the assured and his mother and sister that it should be taken out for the benefit of his mother. In pursuance of this understanding the mother and sister paid the first premium, or contributed money towards it. Afterwards he told his mother that he had taken out the policy, and one day showed it to her. There appears to have been a full understanding between him and his mother that the policy was to be taken out for her benefit, and afterwards that it had been so done. In point of fact it was made payable to her, and this was done with the intention of giving to her the benefit of it. This constituted a valid settlement in her favor. Nothing remained to be done by him to complete it. He might indeed afterwards fail to pay the annual premiums. This, however, does not prevent it from being a good trust. An unrevoked trust is valid, even though there is an express power of revocation. *Stone v. Hackett*, 12 Gray, 227. In this case the assured reserved to himself no power of revocation or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give to him an implied power of revocation. His mother might herself continue the payment of the premiums. Moreover, by the terms of the policy, after payment of two full annual premiums, it would not lapse, and certain valuable rights would still exist under it. Under these circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority. *Chapin v. Fellowes*, 86 Conn. 182; *Lemon v. Phoenix Mut. L. Ins. Co.* 88 Conn. 204; *Nat. L. Ins. Co. v. Haley* (1886, 15 Ins. L. J. 341), 2 New Eng. Rep. 429; *Barry v. Brune*, 71 N. Y. 261; *Landrum v. Knowles*, 22 N. J. Eq. 341; *Manhattan L. Ins. Co. v. Smith* (Ohio), 3 West. Rep. 116, 15 Ins. L. J. 384; *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 193; *Wilburn v. Wilburn*, 83 Ind. 55; *Weston v. Richardson*, 47 L. T. N. S. 514.

It is urged in behalf of the widow of the assured that the above rule should not be applied to the case of an endowment policy like the present, where the whole sum covered by the

policy was to be paid to the assured himself as soon as the premiums and other payments should amount to that sum. But the assured died before the premiums amounted to that sum, and no other payments were made upon the policy; and therefore the amount of the policy did not become payable to him, but by its terms was payable to his mother. The fact that it might have become payable to him in a certain contingency which did not happen is immaterial. In *Lemon v. Phoenix L. Ins. Co.*, *supra*, the policy was an endowment policy; but this fact was not dwelt upon in the decision, or, so far as appears, in the argument.

It is further suggested that the defendants have incurred a double liability. But the second policy contains a statement that it is a continuation of the original policy. There is nothing to show any estoppel in favor of the widow. She paid nothing towards the premium, and in no way has altered her position in consequence of the issue of the second policy. Indeed, it does not appear that she was aware of its existence. Neither the assured nor the defendants intended to create a double liability. They undertook to do what they could not accomplish; namely, to transfer the benefit from the mother to the wife of the assured. There being no estoppel, the wife gained no rights by reason of what was done.

Judgments affirmed.

Miriam P. HAMLEN *et al.*

v.

Honora WERNER *et al.*

The city of Boston caused a tract of land on Tremont Street, of which it was the owner, to be divided into eleven building lots, and a plat was made and duly recorded, and on October 25, 1860, the city conveyed lot No. 2, by a deed subject to the following conditions, among others: "2. The front line of the building which may be erected on the said lot shall be placed on a line parallel with, and ten feet back from, said Tremont Street. * * * 5. No building which may be erected on said lot shall be less than three stories in height, * * * or be used or occupied for any other purpose or in any other way than as a dwelling-house, for a term of twenty years from the 1st day of June, 1860." This lot was subsequently conveyed, subject to these conditions, to the defendants. The remaining lots were conveyed by the city to other purchasers, subject to the same conditions. These conditions and restrictions were inserted by the city in said deeds, to establish a general plan of building upon all the lots, for the general improvement of the neighborhood, and for the benefit of all purchasers of said lots who should derive title to the same through said city. The houses originally built upon all of said lots were in accordance with the conditions and restrictions; and the front line

of each of said houses was placed on a line parallel with, and ten feet back from, said Tremont Street. The plaintiff, one of the owners of said lots, alleged in his bill that the defendants were erecting a wooden addition to the house theretofore built on said lot No. 2, resting upon the ground, fifteen feet wide, and fifteen feet high, extending from the front line of the house theretofore built on said lot No. 2 to the line of said Tremont Street, which was to be used, in connection with the lower story of said house as originally built, as a store. As soon as plaintiff knew that the work was in progress, he notified the defendants that he forbade them to erect such structure, and requested them to remove it. On the hearing a decree was rendered, requiring the defendants to remove such portion of said wooden addition as is within ten feet of said Tremont Street. On exceptions the condition that the building erected should be placed on a line parallel with, and ten feet from Tremont Street, was held a valid restriction which the plaintiff can enforce, and the words "for the term of twenty years," in the fifth condition, are limited to that, and do not apply to the former condition.

(Suffolk—Filed May 7, 1887.)

ON report. Decree affirmed.

Bill in equity, filed August 20, 1885, by Miriam P. Hamlen and others, infants, by their next friend, against Honora Werner and Charles O. Hunter, to restrain the erection of an addition to a house on a public street in the city of Boston, alleged to be in violation of a building condition contained in a deed of said premises from the city of Boston. The answer filed by defendants alleged that the restrictions or conditions set forth in the deed or conveyance from the city were limited to a period of twenty years from the year 1860; and that said period had long since expired. The case was heard in the superior court, before Staples, J., on the bill and answer and agreed facts, substantially as follows:

In 1860 the city of Boston, being the owner of a tract of land on Tremont Street, caused it to be divided into eleven building lots; and a plan thereof was made and duly recorded. On October 25, 1860, the city conveyed lot No. 2 on said plan to Lorenzo A. Hitchcock and Samuel Stubbs, by a deed subject to the following conditions and restrictions, viz.:

"1. All taxes and assessments which have been laid or assessed upon the said premises previous to execution of this conveyance shall be paid by the said Hitchcock and Stubbs, their heirs and assigns.

"2. The front line of the building which may be erected on the said lot shall be placed on a line parallel with, and ten feet back from, said Tremont Street.

"3. The building which may be erected on the said lot shall be of a width equal to the width of the front of the said lot.

"4. No dwelling-house or other building, except the necessary outbuildings, shall be erected or placed on the rear of said lot.

"5. No building which may be erected on said lot shall be less than three stories in height, exclusive of the basement and attic, or have an L of more than three stories in height; nor shall said building or said L have exterior walls of any other material than brick, stone, or iron, or be used or occupied for any other purpose or in any other way than as a dwelling-house, for the term of twenty years from the 1st day of June, 1860."

The title to this lot, subject to said conditions and restrictions, by several mesne conveyances became vested in the defendant Werner, who now owns and by his tenants occupies it.

The city of Boston, on or about October 25, 1860, also conveyed lot No. 4 on said plan to said Hitchcock and Stubbs, by a deed containing conditions and restrictions precisely similar to those hereinbefore set forth.

The title to this lot, by several mesne conveyances, subject to said conditions and restrictions, became vested in the plaintiffs.

The city of Boston has at divers times before the filing of plaintiffs' bill conveyed away all the remaining lots shown on said plan,—thirteen in number,—and has, in its deeds of said lots, inserted conditions and restrictions exactly similar to the conditions and restrictions above set forth. Said conditions and restrictions were inserted by said city in said deeds to establish a general plan of building upon all the lots shown on said plan, for the general improvement of the neighborhood, and for the benefit of all purchasers of said lots who should derive title to the same through the city. The houses originally built upon all of said lots, after they were conveyed by said city, were all built in accordance with said conditions and restrictions; and the front line of each of said houses was placed on a line parallel with, and ten feet back from, said Tremont Street, leaving an open space ten feet in depth between each of said houses and said street.

At the time of filing of plaintiffs' bill, the defendants were erecting a wooden addition to the house heretofore built on said lot No. 2, and since the filing of the bill they have completed the erection of said addition. As soon as plaintiff knew that the work was in progress, he notified the defendants that he forbade them to erect said structure, and requested them to remove it.

Said addition rests upon the ground, is fifteen feet wide, and fifteen feet high, and extends from the front line of the house heretofore built on said lot No. 2, to the line of said Tremont Street, and is used, in connection with the lower story of said house as originally built, as a store.

The court, after hearing, entered a decree ordering said addition to be removed within thirty days, and reported the case to this court.

Messrs. Thomas J. Gargan and P. M. Keating, for defendants:

I. A deed should be so construed as best to give effect to the lawful intent of the parties to the deed.

Pray v. Pierce, 7 Mass. 381; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159, 167.

In ascertaining the intent of the parties, all parts of the instrument should be considered, and the deed should be so interpreted that

every clause shall have full operation and effect, if it can be done consistently with the rules of law and the manifest intent of the parties.

Jamaica Pond Aqueduct Corp. v. Chandler, supra.

A fair construction of the five restrictions contained in the defendant's (Werner's) deed, and a careful consideration of the last clause in the fifth of said restrictions, shows that the intent of the parties to the original deed, dated October 25, 1860, was that the second of said restrictions should cease to have force after the expiration of twenty years from the 1st day of June, 1860. It is reasonable to assume that the parties to the deed of 1860 had in mind the probability that the land in question would some time be required for business purposes, and, with that in view, limited the time during which said restrictions would be valid to twenty years from the 1st day of June, 1860. If such was the purpose for which said parties placed a limit of twenty years upon said restrictions, can it be said that said parties intended that, after the expiration of twenty years from June 1, 1860, all the premises might be used for business or trade, except the space of ten feet back from Tremont Street, mentioned in the second of said restrictions, which is the most valuable part of said premises for business purposes? We are not ignorant of the decision in *Keeney v. Ayling*, 126 Mass. 404; but we believe that that decision does not go so far as to hold that after the expiration of twenty years from the 1st day of June, 1860, no structure can be erected in said space of ten feet back from said Tremont Street. We therefore respectfully submit that the second of said restrictions contained in defendant's (Werner's) deed cannot now be enforced against the defendant.

II. Even assuming, for the purpose of argument, that said restrictions do not cease to be of force after the expiration of twenty years from the 1st day of June, 1860, they are against the policy of the law, and therefore void. It is a total and perpetual prohibition of carrying on any mechanical, manufacturing, or mercantile business upon the granted premises. If we assume that said restrictions are not limited in duration, they purport to exclude everybody, at all times, from carrying on any kind of trade or business on any land within ten feet back from said Tremont Street, and lying between Northampton and Camden streets. They discourage industry and enterprise, are in restraint of trade, and therefore void.

Pierce v. Fuller, 8 Mass. 223; *Alger v. Thacher*, 19 Pick. 51; *Taylor v. Blanchard*, 13 Allen, 370; *Hinde v. Gray*, 1 Man. & G. 195; 1 Scott, N. R. 123; 4 Jur. 392; *Green v. Price*, 13 M. & W. 695; 9 Jur. 857; 14 L. J. Exch. 105.

We do not deny that every owner of real property has the right so to deal with it as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the enjoyment of the land which he retains. But such restriction must be exercised reason-

ably, and with a due regard to public policy, and without creating any unlawful restraint of trade.

Homer v. Ashford, 3 Bing. 322.

III. If we assume that the limit of time stated in the fifth of said restrictions has no connection with the second of said restrictions, the defendant Werner will be permanently restrained from using said space of ten feet back from said Tremont Street, for any other purpose than as a kind of lawn. Thus the second of said restrictions becomes a perpetual burden upon the land, and upon subsequent land-owners. The law does not favor restrictions of any kind upon the use of land, and, least of all, such perpetual restrictions.

Hubbell v. Warren, 8 Allen, 173.

Said restrictions, even if not actually void, are so unreasonable and so far against public policy that they should not be enforced in a court of equity.

1 Story, Eq. p. 769.

Mr. C. W. Turner, for plaintiffs:

A right to have the restrictions complied with was acquired by each grantee of one of said lots from said city, in the nature of an easement which he or his successors in title could enforce in equity against the grantee of any other one of said lots, or his successors in title.

Sharp v. Ropes, 110 Mass. 385; *Whitney v. Union R. Co.* 11 Gray, 865; *Parker v. Nightingale*, 6 Allen, 341; *Linzee v. Mixer*, 101 Mass. 530.

In *Sanborn v. Rice*, 129 Mass. 395, a precisely similar restriction was construed, and defendant ordered to remove an addition which he had made to his house, which brought its front line nearer to the street than it was as originally constructed. Therefore the restriction in this case must relate to any addition which defendants may make to the building originally erected, and is not limited in its operation to the placing the front line of said building, when first built, at a proper distance from Tremont Street.

It is no objection to the restriction which plaintiffs seek to enforce that it creates a perpetual servitude upon defendant's property, and prevents forever the use of a part of his land for building purposes. Rights of way, rights to light and air, and rights to have land remain unbuild upon, unlimited in time, but which touch or concern the dominant estate, are among the most common forms of easements created by restrictions in deeds, and have often been before the courts.

Payson v. Burnham, 141 Mass. 547, 2 New Eng. Rep. 687; *Brooks v. Reynolds*, 106 Mass. 81; *Norcross v. James*, 140 Mass. 188, 1 New Eng. Rep. 327; *Sanborn v. Rice*, 129 Mass. 395.

The addition built by defendant is in violation of restriction No. 2 in the deed of defendant's lot.

Bagnall v. Davies, 140 Mass. 77, 1 New Eng. Rep. 33; *Sanborn v. Rice*, 129 Mass. 387; *Manners v. Johnson*, 1 Ch. Div. 673; *Linzee v. Mixer*, 101 Mass. 526.

W. Allen, J., delivered the opinion of the court:

The condition that "the front line of the

building which may be erected on the said lot shall be placed on a line parallel with, and ten feet from, the said Tremont Street" is a valid restriction, which the plaintiff can enforce. *Sanborn v. Rice*, 129 Mass. 395; *Bagnall v. Davies*, 140 Mass. 76, 1 New Eng. Rep. 33; *Linzee v. Mixer*, 101 Mass. 573; *Peck v. Conway*, 119 Mass. 546.

The words "for the term of twenty years from the 1st day of June, 1860," in the fifth condition, are limited to that, and do not apply to the second, which the plaintiff relies upon. *Keating v. Ayling*, 126 Mass. 404.

There can be no question that the defendants' building is prohibited by the restriction.

Decree affirmed.

James GULLINE

v.

CITY OF LOWELL.*

Where a boy seven years of age was passing, with his father and younger sister, over a bridge in the city of Lowell, across the Merrimack River, about eight o'clock in the evening, and, upon being told by the father to cross to his other side and take hold of the little girl's hand, he said, "I will, father; but I will clip this post first;" meaning thereby that he would hug the post, which was latticed, and one boy had been accustomed to climb; and, his father making no objection, he attempted to do so, but slipped through a hole in the bridge, about eleven inches square, and was drowned; and it appeared that the city had reasonable notice of the defect in the bridge, and that the hole existed where braces of the bridge went down between the carriage-way and the part of the bridge used by foot-passengers,—in an action by the father, as administrator of the estate of the deceased, to recover damages under the provisions of Pub. Stat. chap. 52, § 15, it was held that the boy was a traveler, and did not cease to be one when he stepped aside for an instant to clasp, in play, the post in the highway and almost in his path; and that the court committed no error in refusing to rule that there was no evidence of due care on the part of the plaintiff or of his intestate.

(Middlesex—Filed May 10, 1887.)

ON report. *Judgment for plaintiff on the finding.*

Action of tort brought by James Gulline, as administrator of the estate of his minor son, Robert Gulline, to recover damages under the provisions of Pub. Stat. chap. 52, § 17, by reason of the death by drowning of said Robert Gulline on June 7, 1884, occasioned by an alleged defect in a bridge known as Central Bridge, over the Merrimack River, in Lowell,

tried in the superior court, before Blodgett, J., without a jury.

The court found the following facts: That there is in the city of Lowell a bridge across Merrimack River known as Central Bridge, which the defendant is by law bound to keep in repair; that there was a defect or want of repair in said bridge, as hereinafter set forth, and that, by reason of said defect or want of repair, the life of said Robert Gulline was lost on June 7, 1884; that the defendant had previous reasonable notice of the said defect or want of repair; that, within the time required by law, due notice in writing was given to defendant of the time, place, and cause of said loss of life, in which notice damages for said loss of life were claimed of defendant; that said bridge is built of iron, 468 feet in length, with a roadway in the centre thereof 32 feet 9 inches wide, and a footway on each side 9 feet 4 inches wide, and 6 inches higher than the level of the roadway; that upon the outside, on both sides of the bridge, there is an iron fence about 5 feet high; that along the whole length of the bridge, in the sidewalks on either side, and within a few inches of the roadway, there are latticed iron columns about 10 inches square, 30 feet in height, and placed at a distance of about 12 feet apart; from the top of each column to the bottom of the next column on the same side of the bridge there are parallel diagonal iron braces about $\frac{1}{4}$ of an inch in thickness and 5 inches wide and 13 inches apart; that these braces run through the planking of the sidewalk and connect with the columns under the same; other than these posts or braces there is no obstruction between the sidewalk and the roadway; that the flooring of the footways was of two-inch Georgia pine planking; that the space between the separate pairs of diagonal braces, placed at regular distances apart, was large enough for a horse and carriage to have been driven from the roadway on to the footway; that when the plank sidewalk was laid, where these braces went through the same, slots were cut into one side of the planks so that the same could be put down around the said braces, and that upon three sides between the two parallel diagonals comprising one set of braces there was nothing to support the planking; that, at a distance of 7 inches southerly from one of these latticed iron posts which is herein referred to, and on the west side of the bridge where two parallel diagonal braces (which were $11\frac{1}{4}$ inches apart from each other) went through the planking to connect with the latticed iron pillar, by bolts underneath the planking, there was a hole in the planking of the bridge, 11 inches square, between the braces, which had been made by the breaking in of the planking; that through this hole the said Robert fell into the river below and was drowned; that said hole constituted a defect or want of repair, of which the defendant had reasonable notice, as aforesaid; and that this hole had existed at least for several weeks prior to the accident; and that, in respect of this hole, the bridge was faulty in construction. That the plaintiff's intestate, who was seven years of age, and a bright boy for his years, resided with his father in a part of Lowell called Centralville, which was on the north side of the river, the city

*See *Oil City & Petroleum Bridge Co. v. Jackson* (Pa.), 5 Cent. Rep. 324; and note to *Chrystal v. Troy & Boston R. R. Co.* (N. Y.), 7 Cent. Rep. 245, in reference to negligence in the case of children.

proper being situated on the south side, and the plaintiff had frequently passed over the bridge; that there was nothing to intercept the view of this hole except as herein stated, but neither the father, mother, nor the son knew of any hole or defect in the bridge.

The defendant claimed that the plaintiff's evidence was not sufficient in law to support the burden of proving due care on the part of the plaintiff's intestate, or on the part of those in charge of him.

Upon the question of proving due care, the plaintiff introduced the following evidence, which was all the evidence introduced by the plaintiff on that point:

James Gulline, the plaintiff, testified as follows. On June 7, 1884, about eight o'clock in the evening, I was going home to Centralville, which is on the north side of the river, with my wife, my little girl three years old, and my son Robert, who was seven years old; the little girl began to cry just before we got on the bridge, and wanted her mother to carry her. I said to the mother, "You go on the other side of the bridge, and she will walk with me well enough." The mother then crossed to the east side of the bridge, and left me with the two children, the little boy on the right hand and the little girl on the left, on the sidewalk on the west side. Going over the bridge the little girl began to cry, and I said, "Robert, go around the other side and take hold of the little girl's hand;" and he said, "I will, father; but I will clip this post first (and that is hugging)." (The post indicated was the one near the hole above described). And he did go, and I walked directly on, and looked around after going three or four yards, and there was no boy to be seen. I went directly home and found the boy was not there, and after some conversation with my wife I went to look where I left the boy, and saw the hole.

Upon cross-examination Mr. Gulline testified: I have lived in Centralville for twelve months. The boy lived with me all the time. I crossed the bridge every day to work. Boy left me when I was about fourteen yards on the bridge. He had hold of my right hand. Said he wanted to "clip the post" (or throw his arms around it—call it hugging). The post is a latticed post where the boys had been accustomed to climb. I was nearly opposite the post when he spoke of clipping it and left my side. I didn't see him any more. I did not glance about, but went three or four yards and looked around. I made no inquiry about the boy's disappearance. Saw no opening at that time. Went directly home. Arrived there between nine and ten o'clock. Waited some twenty minutes or more for my wife. I stayed in the house a half hour, and then went to the hole and then to the police station. At the entrance to the bridge there is an electric light, and another electric light a short distance from, and nearly over, this hole.

The father made no objection to the boy "clipping" the post, though he knew the boy intended so to do. Between the time when the boy let go the father's hand and the time when the father looked around, the boy went through the hole in the bridge.

Upon this evidence, and upon the facts found by the court as hereinbefore stated, the 2 Mass.

defendant asked the court to rule that the said evidence of plaintiff was insufficient in law to show the due care required to maintain the action, and that there was no evidence of due care on the part of the plaintiff, or his intestate, or those in charge of said intestate. The court declined so to rule, and the defendant duly excepted.

The court found for the plaintiff, and assessed damages in the sum of \$500, and, at the request of the defendant, reports the case for the determination of the supreme judicial court. If, as matter of law, the court should have ruled as requested by the defendant, judgment is to be entered for the defendant; otherwise, judgment for the plaintiff on the finding.

Mr. William F. Courtney, for defendant:

I. It appears that in the plank walk, and between the driveway for carriages and the part of said walk used by foot passengers on either side of the bridge, there is a space occupied by iron braces to sustain the bridge, and not used, and clearly not intended, for passengers; that although this space is nearly all covered with boards or planks, yet there was a hole where the braces went down, and that the deceased, while amusing himself by climbing up, sliding down, or hugging the post or the braces, fell through the hole and was drowned, as he might have been had he tried to hang by the outside railing and lost his hold.

II. Travelers are to use due diligence to avoid accidents; and towns are to keep the highways in such condition that travelers using such care may go safely. The safety and convenience required to be secured for the public ways relate only to their use as ways for the purpose of travel thereon.

Howard v. Bridgewater, 16 Pick. 189; *Commonwealth v. Wilmington*, 105 Mass. 599; *Macomber v. Taunton*, 100 Mass. 255.

The plaintiff's intestate was not using the traveled walk at the time of the accident, and was careless and negligent in being where he was at the time.

It is only those who are using the road or walk for legitimate purposes, in the usual and ordinary mode, that can claim indemnity of a town for injuries caused solely by defects in the highway, or by the combined effect of such defects and pure accident.

Richards v. Enfield, 13 Gray, 344; *Commonwealth v. Wilmington*, 105 Mass. 599.

The act of the plaintiff's intestate at the time of the accident was an improper and unauthorized use of the highway, which occasioned or contributed to the accident. He was not using the bridge or way for a purpose for which the city was bound to erect and maintain it. His improper and unauthorized use of the bridge shows that he was not using due care at the time of the accident, and hence cannot recover in this action, even though the bridge was defective.

Stickney v. Salem, 3 Allen, 374.

III. The rule is established that an infant is bound to a degree of care proportioned to its age and discretion merely.

15 Wall. 401 (82 U. S. bk. 21, L. ed. 114); 17 Wall. 657 (84 U. S. bk. 21, L. ed. 745); *Munn v. Reed*, 4 Allen, 481.

Contributory negligence has, however, been attributed to a child of six years.

McMahon v. Northern Cent. R. Co. 39 Md. 438; *Baltimore & O. R. R. Co. v. Schweindling*, 101 Pa. 258; 47 Am. Rep. 706; *Tighe v. Lowell*, 119 Mass. 472.

Playing in the street or highway is contributory negligence on the part of children, which will bar an action.

Stinson v. City of Gardiner, 42 Me. 248; *Tighe v. Lowell*, 119 Mass. 472; *Blodgett v. Boston*, 8 Allen, 237.

IV. An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is confided. That person is keeper and agent for this purpose; and in respect to third persons his act must be deemed that of the infant; his neglect, the infant's neglect. The prevailing doctrine is that where an infant is of such tender years as to be *non sui juris*, the negligence of the parent or one *in loco parentis*, contributing to the injury, is imputable to the child, and will prevent a recovery by such child or its personal representative. This doctrine holds good in Massachusetts.

Hartfield v. Roper, 21 Wend. 615; *Cosgrove v. Ogden*, 49 N. Y. 255; *Ihl v. 42d St. & G. St. R. R. Co.* 47 N. Y. 823; *Lynch v. Smith*, 104 Mass. 52; *Gibbons v. Williams*, 185 Mass. 333; *Wright v. Malden & M. R. R. Co.* 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401; *Zoebsch v. Tarbell*, 10 Allen, 385; *Meeks v. S. P. R. R. Co.* 52 Cal. 602; 88 Ill. 441; 27 Ind. 513; 46 Ind. 25; 38 N. Y. 445.

V. This case shows that the child stopped on the bridge, and went outside of the ordinary traveled part thereof to play, and, further, that this was done with the consent and approval of the parent. Defendant contends that this was negligence, both in the parent and child, which precludes recovery in this action.

In order to sustain an action for the negligence of the defendant, whereby the plaintiff is alleged to have sustained injury, it must appear that the injury did not occur from any want of ordinary care on the part of the plaintiff, either in whole or in part.

Robinson v. Cone, 22 Vt. 218; *Murphy v. Deane*, 101 Mass. 455.

Where an injury has occurred to a child, and there is no evidence that the child was using care, he cannot recover.

Stock v. Wood, 136 Mass. 353.

The plaintiff cannot recover if all the evidence in the case is equally consistent with either care or negligence on his part.

Crafts v. Boston, 109 Mass. 519; *Smith v. First Nat. Bank of Westfield*, 99 Mass. 605.

VI. As the burden of proof is upon the plaintiff to show that he used due care, if the evidence on his part has no tendency to show it, or tends to show that he was careless, it is competent for the court in such a case to direct a verdict for the defendant.

Hackett v. Middlesex Mfg. Co. 101 Mass. 101; *Hinckley v. Cape Cod R. R. Co.* 120 Mass. 257, 262; *Crafts v. Boston*, 109 Mass. 519.

Messrs. D. S. & G. F. Richardson, for plaintiff:

The burden is upon the plaintiff to show that the intestate, at the time of the accident, was exercising due care.

Mayo v. Boston & M. R. R. 104 Mass. 137.

The burden may be sustained by proving

facts and circumstances from which due care may be inferred.

Cook v. Metropolitan R. R. Co. 98 Mass. 361. *Commonwealth v. Boston & L. R. R.* 126 Mass. 69.

The facts that the accident happened in the night-time and that the hole was in the sidewalk, taken in connection with its location relative to other parts of the bridge, were sufficient to justify a finding that the intestate was in the exercise of due care at the time of the accident; because the defect was such and so situated that it would not be observed by a boy seven years old, exercising that degree of care which the law requires of boys of that age.

Priest v. Nichols, 116 Mass. 401; *Elkins v. Boston & A. R. R.* 115 Mass. 190; *Adams v. Carlisle*, 21 Pick. 146; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282. See also *Smith v. Smith*, 2 Pick. 621; *Butterfield v. Forrester*, 6 East, 43; *Flower v. Adam*, 3 Taunt. 814; *White v. Winnissimmet Co.* 7 Cush. 155; *Holly v. Boston Gas Light Co.* 8 Gray, 133; *Hinckley v. Cape Cod R. R. Co.* 120 Mass. 257; *Mahoney v. Metropolitan R. R. Co.* 104 Mass. 73; *Butterfield v. Western R. R. Corp.* 10 Allen, 532.

In the case at bar, reasoning from the fact that when the son was last seen, a few seconds before the accident, he was in the exercise of due care, the court might legally presume, in the absence of evidence, direct or otherwise, of negligence, that he continued to exercise due care up to the time when he fell through the bridge. Sir William Jones defines due care to be that degree of care which every person of common and ordinary prudence takes of his own concerns; and the accuracy of the definition has never been questioned.

Since the mere fact that a person receives bodily injury is not in itself any evidence of due care or of negligence, then in those cases where there are no facts or surrounding circumstances directly connected with the injury itself from which due care can be logically inferred, why may it not properly be held that the party upon whom rests the duty of proving due care sustains that burden by inference from the fact that every person of common and ordinary prudence takes due care in respect to all matters in which he is concerned? The burden is upon an executor to prove the sanity of the testator, and yet, in all cases where there is no evidence at all upon that issue, there is a presumption of sanity which alone is sufficient to prove the fact. The presumption must rest partly upon the fact that the great majority of people are sane. The presumption that every man acts honestly in any given transaction (*Hatch v. Bayley*, 12 Cush. 27) can only be sustained upon the ground that the great majority of men are honest in their dealings. The presumption of due care may, with equal soundness, rest upon the fact that the great majority of people are careful in respect to their own concerns. There was no evidence of any negligence on the part of the parents of the intestate.

W. Allen, J., delivered the opinion of the court.

The only question in these exceptions is whether the court erred in refusing to rule that there was no evidence of due care on the

part of the plaintiff or of his intestate. There was evidence of the conduct of the parties, and that is evidence upon the question of due care. There was certainly direct evidence tending to show that until the boy left his father's side, an instant before the injury, both were in the exercise of ordinary care; and from which, unless controlled by other evidence, a jury might have inferred that there had been no negligence on the part of either of them. The manner and circumstances in which the plaintiff's intestate left his father's side form part of their conduct, and of the facts from which their care or negligence is to be inferred by the jury, unless they were of such a character as to be obviously and necessarily inconsistent with ordinary prudence. The court cannot say, as matter of law, that for a boy seven years of age to step aside and clasp a post he is passing, or for his father, in whose care he is, not to forbid him to do it, is negligence. A jury would be justified in finding that, under the circumstances, they were acts natural and to be expected in boys and their fathers of ordinary prudence.

It is argued that the boy was making an unlawful use of the highway, and that the father was negligent in allowing it; and several cases are cited where persons injured were debarred of their remedy because making a use of the highway for which it was not intended; but, as applied to the case at bar, they afford very little aid to the defendant. It was decided in *Blodgett v. Boston*, 8 Allen, 287 (which is affirmed in *Tighe v. Lowell*, 119 Mass. 472), that a boy using the highway solely for the purpose of playing could not recover of the city for an injury caused by a defect in the way. But the court say: "We by no means intend to say that a child who receives an injury caused by a defect or want of repair in a road or street, while passing over or through it, would be barred of all remedy against a town merely because, at the time of the accident, he was also engaged in some childish sport or amusement. There would exist in such a case the important element that the person injured was actually travelling over the way. But this element is wholly wanted in the case at bar. We have here the naked case of an appropriation of a portion of a public street to a use entirely foreign to any design or intent to pass or repass over it for the purpose of travel, within the meaning of the statute. It is to this precise case that we confine the expression of our opinion." In *Lyons v. Inhab. of Brookline*, 119 Mass. 491, it was held that a child could not recover, who, while sitting playing upon the sidewalk, was injured by the act of a third person. In *Stickney v. Salem*, 8 Allen, 874, it was held that a person could not recover for injuries caused by the breaking of an insufficient railing, occasioned by his leaning against it while lounging upon a sidewalk. In *Britton v. Cummington*, 107 Mass. 847, the plaintiff recovered for damages to his carriage and horses, although he had left his carriage and was engaged in picking berries by the side of the road. The court say: "There can be no doubt that a traveler on the highway may stop his horse, alight from his carriage, and employ himself, while out of his carriage, in acts that have no connection with his journey or his

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purpose. Such a position and such employment, for a reasonable time, would not of itself deprive him of his rights as a traveler." In *Hunt v. Salem*, 121 Mass. 294, a boy on his way home crossed the street to look at toys in a shop window, and stood looking at them four or five minutes, and was injured as he turned away to resume his walk. It was held that he could recover.

In the case at bar, the boy was a traveler, and did not cease to be one when he stepped aside for an instant to clasp in play a post in the highway, and almost in his path. The act was a natural and ordinary incident of traveling.

Judgment for the plaintiff on the finding.

Julia B. METCALF

v.

William O. WILLIAMS.

Plaintiff, on November 22, 1883, purchased 100 shares of railroad stock through the defendant, who acted without compensation. On December 21, 1883, the defendant ordered the broker through whom he had made the first purchase on account of the plaintiff to buy 100 shares more on sixty days' credit, and deposited the first-purchased shares as security. In this the defendant understood himself as acting under instructions from the plaintiff. On December 31, 1883, the plaintiff asked the defendant for evidence of her title to stock held by him, upon which he wrote and delivered to her the following order:

"Boston, Dec. 31, 1883.

Charles H. Heath, Esq.,
21 Exchange Place:

Dear Sir,—The 100 shares of N. Y. & N. E. R. R. stock you purchased for me November 22, for which you have been paid, and the 100 shares you purchased for me December 21, at 19½, buyer 60, receiving from me the 100 shares of stock as collateral security, were bought by me for Mrs. Julia B. Metcalf. Please deliver the stock to her if she calls for it at any time, and oblige,

Yours very truly,

Wm. O. Williams."

On July 8, 1884, the plaintiff ordered the defendant to sell her stock, supposing, as she testified, that she had the original shares; and the 100 shares regarded as hers by the defendant were sold at a loss. The transaction set forth in the order was not repudiated by the plaintiff until afterwards. The plaintiff having sued the defendant for the alleged conversion of the 100 shares, in having deposited them as collateral security upon the second purchase, it was held that the plaintiff was presumed to know the contents of the order, and as she made no objection to the defendant's purchase of the second 100 shares, or to the use of the first 100

shares as security, she ratified the defendant's action, he having acted in good faith, and could not recover.

(Suffolk—Filed May 9, 1887.)

ON defendant's exceptions. *Sustained.*

Action of tort for the conversion of certain shares of corporate stock.

The facts appear in the opinion.

Mr. Wilbur H. Powers, for defendant: The order given by defendant was the evidence of plaintiff's title to the stock standing in the name of the defendant. "A party must be presumed to know the contents and true meaning of a written instrument which he takes as evidence of title or of contract."

Freeman's Nat. Bank v. Savery, 127 Mass. 79; *Coolidge v. Smith*, 129 Mass. 558; *Nat. Bank of Commonwealth v. Law*, 127 Mass. 72.

In *Goodman v. Simonds*, 20 How. 365 (61 U. S. bk. 15, L. ed. 941), Justice Clifford says: "Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of its transfer, the question whether a party who took it had notice or not is, in general, a question of construction, and must be determined by the court as a matter of law."

Also see *Andrews v. Pond*, 13 Pet. 65 (38 U. S. bk. 10, L. ed. 61); *Fowler v. Brantly*, 14 Pet. 318 (39 U. S. bk. 10, L. ed. 473).

In the absence of fraud, the presumption of knowledge is conclusive. In *Monitor Mut. Fire Ins. Co. v. Buffum*, 115 Mass. 343, Justice Welles says: "The defendant having thus accepted the policies, and held them as contracts binding upon the insurance company, must be taken to hold them according to the terms which they express. In the absence of fraud he is conclusively presumed to assent to those terms. He cannot be permitted to qualify his contract, or his relations to the subject-matter of it, by asserting and proving that he never read the writing, and was ignorant of its contents."

Also see *Grace v. Adams*, 100 Mass. 505; *Rice v. Dwight Mfg. Co.* 2 Cush. 80.

The subsequent conduct of the plaintiff in keeping said order was a ratification of the acts of the defendant in the premises. She retained this order in her possession, and produced it at the trial.

Foster v. Rockwell, 104 Mass. 167.

If the defendant exceeded his authority in putting up stock as collateral, to purchase for the plaintiff 100 shares more of the same stock on December 21, 1888, and by that act converted the original 100 shares, then, by accepting or receiving the order of December 31, 1888, without objection, the plaintiff ratified the act of the defendant, made it her own act, and undertook to profit by it.

Matthews v. Fuller, 123 Mass. 446; *Shaw v. Nudd*, 8 Pick. 9; *Foster v. Rockwell*, 104 Mass. 170; *Thayer v. White*, 12 Met. 343; *Harrod v. McDaniels*, 126 Mass. 413.

It is not a correct rule of law to take the value of the stock at the time it was pledged as the measure of damages. The true rule of damages is compensation for the injury, and no more.

Lowell, Transf. Stock, 239; 1 Suth. Dam. chap. 3, p. 17.

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Messrs. Perkins & Lyman, for plaintiff:

The circumstances under which the order on defendant's broker was given show that it was written by the defendant, not as a report to the plaintiff of the manner in which her funds had been invested, but merely as "something to show her title" "if anything happened to him." The plaintiff would not naturally give particular attention to the parenthetical clause in the order relating to the pledging of her stock. The plaintiff could not ratify acts of the existence of which she was ignorant; and the defendant, being aware of her ignorance, has no reason to complain. The plaintiff was under no obligation to acquaint herself with the defendant's acts, and it involves an absurdity to argue that, if she had only constructive knowledge of the pledging, she must at once disaffirm it, or be bound by her silence.

Dickinson v. Conway, 12 Allen, 487, 492; *Combs v. Scott*, 12 Allen, 493; *McIntyre v. Park*, 11 Gray, 102; *Thacher v. Pray*, 113 Mass. 291.

But the defendant's neglect to inform her of the pledging of the stock until an election to approve or disapprove could not avail her, and defeats the defendant's right to construe her silence into a ratification.

Amory v. Hamilton, 17 Mass. 109. See *Sturtevant v. Robinson*, 18 Pick. 175; *Baird v. Williams*, 19 Pick. 381.

The weight to be given to any evidence of ratification rested exclusively with the judge of the superior court. Any other questions presented by the defendant were questions of fact decided by the superior court upon conflicting evidence, and such decision cannot be revised by this court. The general rule that damages, in an action of trover, are to be assessed according to the value of the property at the time of its conversion, is too well settled for the citation of authorities.

Holmes, J., delivered the opinion of the court:

This is an action of tort for the conversion of 100 shares of stock. On November 22, 1888, the plaintiff purchased 100 shares through the defendant, who acted for her as a friend, without pay. On December 21, 1888, the defendant ordered the broker to buy 100 shares more, on sixty days' credit, and deposited the first-purchased shares as security. This deposit is the conversion relied on. The parties disagreed in their testimony as to the defendant's authority to make this purchase. On December 31, 1888, the plaintiff asked the defendant how she should know, if anything happened to him, that she had any stock. He said he would give her something to show her title, and wrote and delivered to her the following order, viz.:

"Boston, Dec. 31, 1888.

Chas. H. Heath, Esq.,

21 Exchange Place:

Dear Sir,—The 100 shares of N. Y. & N. E. R. R. stock you purchased for me November 22d, for which you have been paid, and the 100 shares you purchased for me Dec. 21st, at 19½, buyer 60, receiving from me the 100 shares of stock as collateral security, were bought by me for Mrs. Julia B. Metcalf.

Please deliver the stock to her if she calls for it at any time, and oblige

Yours very truly,

Wm. O. Williams "

On July 8, 1884, after some dealings by the defendant which are not material to our decision, the plaintiff ordered the defendant to sell her stock, supposing, as she testified, that she had the original shares; and 100 shares regarded as hers by the defendant were sold at a loss. The transaction set forth in the order was not repudiated by the plaintiff until afterwards.

The defendant asked the court to rule that if the facts were as above stated, the plaintiff was presumed to know the contents of the order; and that if she made no objection to the defendant's purchase of the second 100 shares, or to the use of the first 100 shares as security, she had ratified the defendant's action, he having acted in good faith (as on the findings he must be taken to have done). The judge declined to rule as requested, found that the plaintiff did not understand the contents of the order, and did not ratify the pledge of the first 100 shares, and found that the plaintiff was entitled to recover.

We are of opinion that the rulings requested should have been given, and that the finding for the plaintiff was not justified in view of the facts above stated. It is true that the order was not, in a strict sense, a document of title; that is to say, the plaintiff did not get her title from the order, but had it before, the original purchase having been made for her as undisclosed principal. But the plaintiff asked for the order as a practical means of establishing her title as between herself and the defendant; and she accepted it as purporting to set forth his statement of what her title was as against him. As between herself and the defendant, if she refrained from reading it, she did so at her peril, and, in the absence of fraud, he was entitled to assume that she had read it. However, we do not gather that she denied having read the order, but only that she denied having understood it. If we are right, the plaintiff's case is weaker than if she had not read the order. Whether or not she was bound to find out the meaning of the language of the stock exchange if she did not know it, the only language of that sort is "buyer 60." The purchase of the second 100 shares is set forth in plain English, as is also the fact that the first 100 was received by the broker in connection with the purchase. If we are to listen to the suggestion that the words "collateral security" were unintelligible, there was enough to show to the meanest understanding that the first 100 shares had been used in some way to get the second. The defendant had a right to assume that she knew so much, at least.

What, then, was the position as the plaintiff must be taken to have known it? Assuming that there had been a conversion,—a question which we do not discuss,—it was not a simple conversion by a stranger. The conversion was by pledge or mortgage, by one who had been the plaintiff's agent to purchase the stock, and who remained her agent throughout all her dealings with it, who seems to have had the stock in his name, and who assumed in good

faith to be acting as her agent and by her authority in using the stock as he did. If he exceeded his authority she could ratify his act, and any expression of assent on her part, either by words or conduct, would bind her,—not on principle of estoppel, but as in other cases of election. *Wellington v. Jackson*, 121 Mass. 157, 159; *Smith v. Barrow*, 2 T. R. 199, n. See Com. Dig. *Election*, C. 2; *Oakes v. Mfrs. Ins. Co.* 185 Mass. 248, 249. It is not necessary to consider whether, if there were nothing more in the case, the silence of the plaintiff might not have amounted to an expression of assent (see *Foster v. Rockwell*, 104 Mass. 167, 172; *Phila. Wil. & B. R. R. v. Cowell*, 28 Pa. 329; *Ladd v. Hildebrants*, 27 Wis. 135; *Story*, Ag. §§ 256, 258); for there is more in the case. The plaintiff was notified, by the order, that the pledge or use of her stock was incident to the purchase of other stock; that the defendant assumed that this latter purchase was by his authority, but that, as between himself and the broker, the defendant was responsible. She knew also that the stock was a fluctuating one. If she had a right to repudiate, and did repudiate, the transaction, the defendant could take immediate steps to prevent loss to himself. If she did not, he would naturally rest on the assumption that his understanding as to his authority was correct, and his conduct satisfactory. To be silent under these circumstances was plainly to assent to the purchase; and even on the principle of estoppel, the plaintiff could not repudiate it at a later date to the defendant's loss.

If the purchase was ratified, then the pledge was ratified also. The transaction had to be accepted or repudiated as a whole. The purchase was founded upon the pledge. The plaintiff could not ratify the purchase, and then, at a late date, repudiate the pledge upon which the purchase depended and which was one of its terms.

Exceptions sustained.

Carrie W. BURBANK

v.

BOSTON POLICE RELIEF ASSOCIATION.

Stat. 1882, chap. 78, amending the charter of the *Boston Police Relief Association*, authorizes, but does not require, the corporation to extend its benefits to members after they are retired; and a by-law extending the membership of the association to members who shall be retired from the police department, if they have been members for five years, will not include one who is retired after being a member for a shorter period; nor will the action of the treasurer of the association in accepting two assessments from such retired policeman, supposing he had been a member for five years, and the annual report reciting that he was a retired member, stop the association.

(Suffolk—Filed May 9, 1887.)

ON plaintiff's exceptions. *Overruled.*

Action of contract to recover \$1,000 as a benefit alleged to be due to plaintiff as beneficiary of John W. Morey, deceased, tried in the superior court before Knowlton, J., who ordered a verdict for defendant, and plaintiff alleged exceptions.

The facts appear from the opinion.

Mr. Charles T. Gallagher, for plaintiff:

The Acts of the Legislature, 1882, chap. 78, did not give to the defendant any more right to enact a by-law relative to retired members than it previously possessed. That Act provided that the benefit to accrue by reason of the decease of members should be extended to retired members of the police force, and provided further that such retired members should have no voice in the government of the association, etc. The limitation, under the by-law, art. 1, to those who had been members five years, was an interference with the vested rights of a member who had continued his membership after the Act of 1882 took effect; and such a by-law could only affect members who joined after its passage. It was in the nature of an *ex post facto* law, and unauthorized.

Morawetz, Priv. Corp. § 496, and cases cited.

The plaintiff claims that if, by any technicality, Morey had ceased to be a member of the association, the above by-law had in effect been waived by the association and its officers; and Morey and his beneficiary were entitled to all benefits at his death. 1. Morey paid assessments to the treasurer, whose duty it was to receive all assessments "due to the corporation;" whose books and accounts were subject to directors' inspection, and whose accounts were settled quarterly, and who, at the close of the quarter, made a detailed report to the corporation of all the above details. 2. Morey's name appeared as a member on the clerk's list of the corporation, and this same officer made the annual report of the directors to the corporation. 3. Morey's name also appeared on the annual report of directors, treasurer, and clerk to the corporation, as a retired member from Division 4, where there was also a member of the board of directors. 4. So that, with full knowledge of the facts, the corporation, at its annual meetings, accepted Morey as a member, and authorized its directors and officers to recognize him as such.

The board of directors have "general direction and control of the affairs of the corporation" (By-laws, art. 6); they have authority on all questions relating to the payment of benefits and the matter of membership,—this power being specially delegated to them. Article 18 provides that, on the death of a member, the board of directors shall cause to be paid to such person or persons as the deceased shall designate to receive it, the sum of \$1,000, and provides for approving any change in the disposition of benefit at any regular meeting of the board of directors; and Morey made such designation to the plaintiff, which designation was properly approved in accordance with By-laws, art. 18, and passed upon by the board of directors. So that the plaintiff claims that the board of directors, having full authority from the corporation, with full knowledge of

the facts, constituted the plaintiff a beneficiary, and, as such, entitled to receive the benefit, there being a good consideration in the last section of the assignment for the acceptance, by the corporation, of the plaintiff as beneficiary; and payments of assessments in the nature of premiums having been made thereafter, plaintiff became entitled to the benefit.

Plaintiff submits that on all the evidence the case should have at least been submitted to the jury for their consideration.

Messrs. John F. Cronan and Edward L. Jenkins, for defendant:

Plaintiff cannot maintain this action, although she is a daughter of said deceased, and was designated by him as his beneficiary, if not a member of his family at the time she was so designated.

Elsey v. Odd Fellows Mut. Relief Assn. 143 Mass. 224, 2 New Eng. Rep. 667.

The designation of the plaintiff as beneficiary by the deceased was subsequent to his retirement from the police department, and was invalid.

By-laws, art. 1.

By being retired from the police department, deceased ceased to be a member of said Boston Police Relief Association by art. 1 of its by-laws, without any act of defendant.

Whether or not deceased was a member of the defendant association depended, not only upon questions of law, but upon facts in dispute; to wit, among other things, upon whether or not defendant, as a corporation, ever authorized its treasurer to receive the assessments, or did anything that would estop defendant from saying deceased was not a member thereof at the time of his death, and assumed that acts of its officers not authorized by defendant were acts of the corporation.

Pratt v. Amherst, 140 Mass. 167, 1 New Eng. Rep. 197.

The acts of individual officers could not bind the corporation, in the absence of authority to so act.

Baxter v. Chelsea Mut. F. Ins. Co. 1 Allen, 294.

Neglect of its officers alone could not make defendant liable as upon a contract made by it, because it never made the contract.

Baxter v. Chelsea Mut. F. Ins. Co. supra.

W. Allen, J., delivered the opinion of the court:

The defendant was incorporated by Stat. 1876, chap. 16, "for the purpose of assisting the families of deceased members of said association, and the members thereof, when sick and disabled, or upon the decease of their wives." It was required that all the members should be members of the police department of the city of Boston. It was provided by art. 1 of by-laws adopted that the corporation should be composed of members of the police department of the city of Boston; and that "when a member leaves the police department by resignation, discharge, or from any cause whatever, he shall cease to be a member of the corporation." The Act of incorporation was amended by Stat. 1882, chap. 78, so that the benefit to accrue by reason of the decease of members "may be extended to such members as may be retired from the police

force," under Stat. 1878, chap. 244, § 5. In February, 1884, new by-laws were adopted, art. 1 being the same as art. 1 of the former by-laws, with the proviso added that members who had been retired after the 16th day of March, 1883, or should thereafter be retired, and who had been members of the corporation for five years previous to their being retired, or were retired through injuries received in discharge of their duties, might retain their membership as provided in Stat. 1882, chap. 78.

One Morey became a member of the corporation after March 16, 1882 (when Stat. 1882, chap. 78, took effect), and before the change in the by-law. In August, 1884, Morey was retired from the police force under Stat. 1878, chap. 244, § 5, and placed on the pension roll for disability, but not through injuries received in the discharge of his duties.

It is contended, in behalf of the plaintiff, that Morey continued to be entitled to the benefits of membership in the corporation after he was retired from the police force, by the terms of the Statute of 1882, chap. 78, without, or in spite of, any action of the corporation. But the statute provides that the benefits may be extended to retired members. Its whole effect is to extend the class eligible to the benefits of membership so that it shall include retired members of the police force. It authorizes, but does not require, the corporation to extend its benefits to members after they are retired. The only attempt by the corporation to exercise this authority was by the by-law of February 18, 1884; and Morey was not included in that, as he had not been a member five years, and was not retired through injuries received in the discharge of his duties. That by-law, after declaring that the corporation should be composed of members of the police department, and that when a member leaves the police department for any cause he shall cease to be a member of the corporation, adds the proviso that members who shall be retired from the police department may retain their membership if they have been members for five years before being retired, and provides that those who are retired for injuries received in the discharge of their duty shall receive all benefits as though they had been members for five years. It is argued that the proviso is a valid execution of the authority given by the statute, and that the limitations added to it are unauthorized, and to be rejected, leaving the proviso in effect. But the authority to extend the benefits to a class authorized the extension to a designated part of the class. Certainly the by-law cannot be held to include those whom it expressly excludes. It is further argued that the corporation accepted Morey as a member and entitled him to the benefit of a member, after he had been retired. Two semi-annual assessments, which would regularly have become due from Morey had he continued a member, after his retirement were paid by him and received by the treasurer. Morey's name was reported in 1884, in the annual reports by the officers to the corporation, as a retired officer, and his name was on the annual list of members. The by-laws provided that every member, upon joining the corporation, should designate in writing, at

tested by two witnesses and the treasurer of the corporation, some member of his family to whom the amount to be paid upon his decease should be paid; and that any member might, at any meeting of the directors, make such change in the disposition of said sum by transferring the payment to some other member of his family, as he should elect. In May, 1885, Morey changed the designation from his niece to his daughter, the plaintiff, by an instrument under seal, and attested by two witnesses and the treasurer of the corporation. It is to be assumed that this was done at a meeting of the directors, but it does not appear that any action was taken by the directors upon it. There is no ground for the contention that the defendant is bound by these acts of its officers, or is estopped to deny that Morey was a member. Neither the treasurer nor the directors had authority to continue Morey as a member. The by-laws declared that he was not a member, and the corporation itself could not vote to give him the rights of a member.

The corporation has done nothing to ratify the acts of its agents, even if the acts were such as would give Morey the rights of a member if they had been ratified.

Exceptions overruled.

William H. MAHONEY

v.

MIDDLESEX COUNTY COMMISSIONERS.

An attorney has power to bind his client by entering into a recognizance for him, that being a necessary step in the remedy he is pursuing; and, if unable to act, he may employ another attorney to act for him, who may bind the client in the same manner. Such a recognizance entered into in the name of the petitioner, and also by the attorney so employed by the original attorney, as surety, is sufficiently evidenced by the noting of the clerk on the petition as follows: "February 11, 1885, Chas. F. Paige recog. as pr. & su. in \$200."

(Suffolk—Filed May 9, 1887.)

PETITION for *mandamus* to compel the county commissioners of Middlesex County to issue an order and warrant for a jury to revise an assessment for damages for land taken by the city of Somerville for a street. *Petition dismissed.*

The facts and questions raised appear from the opinion.

Mr. Charles F. Donnelly, for petitioner:

It is requisite, before the county commissioners can acquire jurisdiction of the case or order a jury, that a recognizance with sureties should be given by the party applying for the order of notice and jury.

Gen Stat. chap. 24, § 17; chap. 48, § 24.

A recognizance is an obligation of record which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act.

2 Bl. Com. 341; *Warner v. Howard*, 121 Mass. 82.

It must exist of record. It must be proved by the record.

Treas. Vermont v. Marrell, 14 Vt. 64.

It must set forth of record the act to be done. The condition of it must be so set forth in the body of it as to admit of extension consistent with the terms of it.

2 Wash. C. C. 422; *Treas. Vermont v. Marrell*, *supra*; *Ohio v. Crippen*, 1 Ohio St. 399.

No brief memorandum relating to the subject-matter of a recognizance can be a recognizance. The record must stand or fall by itself.

Ohio v. Crippen, *Treas. Vermont v. Marrell*, *supra*; *Bridge v. Ford*, 4 Mass. 461.

Did the petitioner ever "give a recognizance to the county for the payment of all the costs and expenses," as required by Gen. Stat. chap. 48, § 24? The report finds that the recognizance was given without his express authority, or the express authority of his attorney of record; that it was given without his knowledge or the knowledge of his said attorney; that it was given by one who was in the employment of Mr. Donnelly, "and in the habit of attending to formal business in the clerk's office, and the like, for Mr. Donnelly," the petitioner's attorney in the proceeding, but who was not of record, or in fact employed by the petitioner.

Strangers cannot become bail for a man without his consent. The giving of bail constitutes a contract between the principal and his sureties; and the principal has a right to determine for himself whether he will assume the obligations of such a person or not.

People v. Davidson, 87 How. Pr. 416. See also *People v. Slayton*, Breese, 257.

It is essential to the validity of a bail-bond that it be signed or executed by the principal himself, or, in his name, by some one authorized by him. His attorney is not so authorized.

Price v. State, 12 Tex. App. 285.

A recognizance is equal in solemnity to, and in some respects, at common law, takes a priority over, an ordinary bond.

1 Ohio St. 399.

In this State, by Pub. Stat. chap. 161, § 104, parties other than the party to be bound may give bonds; but even here the magistrate must be satisfied that there are good reasons why the bond is not executed by the principal. There has been no legislation authorizing the giving of the higher obligation of a recognizance by any person other than the person to be bound thereby.

The recognizance entered into in this case is not in compliance with the provisions of Gen. Stat. chap. 48, § 24. It is not a recognizance in the name of the petitioner. The record shows the same person as principal and surety. The statutes then and now in force require more than one surety on a recognizance of this character.

Gen. Stat. chap. 17, § 24, re-enacted in Pub. Stat. chap. 22, § 23, defines the recognizance directed to be taken in Gen. Stat. chap. 48, § 24, and prohibits the county commissioners from doing any act in which the county has no interest until they shall have required the applicant to enter into a recogni-

zance to the county, with sureties conditioned as aforesaid.

The petitioner is not estopped from setting up the fact that no recognizance was given: because the act of Mr. Paige in entering into the recognizance was absolutely void; because, from the date of the filing of his petition up to the time of his personally appearing and tendering in writing a recognizance with securities, neither he nor his attorney ever appeared in the case.

Mr. Samuel C. Darling, for respondents:

As to the memorandum of the recognizance at bar, it was in proper form.

Townsend v. Way, 5 Allen, 427.

Morton, Ch. J., delivered the opinion of the court:

The city of Somerville took a part of the plaintiff's land for a street, and duly made an award of the damages thereby caused to him. Under the statutes applicable to the case, the plaintiff, if dissatisfied with the award, was required, within one year thereafter, to make his complaint to the county commissioners of Middlesex County, who, upon a recognizance being given to the county for the payment of costs and expenses, could issue an order for a jury to assess the plaintiff's damages. Such jury must be summoned and give their verdict within three months next after the date of the order. Stat. 1871, chap. 182, § 22; Gen. Stat. chap. 48, §§ 24, 40, 73; Pub. Stat. chap. 49, §§ 35, 52, 79.

In the case at bar, the plaintiff, within a year after the award of damages by the city, prepared his complaint or petition for an order for a jury, signed in his behalf by his counsel, Mr. Donnelly. Mr. Donnelly being ill, Mr. Paige, an attorney at law, not a partner of Mr. Donnelly, but in his employ, acting in his behalf, took the petition to the clerk's office and filed it. At the same time he entered into a recognizance in the name of the petitioner, and also as surety, which was noted by the clerk on the back of the petition in the usual form, as follows: "February 11, 1885, Chas. F. Paige, recogs. as pr. & su. in \$200."

The plaintiff now contends that this is not a sufficient recognizance. It does not purport to be a recognizance, but is a minute or memorandum made by the clerk upon the record, which enables him to extend the recognizance in full when necessary. It has been held that such memoranda are competent evidence, before the record has been extended, to prove the fact that a recognizance has been taken.

Townsend v. Way, 5 Allen, 426.

But the plaintiff's principal contention is that Paige had no authority to enter into a recognizance for him, and therefore that the recognizance was void. Mr. Donnelly was employed by the plaintiff as his attorney to prosecute his claim against the city of Somerville. He had authority to do all acts within the scope of his employment, and could bind his client by entering into a recognizance for him, that being a necessary step in the remedy which he was pursuing. If he was unable to act, and employed another attorney to act for him, the act of such attorney is his act, and, being within the scope of his employment, is

binding upon the client. This subject has been recently discussed in *Shattuck v. Bill*, 143 Mass. 56, 2 New Eng. Rep. 159, which is decisive against the plaintiff on this point.

We need not discuss the question whether, if there had been no recognition taken, the plaintiff, who would have lost nothing by the omission, could avail himself of that fact. As there was a sufficient recognition, and a legal order for a jury, it was the duty of the plaintiff to prosecute his claim before the jury within three months of the order; and, not having done so, he has lost his remedy, and has no right to another order for a jury. *Thorndike v. County Comrs.* 117 Mass. 566.

Petition dismissed.

William E. PACKARD

v.

Elmer E. RYDER.

An inhabitant and householder of a town has a right to land upon and walk along unenclosed flats or shore within such town, below high-water mark, and within 100 rods of the high-water mark, not passing above said mark, for the purpose of fishing.

(Barnstable—Filed May 9, 1887.)

ON defendant's exceptions. *Sustained.*

Action of tort for the breaking and entering of plaintiff's close.

At the trial in the superior court before Brigham, *Ch. J.*, the case was argued upon agreed facts substantially as follows:

April 8, 1886, the defendant landed upon the plaintiff's flats, having come thereto by water, and landing from his boat. The tide was out, and defendant walked along plaintiff's flats, *i. e.*, the narrow strip of land between high-water mark and low-water mark, in part consisting of shingle and gravel, and in part covered with sedge grass, and, while so walking, fished in the adjoining waters, and took therefrom ten trout. Said strip of land was not marsh land, but was a sloping strip of seashore, and the waters facing the flats are the open, navigable tidal waters of Buzzard's Bay. Defendant at no time went above high-water mark, or within 100 rods of high-water mark. Defendant was forbidden by plaintiff to walk upon said flats, but continued his fishing, claiming the right so to do. It appeared from the answer of defendant that no portion of the side of plaintiff's land facing the seashore was fenced, built upon, or appropriated by plaintiff, and defendant, in fishing thereon, did no unnecessary damage. The court ruled, as a matter of law, that plaintiff was entitled to recover, and ordered judgment accordingly, and the defendant alleged exceptions.

Mr. Charles F. Chamberlayne, for defendant:

I. Under the common law of England no common right can be said to have been more definitely established or more jealously guarded than the public right of fishing in tidal waters.

2 Mass.

Hale, *De Jure Maris*, chap. 4; Coul. Waters, p. 343, and cases cited; Hall, *Seashore*, 2d ed. 1875, 42, and cases cited; *Fitzvaller's Case*, 1 Mod. 105; *Warren v. Matthews*, 6 Mod. 73; *Orford v. Richardson*, 4 T. R. 487; *Crichton v. Coltery*, 19 W. R. 107; *Blundell v. Catterall*, 5 B. & Ald. 268; *Malcomson v. O'Dea*, 10 H. L. Cas. 598, 618.

Under English law, as expressly provided by Magna Charta, the Crown itself had no power to divest the seashore of the public rights—principally fishing and navigation—subject to which the Crown held the *jus privatum* in these shores. The grantee of the Crown must take the seashore subject to precisely the same rights on the part of the public.

Blundell v. Catterall, 5 B. & Ald. 269, 287; See also *Martin v. Waddell*, 16 Pet. 387, 413 (41 U. S. bk. 10, L. ed. 997, 1013).

Upon whatever theory developed, it may be taken as settled that not only was the public right of fishing in tidal waters established in England from the earliest times, but that every possible protection which the law could give was afforded the exercise of that right,—subject only to another public right, the paramount right of navigation.

Nor is there any difference, so far as regards the public right of fishing, between the shore of tidal waters and the tidal waters themselves,—both were equally public.

Bract. lib. 1. chap. 12, § 6; Coul. Waters, pp. 14, 36, 344; *Warren v. Matthews*, 1 Salk. 357; *Ward v. Creswell*, Willes, 265; *Bagott v. Orr*, 2 B. & P. 472; *Carter v. Murcot*, 4 Burr. 2163; *Orford v. Richardson*, 4 T. R. 487; *Broke's Abridg. lib. Customs*, pl. 46; Hall, *Seashore*, 2d ed. 1875, 174, 191.

II. The colonial ordinance of 1641-7 had a limited end in view, *viz.*, the extension of commerce, and, incidentally, the projection into tide waters of the necessary appliances for receiving and discharging cargoes.

Commonwealth v. Charlestown, 1 Pick. 180, 188, per Parker, *Ch. J.*; *Storer v. Freeman*, 6 Mass. 435, 438; *Sparhawk v. Bullard*, 1 Met. 95, 108; *Commonwealth v. Alger*, 7 Cush. 53, 77, 94; *Commonwealth v. Roxbury*, 9 Gray, 451, 515, note.

In a statute framed with this object, a limitation upon the extent to which wharves could be projected into the water was obviously appropriate and indeed necessary. But there is, it is submitted, nothing in all this to meet the ordinary presumption that, whether the Crown or the State holds the seashore in trust for the public rights of navigation and fishing, its grantee takes subject to the same rights, except so far as the ordinance gave the possibility of enclosing the seashore by permanent erections, etc.

Austin v. Carter, 1 Mass. 231; *Commonwealth v. Alger*, 7 Cush. 53, 68, 74, 76, 93; *Martin v. Waddell*, 16 Pet. 387, 413 (41 U. S. bk. 10, L. ed. 997, 1013); *Blundell v. Catterall*, 5 B. & Ald. 268, 274, per Best, *J.*; *Weston v. Sampson*, 8 Cush. 847, 852.

It will be observed that the ordinance of 1641-7 was apparently intended as a statute for the enlargement of important public rights, rather than as a restriction of them. The right of the public to free speech, free emigration, free fishing and fowling, the common use of

great ponds, etc., are all included in the same instrument.

See *West Roxbury v. Stoddard*, 7 Allen, 158, 168.

It is submitted that this statute, so far as it affects to grant private ownership inconsistent with the right of fishery, must be construed strictly, because it is (1) in derogation of the common law; (2) in derogation of common right.

Statutes in derogation of common law are to be so construed; *i. e.*, strictly, and not with the result of extending their *prima facie* effect by implication.

Dwelly v. Dwelly, 46 Me. 377; *Gibson v. Fenney*, 15 Mass. 205; *Beriles v. Nunan*, 92 N. Y. 152, 157.

Statutes in derogation of common right are construed with exceptional strictness.

Bish. Written L. § 119, and cases; *Martin v. Waddell*, 16 Pet. 367, 411 (41 U. S. bk. 10, L. ed. 997, 1013).

It is well settled that the defendant would have had the undoubted right to enter upon the land in question for the purpose of digging,—or in other words, fishing—for shellfish.

Weston v. Sampson, 8 Cush. 347; *Lakeman v. Burnham*, 7 Gray, 437; *Proctor v. Wells*, 103 Mass. 216; *Commonwealth v. Bailey*, 13 Allen, 541. See also *Porter v. Shehan*, 7 Gray, 435.

The rule is the same generally throughout the country.

Peck v. Lockwood, 5 Day, 22; *Paul v. Hazleton*, 37 N. J. L. 106; *Oyster Co. v. Baldwin*, 42 Conn. 255; *Preble v. Brown*, 47 Me. 284.

The plaintiff may contend that there is a distinction, in this connection, between shellfish and swimming fish,—that shellfish are taken on the seashore, and swimming fish caught while the fisherman is water-borne. The contention admits that if the tide in this instance were in, the defendant would have had the right to fish, while water-borne, on the same land over which he actually walked. As the littoral proprietor, so far as he is owner, is owner *usque ad celum*, and as a trespass is equally possible in any horizontal stratum of his close, to call walking, for the purpose of fishing, on the soil when left bare by the tide, a trespass, and crossing the same soil a few feet or inches above it, for the same purpose, not a trespass, is apparently to confuse the two distinct public rights of fishing and navigation.

Drake v. Curtis, 1 Cush. 395, 413.

Mr. H. P. Harriman, for plaintiff:

1. The public right of fishing gave the defendant no right to enter upon the flats of the plaintiff when the tide was out, for the purpose of taking fish swimming in the water. It is now settled that the public right of fishery affords no justification for any act committed upon the land of a riparian owner for the purpose of taking fish swimming in the water.

Coolidge v. Williams, 4 Mass. 144; *Gray v. Bond*, 2 Brod. & B. 667; *Hart v. Hill*, 1 Whart. 188; *Whittaker v. Burhans*, 62 Barb. 237; *Duncan v. Sylvester*, 24 Me. 482.

2. The right to so fish from the land of another must be proved by prescription as belonging to some estate, and can only be proved by prescribing in a *que estate*.

Waters v. Lilley, 4 Pick. 148.

3. The defendant offered to prove, not such a prescriptive right, but a custom; and such a custom is illegal.

Waters v. Lilley, *supra*; *Freary v. Cooke*, 14 Mass. 488; *Codman v. Evans*, 5 Allen, 310; *McFarlin v. Essex Co.* 10 Cush. 310; *Gould, Waters*, §§ 100, 184, and cases there cited.

Holmes, J., delivered the opinion of the court:

It is now well settled that there is a public right to take shellfish on the shore and flats below high-water mark and within 100 rods of the upland, until the flats are enclosed by the proprietor. *Weston v. Sampson*, 2 Cush. 347; *Dunham v. Lamphere*, 3 Gray, 288, 271; *Lakeman v. Burnham*, 7 Gray, 437; *Commonwealth v. Roxbury*, 9 Gray, 526, 527; *Commonwealth v. Bailey*, 13 Allen, 541, 542; *Proctor v. Wells*, 103 Mass. 216; *Commonwealth v. Manimon*, 136 Mass. 456, 458. But the right to take shellfish is asserted on the single ground that the general right of fishing extends to and includes it. *Weston v. Sampson*, *Lakeman v. Burnham*, *ubi supra*. The cases cited show too plainly for further discussion that if there is a right to go upon flats and to disturb the soil for clams, *a fortiori* there is a right to pass over them for fishing, in the stricter sense of the word. The defendant did not set nets, or create any permanent obstruction, as in *Duncan v. Sylvester*, 24 Me. 482.

Exceptions sustained.

Theodore H. WOOD

v.

W. W. BAILEY *et al.*

1. An action for malicious prosecution cannot be maintained before the termination of the prosecution; and while an action for false imprisonment cannot include any damage for what occurred before the process was used at all by the officer, it may include damages for what occurred after it began to be wrongfully used upon the plaintiff for the purpose of collecting the defendant's debt, with defendant's participation, by his direction, or under his influence—some distinct act or omission which amounted to a misuse or abuse of the process after it issued, some indignity or oppression beyond the mere fact of arrest and detention, some separate pressure to compel him to make settlement.
2. In an action for false imprisonment, for an abuse of the process of the court in executing an order of arrest upon a charge of illegal appropriation of money as treasurer of a corporation, against the sureties upon the treasurer's bond, it is improper to introduce in evidence an offer by one of the sureties, made on another trial in defending a suit upon the treasurer's bond, to prove that a majority of the directors of the corporation approved the appro-

priation of the money made by the treasurer, for the purpose of showing that said defendant knew of the want of foundation for the prosecution instituted by himself and the other sureties,—such offer appearing as a recital in a brief by such defendant upon an appeal from the refusal of the court to admit such proof.

(Suffolk—Filed May 6, 1887.)

ON defendants' exceptions. *Sustained.*

Action of tort brought by Theodore H. Wood, by writ dated July 8, 1884, against W. Bailey, Josiah G. Graves, and Charles H. Burns, all of Nashua, in the State of New Hampshire. No service was made upon Burns, and the case proceeded to trial against Bailey and Graves.

The declaration contained three counts based upon the same alleged facts. It alleged that in 1872 the plaintiff was and for a long time had been agent of the Peterboro' Railroad Company, a corporation organized under the laws of New Hampshire, and having its usual place of business at Nashua in the county of Hillsboro', and had rendered the company valuable services as such agent; that in May, 1872, he became its treasurer, and remained its treasurer till 1877, giving bond as treasurer in the sum of \$15,000, with said Bailey and Graves as his sureties, Graves being then and thereafter a director; that on September 30, 1875, with the consent and approval of a majority of the directors first obtained, and with the knowledge of all, he rightfully, as defendants knew, took from the treasury of said company \$4,200 in payment for his services as agent and treasurer, and entered the same properly on its books; that thereafter, on June 1, 1878, said Burns, being the attorney of said railroad company, and also county solicitor for Hillsboro' County, brought an action upon said bond against said Wood, Bailey, and Graves to recover back said \$4,200, and recovered judgment, early in 1882, against all of them, in the sum of upwards of \$6,000; that after said judgment was recovered, said Burns, Bailey, and Graves, for the sole purpose of enforcing the payment of said judgment by the said Wood alone, falsely, maliciously, and without probable cause procured an indictment against said Woods in the Supreme Court of said Hillsboro' County for the crime of embezzlement; they well knowing that he was not guilty of such crime, and that the court had no jurisdiction in the premises, inasmuch as the alleged offense occurred more than six years before the date of the indictment, and said Woods had been usually, publicly, and continuously a resident of said Nashua during all of said period and before, and knowing that such indictment could only be procured by the intentional and wilful misrepresentation and concealment of material facts, and that the court had no jurisdiction; that thereafter the defendants fraudulently obtained a requisition from the governor of New Hampshire upon the governor of Massachusetts, where said Wood then resided, for his rendition as a fugitive from justice, and caused said Wood to be arrested in Boston, and confined in jail for one night, and then to be delivered to one Buxton, a

deputy sheriff of said Hillsboro' County, and the agent of the governor of New Hampshire, and to be conveyed by said Buxton to said Nashua, where, by the procurement of the defendants, he was wrongfully held in custody by said agent for six days, against his will and without reasonable cause, and was fraudulently forced by the defendants to give to said Bailey and Graves a deed of 9,600 acres of land in Texas, and to procure a deed to them from his daughter of certain lands in New Hampshire, and to pay all the costs and expenses of his arrest and imprisonment, after which he was discharged without being brought to court or allowed to procure bail; and that said indictment was afterwards *not pros'd* by said Burns, and no warrant, precept, *capias*, or requisition ever returned to court.

The defendants' answer admitted that the plaintiff was agent and treasurer of said railroad company; that he took said \$4,200; that suit was brought upon said bond, and judgment recovered as alleged, and that he was thereafter indicted for embezzlement, and denied all the other allegations of the declaration; and further alleged that all proceedings in obtaining the indictment, and all proceedings subsequent thereto, were under the sole care, charge, and control of said Burns in his capacity as county solicitor, as aforesaid; and that the defendants were not responsible therefor, and had not committed any illegal or wrongful act. At the trial in the superior court before Knowlton, J., the plaintiff offered in evidence a certified copy of the indictment, with the entry therein that the same should be brought forward no further; also a certified copy of the requisition from the governor of New Hampshire upon the governor of Massachusetts, with the indictment and affidavit of Bailey annexed thereto, and a certified copy of the warrant issued by the governor of this Commonwealth.

There was a great amount of testimony taken at the trial, most of which was contradictory, but it was, as far as applicable, strongly in favor of the allegation of plaintiff that the indictment was pushed by defendants, Bailey and Graves, for the purpose of forcing a settlement; and it was not disputed that a settlement of defendant's claim against plaintiff was made by a grant of the Texas lands, etc., and that the indictment thereupon dropped.

The defendants requested the court to instruct the jury as follows:

1. That, upon the evidence, the plaintiff cannot maintain an action for malicious prosecution against either of the defendants.
2. That, upon the evidence, the plaintiff cannot maintain an action for false imprisonment against either of the defendants.
3. That, upon the evidence, the plaintiff cannot maintain this action against either of the defendants.
4. That if the defendants, or either of them, used the arrest of the plaintiff upon a legal warrant to induce or compel the transfer of property to them or for their benefit, such transfers were made under duress, and an action will lie for the recovery of the property; but he cannot maintain this action for improper use or for abuse of legal process.

The court declined to instruct the jury as requested in the third and fourth prayers, gave the instruction requested in the first prayer, and refused to adopt the language of the second, but instructed the jury as follows:

"The plaintiff seeks to recover damages for an alleged malicious prosecution, and he has also inserted in his writ counts for the wrongful use of a process already commenced, and imprisonment alleged to have been wrong under that process.

"I instruct you that, in this case, the action for malicious prosecution cannot be maintained against these defendants, or either of them; and ordinarily very much of the evidence and argument might seem to be of no consequence, so far as it bears upon the charge of malicious prosecution; but I shall submit the case to you upon the question whether there was a wrongful use of this process by these defendants, or by either of them; and upon that, the nature of the process itself, and whether it was wrongful and malicious, so far as these defendants, or either of them, had to do with it, if they had to do with it at all to their knowledge, may possibly bear upon the question of whether they, or either of them, abused the process. I do not say that it is necessarily material upon that point, but I think it proper to give you instructions upon the law relating to malicious prosecution, in view of the probability of your finding that these defendants, one or both of them, had to do with the prosecution, and of your finding that their knowledge about it bears somewhat upon the question whether they did or did not abuse it after it had been instituted."

The court then proceeded to instruct the jury as to malicious prosecution and embezzlement, which instructions were not excepted to. The court then proceeded to instruct the jury—which was not excepted to—that the court in New Hampshire had jurisdiction to find an indictment relating to the subject-matter, and that this indictment, under the laws of New Hampshire, might have been amended, if necessary, with regard to the time charged as the time of the alleged embezzlement. The court then proceeded to instruct the jury as follows:

"I instruct you that, upon the evidence, the indictment was so found, and the proceedings pending the arrest of Wood, and his extradition to New Hampshire, were so conducted that these defendants cannot be held liable, unless there was a misuse and abuse of the process after the plaintiff was taken into custody, in which the defendants participated; and that brings you to the important question in the case.

"The plaintiff claims that these defendants used this prosecution to collect their private debt; and that the defendants deny; and there is the issue for your consideration. No one has a right to commence or to use a criminal prosecution for the purpose of collecting his private debt. It is in the interest of the community that offenders against the law should be punished; it is in the interest of the community that those who know the facts constituting a crime should come into court and testify to those facts, and that they should not collect their claims and compound the crime

by any arrangement to withhold their testimony, such as to allow the offender to escape. On the other hand, one entitled to money or property which has been taken or detained by another, under such circumstances as to make him liable to punishment for a crime, has a right, if he can, to get his money or property. It is entirely proper and lawful for him to collect his debt, if it is a debt, or to recover back his property which has been stolen or taken away from him; and the mere fact that the offender is under arrest, and that the offender may perhaps have hope or expectation of favor from the Commonwealth if he restores the money or property, does not make the reception of it by him who is entitled to it illegal or in any way improper.

"In this case you will have to consider carefully a question, which is nice, as to whether these defendants, or either of them, by influence which they were able to exert, or otherwise, actively used this prosecution as a means of getting their debt; or whether they received their debt in consequence of the situation in which the plaintiff in this case found himself, on account of his desire to relieve himself from arrest, on account of any hope or expectation which he might have had that the county solicitor would show him favor if he restored that which was due these defendants. In the one case the getting of the property which was conveyed for the benefit of these defendants would be a wrong, a misuse and abuse of this criminal proceeding; in the other case it would be entirely right and proper, notwithstanding, as a consequence of it, perhaps, the plaintiff was released and has escaped all punishment.

"There is no dispute that this plaintiff was indebted to the defendants in a large sum,—some \$6,000 or more. They were entitled to have it, and it was his duty to pay it if he could. There is no dispute that they got, while he was under arrest, conveyances of real estate, part from himself and part from his daughter, which were received as a settlement of their claim. The question upon this branch of the case is whether they got those conveyances by any control or influence which they had over this prosecution, and which they used for the purpose of getting these conveyances; or whether, on the other hand, these conveyances came to them without any active effort on their part, without any use by them of the process, either directly or indirectly, but from the plaintiff in this case, because he thought it for his interest to settle the suits, and voluntarily saw fit to make the settlement; and, as I have already intimated, you must appreciate this question as one of some nicety. It is important for you to discriminate between an active use and a mere quiet reception of what came as a result of the situation."

The court then proceeded,—which is not excepted to—to call the attention of the jury to the evidence on each side, and to state that, no claim being made for the property transferred by the plaintiff, he was entitled to such damages as he sustained by the detention of his person under arrest, and such loss of time, and such mental and physical suffering, such injury to feelings or to reputation, as came from the wrongful use of the process.

The judge also said in the course of the

charge, which was not excepted to: "I do not allow you to estimate any damages in this case for anything which occurred before this process was used at all by the officer, but only for what occurred after it began to be used upon this plaintiff, and after it began to be wrongfully used, for the purpose of collecting the defendants' debt, and so used with their participation, by their direction, or under their influence."

The court, in view of an apparent misunderstanding of counsel, then proceeded to instruct the jury as follows:

"There may be a misunderstanding of what was meant by an expression, 'influence,' which I used in the course of this charge; and when I spoke of a liability which might exist on the part of these defendants for any influence which they used, or for any control of these proceedings through their influence, I meant, of course, an influence which they brought to bear in some way upon those in charge of the proceedings. I did not mean influence in the sense of the feeling of friendship, or the opinion regarding them which the officer who made the arrest might have had, or which the county solicitor might have had, without any attempt on their part to use an influence, and without any active accomplishment of such a purpose by themselves."

The jury found a verdict for the plaintiff against both defendants.

The defendants excepted to the admission of the brief of the sureties in the case of *Peterboro' Railroad v. Wood* (mentioned in the opinion); and to the examination of Bailey thereon; to the refusal of the court to instruct the jury as requested in their second, third, and fourth prayers for rulings; and to the charge of the court to the jury, except those parts thereof hereinbefore stated as not excepted to, and except the instruction that the action for malicious prosecution could not be maintained.

Messrs. B. Wadleigh and P. E. Tucker, for defendants:

The defendants were entitled to the instruction set forth in the second prayer.

It is well-settled law that an action for false imprisonment will not lie for acts done under and within the scope of the authority of valid process of a court of competent jurisdiction.

Wherever an injury to a person is occasioned by regular process of a court of competent jurisdiction, though maliciously adopted, case is the proper remedy, and trespass is not sustainable.

1 Chitty, Pl. 16th Am.ed. 149, and cases cited.

But no person who acts under a regular writ or warrant can be liable to this action (trespass), however malicious his conduct; but case for the malicious motive and want of probable cause for the proceeding is the only sustainable form of action.

1 Chitty, Pl. 16th Am.ed. 208, and cases cited; *Plummer v. Dennett*, 6 Me. 421, and cases cited; *Cassier v. Fales*, 189 Mass. 463; *Coupal v. Ward*, 106 Mass. 289.

For arrest upon a lawful warrant issued upon the complaint of the defendant, "and the imprisonment following it, the defendant is not liable in an action for assault and false imprisonment, although his object in making the

complaint was to enforce the payment of a debt or to extort money. The plaintiff's remedy, if any, is by an action for malicious prosecution."

Mullen v. Brown, 138 Mass. 114.

The distinction between the actions of malicious prosecution and false imprisonment is, that where the imprisonment is under valid legal process, trespass on the case or malicious prosecution must be used; but trespass *vi et armis*, or false imprisonment, where it is extrajudicial.

Colter v. Lower, 35 Ind. 285.

There is a class of cases where duress is set up as an answer to a contract, in which the term "false imprisonment" has been used as equivalent to "duress," and which have been frequently erroneously cited as sustaining the proposition that an action of false imprisonment can be maintained in cases like this. Such are the following:

Shaw v. Spooner, 9 N. H. 197; *Hackett v. King*, 6 Allen, 58; *Taylor v. Jaques*, 106 Mass. 291.

"Duress" and "false imprisonment" are not synonymous terms, although so used in these cases.

Watkins v. Baird, 6 Mass. 511.

For reasons above given, neither malicious prosecution nor false imprisonment will lie; not malicious prosecution, because the original case is not ended, and not false imprisonment, because the imprisonment was on legal process. It is equally clear that an action for misuse or abuse of process will not lie.

There was no misuse or abuse of the process by the officer or the keeper while the plaintiff was under arrest.

While in the custody of the officer, plaintiff made two deeds of property, the value of which together then amounted (whatever their value may be to-day) to the amount which the Supreme Court of New Hampshire had previously said he had improperly taken from the Peterboro' Railroad, together with the costs of the judgment.

If these deeds were given under duress, the plaintiff could bring actions at law or in equity to recover the land or annul the deeds as voidable. But until avoided they remained good, and neglect to avoid is affirmance.

The action for abuse of legal process, if it be distinguishable from the action for malicious prosecution (*Hamilburgh v. Shepard*, 119 Mass. 30), is confined to cases of abuse of civil process (Am. Lead. Cas. *223).

The only case quoted under the head of abuse of legal process, which apparently decides that it may be extended to criminal process, is that of *Page v. Cushing*, 38 Me. 527. That was an action of conspiracy in the malicious prosecution and abuse of legal process in obtaining and issuing maliciously and without probable cause a search warrant for liquors alleged to be illegally kept for sale. So far as this was held to be an action for conspiracy, the rulings of the court were incorrect.

Parker v. Huntington, 2 Gray, 125.

Most of the rulings of the court in the Maine case related to malice, and were undoubtedly correct; and where the court passed upon that which related to abuse of process, it held that the ruling of the court below—that an acquittal

need not be shown—was correct, because it did not appear that the original process had ever been brought to trial, and because, in actions for malicious prosecution, in the opinion of that court (unlike the decisions in this State), it was not necessary to show a termination of the action alleged to have been maliciously prosecuted. This was really a decision upon an action for malicious prosecution, and not upon an action for abuse of process, although the court confounded the two. The proceedings in this case were under the charge of the district attorney, and were approved by the court.

Even if the county solicitor's motives were bad, of which there is no evidence, his lawful acts would not thereby be made illegal.

Morrison v. Howe, 120 Mass. 578.

The defendants were guilty of no unlawful act. Acts alone are the basis of actions. A bad motive or purpose is of itself no tort. A bad motive cannot make an act wrong which in its own essence is lawful.

Cooley, Torts, 690.

It was clearly within the power and discretion of the county solicitor to impose, as a condition of making the order to be carried forward no further, that plaintiff should restore the money illegally taken.

Whart. Cont. § 487.

But even in cases for abuse of civil process, it must be shown that some damage was caused by the alleged abuse, or the action will not lie.

Florence v. Jennings, 2 C. B. N. S. 462.

Mr. A. W. Boardman, for plaintiff:

The indictment was procured, and so was the requisition, not in the public interest,—to bring an offender to justice,—but to enforce the payment of a debt; and that was the only purpose of it. All the defendants knew this.

"No one is justified in doing a wrong or unlawful act upon the ground that he did it to obtain a lawful end."

Wills v. Noyes, 12 Pick. 824.

"An abuse of an authority in law, by using it for improper purposes, or beyond its due limits, or in any improper or illegal manner, is a forfeiture of all its protection."

Barrett v. White, 3 N. H. 210.

"Individuals cannot take the execution of the laws into their own hands; and it is the duty of every good citizen, if he knows of any offense against society, to bring the offender before the proper tribunal for inquiry, trial, and punishment."

Commonwealth v. Snelling, 15 Pick. 340;

Shaw v. Spooner, 9 N. H. 197.

"The law neither justifies nor excuses their trifling with the plaintiff's liberty and good name, or experimenting with his fears. It was a willful disregard of his rights."

Johnson v. Ebberts, 6 Sawy. 588; *Holley v. Mix*, 3 Wend. 350.

"Each person who participates in a groundless prosecution is severally liable."

Cotton v. Huidekoper, 2 P. & W. 148, 153.

In *Stone v. Crocker*, 24 Pick. 83, the court says: "What greater private injury can any man suffer than to be arraigned for a felony or other crime, and subjected to the expense, vexation, and ignominy of a public trial, and what act can more deserve the severest animadversion of the law than the prostitution of its process

to the gratification of malice, at the expense of innocence?"

If this point needs further support, it will be found in the long delay before indictment, the spur the judgment gave them, the driving away of Wood's bail, and in the abandonment of the prosecution after the machine had done all it was built for. The great crime was committed eleven years ago, and nobody whipped for it yet.

1 *Whart.* § 444; *Bigelow*, Torts, 82, 197; *Cardinal v. Smith*, 109 Mass. 160.

"It is sufficient if the plaintiff, in his declaration, states facts upon which, if proved, he would be entitled to a verdict."

Graves v. Dawson, 180 Mass. 83.

"Every restraint of the liberty of the person, if not justified by law, is false imprisonment."

Commonwealth v. Nickerson, 5 Allen, 518; 525. See also *Parker v. Huntington*, 2 Gray, 127; *Skinner v. Gunton*, 1 Wms. Saund. 239, notes.

The verdict shows that, whether Wood was guilty or not, or the prosecution barred or not, the law was misused and abused for the purpose of extortion, and eluded by a corrupt compromise; and that the defendants "actively used the prosecution as a means of getting their debt;" that Bailey and Graves sought and found a ready tool in Burns to aid them in indicting, arresting, and holding Wood solely for the purpose of collecting their debt. And this was such misuse and abuse of process as to render the defendants liable for damages in this action.

Bigelow, Torts, p. 119; *Watkins v. Baird*, 6 Mass. 506; *Savage v. Brewer*, 16 Pick. 453; *Commonwealth v. Nickerson*, 5 Allen, 518, 525; *Hackett v. King*, 6 Allen, 58; *Taylor v. Jaques*, 106 Mass. 295; *Fisher v. Deans*, 107 Mass. 118; *Johnson v. Reed*, 186 Mass. 423; *Shaw v. Spooner*, 9 N. H. 197; *Shaw v. Reed*, 30 Me. 105; *Page v. Cushing*, 38 Me. 523; *Bowen v. Buck*, 28 Vt. 308; *McMahon v. Smith*, 47 Conn. 221; *Juchter v. Boehm*, 67 Ga. 534; *Grainger v. Hill*, *Bigelow*, Lead. Cas. Torts, 184.

The plaintiff's right to recover damages for such misuse and abuse of process is not governed by the termination or nontermination of the criminal proceedings.

Add. Torts, p. 257, cases cited, and p. 243; *Grainger v. Hill*, 4 Bing. (N. C.) 213; *Bigelow*, Lead. Cas. Torts, 184; *Page v. Cushing*, 38 Me. 523.

In the case last cited, the court says there is no reason why suit for damages should be postponed till the prosecution, known to be false and hopeless, should be more formally terminated. Besides, "the plaintiff is not in fault that the prosecution cannot be terminated by a judgment upon a verdict."

Graves v. Dawson, 183 Mass. 420.

Even if Wood had committed the crime, and the prosecution had not been barred, and the indictment, warrant, and requisition had been obtained and the arrest made in good faith, and for the sole purpose of bringing an offender to justice; in other words, if all the proceedings had been just and legal up to and including the bringing of Wood to Nashua,—the defendants had no right to drive off his bail, or hold him, as they did, for purposes of trade or compromise. This was trespass and

false imprisonment, for which the defendants are liable in this action.

Watkins v. Baird, 6 Mass. 506; *Shaw v. Spooner*, *ubi supra*; *Commonwealth v. Nickerson*, 5 Allen, 518, 525; *Hackett v. King*, 6 Allen, 58; *Taylor v. Jaques*, 106 Mass. 295; *Fisher v. Deans*, 107 Mass. 118; *Adams v. Paige*, 7 Pick. 542.

Other cases bearing upon this, not already cited, are as follows:

As to malice,—

Stevens v. Midland Rail. Co. 10 Exch. 356; *Brooks v. Warwick*, 2 Stark. 398; *McDonald v. Rooke*, 2 Bing. (N. C.) 219; Add. Torts, p. 246, and cases cited; *Ross v. Langworthy*, 13 Neb. 492.

As to probable cause,—

Bacon v. Towne, 4 Cush. 238; *Kimball v. Bates*, 50 Me. 308; *Barron v. Mason*, 81 Vt. 189; *Mitchell v. Wall*, 111 Mass. 492.

"The circumstances of the abandonment of the prosecution may be such as to indicate *prima facie* a want of probable cause."

Bigelow, Torts, 82, 197; 6 Bing. 190.

As to complicity,—

Commonwealth v. Pease, 16 Mass. 91; *Jones v. Rice*, 18 Pick. 440, 442; *Partridge v. Hood*, 120 Mass. 405; Heard, Cr. L. p. 6, note; 11 Whart. § 2505.

C. Allen, J., delivered the opinion of the court.

The three counts of the declaration are treated by the counsel for the defendants as being counts respectively for malicious prosecution, for false imprisonment, and for abuse of criminal process; and the trial appears to have proceeded on that ground. No question as to the form of the declaration has been raised. The court correctly ruled, upon the request of the defendants, that, upon the evidence, the plaintiff could not maintain an action for malicious prosecution, the prosecution not having been brought to a termination. The principal questions arise upon the other requests by the defendants for instructions.

The court declined to rule that, upon the evidence, the plaintiff could not maintain an action for false imprisonment against either of the defendants. No action would lie for false imprisonment by reason of what was done in pursuance of the warrant of the governor in extraditing the plaintiff from Massachusetts to New Hampshire, or of what was done in pursuance of any lawful precept issued upon the indictment in New Hampshire; but if acts were done in excess of what was authorized, and if the process of the law was abused, the remedy might be by an action for false imprisonment. The court therefore properly declined to adopt the language of the defendants' second request; and all the rights of the defendants in respect to this were saved by the course of the instructions in relation to the wrongful use of process already commenced.

There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a first cause, and is valid in form, and that the arrest or other proceeding upon the process was justifiable and proper in its inception. But the grievance to be redressed arises in consequence of subsequent proceedings. For example, if, after an arrest upon civil or criminal process, the

party arrested is subjected to unwarrantable insult and indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue hardship, he has a remedy by an action against the officer and against others who may unite with the officer in doing the wrong. It is sometimes said that the protection afforded by the process is lost, and that the officer becomes a trespasser *ab initio*. *Esty v. Wilmot*, 15 Gray, 168; *Malcom v. Spoor*, 12 Met. 279. This rule, however, is somewhat technical, and is hardly applicable to others than the officer himself. But the principle is general, and is applicable to all kinds of abuses outside of the proper service of lawful process, whether civil or criminal, that for every such wrong there is a remedy, not only against the officer, whose duty it is to protect the person under arrest, but also against all others who may unite with him in inflicting the injury. Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest, for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act in accordance with the wishes of those who have control of the prosecution.

The leading case upon this subject is *Grainger v. Hill*, 4 Bing. (N. C.) 212, where the owner of a vessel was arrested on civil process, and the officer, acting under the directions of the plaintiffs in the suit, used the process to compel the defendant therein to give up his ship's register, to which they had no right. He was held entitled to recover damages, not for maliciously putting the process in force, but for maliciously abusing it to effect an object not within its proper scope. In *Page v. Cushing*, 88 Me. 523, the same doctrine was held applicable to the abuse of criminal process. *Holley v. Mir*, 3 Wend. 350, is to the same effect; and it was held that an action for false imprisonment will lie against an officer and a complainant in a criminal prosecution, where they combine and extort money from a party accused, by operating upon his fears, though the party was in the custody of the officer under a valid warrant issued upon a charge of felony. The case of *Baldwin v. Weed*, 17 Wend. 224, was an action for false imprisonment. The plaintiff had been indicted in New York; he was arrested in Vermont, and carried to New York for trial. The defendant Weed procured the requisition, was present at the arrest, and caused the plaintiff to be put into irons, with the purpose to secure two small debts. The plaintiff executed to Weed a bond for the delivery of property much in excess of the debts. The action for malicious prosecution failed, but the court (Nelson, J.) declared that an action of trespass, assault, and false imprisonment should have been brought, and was the appropriate remedy for the excess of authority and abuse of the process; and intimated to the plaintiff to amend his pleadings accordingly. See also *Carleton v. Taylor*, 50 Vt. 220; *Mayer v. Walter*, 64 Pa. 283.

On similar grounds, an officer becomes responsible in damages for abuse of process, or as trespasser *ab initio* by reason of such abuse, who omits to give an impounded beast reasonable food and water while under his care

(*Adams v. Adams*, 18 Pick. 384); or who stays too long in a store where he has attached goods (*Rowley v. Rice*, 11 Met. 337; *Williams v. Powell*, 101 Mass. 467; *Davis v. Stone*, 120 Mass. 228); or who keeps a keeper too long in possession of attached property (*Cutter v. Howe*, 122 Mass. 541); or who places in a dwelling house an unfit person as keeper, against the owner's remonstrance (*Malcom v. Spoor*, 12 Met. 279).

In various other cases where it has been said that the only remedy was by an action for malicious prosecution, the whole grievance complained of consisted in the original institution of the process, and no abuse in the mere manner of serving it was alleged. Such cases are *Mullen v. Brown*, 138 Mass. 114; *Hamilburgh v. Shepard*, 119 Mass. 30; *Coupal v. Ward*, 106 Mass. 289; *O'Brien v. Burry*, Id. 300. The case of *Hackett v. King*, 6 Allen, 58, was trover for the conversion of property which the plaintiff conveyed to the defendant under alleged duress. In *Taylor v. Jaques*, 106 Mass. 291, the question arose in another form, the action being on a promissory note, in defense to which the defendant alleged that his signature was procured by duress.

In examining the instructions of the learned judge to the jury in the present case, no error is found. He made a careful discrimination between the remedy for a malicious prosecution, and a malicious abuse of process in the manner of executing it. He instructed them explicitly that no damages should be given for anything which occurred before the process was used at all by the officer, but only for what occurred after it began to be used upon the plaintiff, and after it began to be wrongfully used for the purpose of collecting the defendants' debt, and so used with their participation, by their direction, or under their influence. He told them also, in effect, that it must be proved that the defendants, by influence which they were able to exert, or otherwise, actively used the prosecution as a means of getting their debt; and this he afterwards explained and enforced by saying that it must be an influence which they brought to bear in some way upon those in charge of the proceedings. Under these instructions, the jury could not properly hold the defendants responsible for merely setting the criminal law in motion, and arresting the plaintiff, and holding him in custody until his discharge; but only for some distinct act or omission which amounted to a misuse or abuse of the process after it had issued, some indignity or oppression beyond the mere fact of arrest and detention, some separate pressure to compel him to make the settlement.

The defendants contend that there was not sufficient evidence to warrant the jury in finding any such abuse of process. But it is unnecessary for us to go into a consideration of this question, since, upon another ground, the case will have to go to a new trial; and the evidence upon the new trial may not be the same. The magnitude of the verdict certainly leads to the fear that the jury may have failed to appreciate the legal grounds upon which the plaintiff's claim to damages must rest; but the question whether the damages are excessive is not before us; and no question is before us as to the rule of law as to the measure of damages.

In the admission of those expressions in Mr. Bailey's brief which related to the assent of a majority of the board of directors to the payment of \$4,261 to the plaintiff, as competent evidence bearing upon the question of misuse of legal process, we think an error was made by which the defendants were prejudiced. The question arose in this way: There was an action by the Peterboro' Railroad Company against the plaintiff, who had been its treasurer, and the sureties upon his bond, who were the defendants in the present case, to recover for money alleged to have been wrongfully appropriated by the plaintiff to his own use, in payment of a claim for services, without the approval of the board of directors. The case was tried before a referee, who in his report set forth that the defendants "proposed to offer the testimony of a majority of the directors who were present at the meeting [when the claim was partly considered] to show that they understood at that time that the bill was to be paid in full as presented; but the referee ruled that the proposed evidence would be incompetent," etc. The correctness of this ruling was controverted, and the case was argued on briefs before the Supreme Court of New Hampshire, the defendant Bailey submitting a brief in which he assumed, as a fact, the existence of the assent of a majority of the board of directors, according to the offer of proof before the referee. This part of the brief was admitted in the present action against the defendants, as evidence that Bailey knew the fact to be as there assumed, and thus as evidence of the groundlessness of the prosecution against the plaintiff, and thus as bearing somewhat on the question whether the defendants did or did not abuse the prosecution after it had been instituted. But we think the statements of the brief had no just tendency to show any personal knowledge, on Mr. Bailey's part, of the fact in question. In the trial of a cause, the offers of counsel to prove certain facts do not usually imply that they have any personal knowledge thereof. Indeed, the facts may be in dispute, and counsel may know that they are in dispute, and, nevertheless, properly offer evidence to prove them. It is as if the counsel should say: "I wish to offer evidence tending to prove so and so. This will probably be controverted by the other side. I wish to offer my evidence, and to go to the jury upon the point." But the court says: "No, even if you succeed in proving what you claim to be the facts, it will not help you. The evidence, if true, is immaterial." There is in such case, of course, no finding of the fact. It remains a controverted question. But on the argument of the law question, whether the ruling of the court was right or not, the counsel and the court must assume, for the purpose of the discussion, that the fact existed as offered to be proved. The statements in the brief of Mr. Bailey amounted to no more than this. They did not import any personal knowledge, on his part, of the facts. By assuming them to be true, he made no admission which justly could be put in evidence against him afterwards, as affecting him personally. For this reason only, a new trial must be had.

Exceptions sustained.

Joseph S. HYDE *et al.*

v.

MECHANICAL REFRIGERATING CO.

A refrigerating company is liable for damage caused to fruit stored by it, by reason of decay of such fruit, caused by raising the temperature of its storehouse to a height above that agreed upon; and the diminution in the market value by reason of such decay may be considered as an element of the damage.

(Suffolk—Filed May 9, 1887.)

ON defendant's exceptions. *Overruled.*

Action of contract, the declaration averring that defendant corporation received from plaintiffs, in good condition, 500 barrels of apples, for the purpose of cold storage, the corporation promising and agreeing, at the time of the delivery of said apples to it, and before, to keep the temperature of the rooms wherein they were stored at 80°, and in no event warmer than 82° Fahrenheit, for which defendant corporation was to receive, and did receive, a large amount over ordinary storage from plaintiffs; that defendant corporation did not keep said apples at the temperature agreed upon, but did keep them much warmer, to wit, at a temperature of from 40° to 50°, instead of from 80° to 82°, as agreed upon, and by reason of said neglect and omission in keeping said apples at said temperature, said apples were greatly damaged, and to the amount as appears from the annexed account. Wherefore defendant owes the plaintiff the amount of said damage and loss, to wit, the sum of \$650; of all which defendant had notice before the bringing of this suit. The answer was a general denial.

At the trial in the superior court before Thompson, J., the plaintiffs offered evidence tending to show that they made a verbal contract with the defendant, according to the terms of which the latter was to store for the plaintiffs 500 barrels of apples, at a temperature not exceeding 82° Fahrenheit, and that, in consideration of said storage, the plaintiffs paid the defendant the sum of \$81.18; that the defendant did not keep the temperature at the agreed 82° Fahrenheit, but at a higher temperature, to wit, about 46°, by which said apples were greatly damaged, to wit, to the amount of \$650, being the diminution in the market value, caused by decay, which, they offered evidence to show, was caused by their being kept at said higher temperature.

After the evidence was all in, and before the charge to the jury, the defendant requested the judge to instruct the jury that "the plaintiffs in this action, assuming all the statements made by them and their witnesses to be true, can only recover the amount (if entitled to recover anything) paid by them for storage and interest; not damages for any diminution in the market value of the apples."

But the judge refused to give either the form or substance of such prayer, and instructed the jury that if they found the agreement to have been made as alleged, they might consider as an element of damage the diminution in the market value of the apples, if they

found that such diminution was caused by the keeping of them at a higher temperature than the one agreed upon. The jury found a verdict for the plaintiffs for \$420.41.

To the rulings and refusals to rule the defendant excepted.

Messrs. Stevens & Durant, and J. E. Farnham, for defendant:

The action and declaration in this case were wholly in contract. There is a clear and well-recognized distinction between the rule or measure of damages applicable in actions of contract and tort; and the court erred in the present case, even if its rulings and instructions could be held to be correct for an action of tort.

1 Suth. Dam. p. 74; *Goddard v. Barnard*, 16 Gray, 205; *Murdock v. Boston & A. R. R.* 183 Mass. 15; Sedgw. Dam. 6th ed. 581.

The form of action selected and adhered to by the plaintiff must control the defendant's liability; and, in the case at bar, the injury which the plaintiffs may have sustained, for which damages could be recovered in the form of action, is too remote.

Bank of Orange v. Brown, 3 Wend. 158; Ang. Car. §§ 422-439; *Hobbs v. London & S. R. Co. L. R.* 10 Q. B. 111.

The contract price is the true measure of damages.

Bush v. Chapman, 2 Greene (Ia.), 549; *Pond v. Wyman*, 15 Mo. 175; *Wood's Mayne Dam.* §§ 53-77.

In the case of *Murdock v. Boston & A. R. R.* 183 Mass. 15, the court ruled "that the damages for a breach of a contract are limited to such as are the natural and proximate consequences of the breach." The detention of the plaintiff during the night, the cold he contracted owing to the dampness of the place where detained, were not the natural consequences of the breach of the defendant's contract. They were results of intervening causes. So, in the case at bar, there is no evidence that the damage to the apples was caused by keeping them at a higher temperature than agreed upon, but may have been caused by the natural process of decay. To hold the defendant responsible in this case would be making it an insurer,—a contract which neither party could have contemplated.

Mr. Charles R. Elder, for plaintiffs:

The declaration states a case in contract, which is "an agreement, obligation, or legal tie whereby one party binds himself, or becomes bound, expressly or impliedly, to another, to do a certain act." The defendant's liability arose from its failure to keep the apples at the temperature agreed upon, and its failure to keep them cold, as the nature of the goods required. There was a breach of contract, for which plaintiffs might sue in contract.

Van Kuran v. May, 7 Allen, 466.

At the trial the plaintiffs proved a contract as alleged. The nature of the goods, their tendency to deteriorate in value when kept at a high temperature, must have been well known to the defendant. The apples were damaged as the direct consequence of the fault of the defendant. The damage to the apples was the direct result of defendant's breach of contract; there was no intervening cause.

Murdock v. Boston & A. R. Co. 138 Mass. 15; *Fox v. Harding*, 7 Cush. 516; *Ingledeu v. Northern R. R.* 7 Gray, 86.

Holmes, J., delivered the opinion of the court:

If a refrigerating company undertakes to store apples at a temperature below a certain height, decay caused, as it was shown to be in this case, by the temperature being allowed to reach a much greater height, is the specific consequence which the contract was made to prevent; and if the decay caused a diminution of market value, such diminution may be considered as an element of damage.

Exceptions overruled.

Milton A. KENT

v.

William N. TODD *et al.*

1. The plaintiff was tenant of the second, and the defendants were tenants of the first, story of the building through the hoistway in which the plaintiff fell. The lease of each party gave him the use of the hoistway in common with the other tenants. The hoistway was partitioned off from the rooms through which it passed, with bolted doors opening into it on each story, and, when not in use, could be closed by two trap doors which made a floor continuous with that of the rest of the story, and afforded access to a window on the floor occupied by the plaintiff, which he was bound to keep in repair, and which, from its situation, would naturally be opened and closed by him at his pleasure. There was also a bar that could be put across the entrance door of the hoistway when either trap door was open. The defendants' servant, for the lawful use of the hoistway, unbolted and opened the entrance door, opened one of the trap doors, and then shut and bolted the entrance door again, leaving the trap door open. The plaintiff had placed a basket inside the partition, seemingly in such a way as not to interfere with the use of the hoistway, and, when about to go home, unbolted and opened the entrance door in order to get the basket, went in, and fell. In an action of tort for damages thus suffered, the court instructed the jury that the plaintiff had no rights in the hoistway, under his lease, except to use it for the purpose of a hoistway; that, apart from any special agreement with the defendants, if he used it for the purpose of storage, and went there for the sole purpose of removing articles there stored, while he was so using it the defendants were under no legal obligation to him as to the care of the hoistway and bars. This instruction, upon exceptions, was declared to limit the plaintiff's rights too strictly, as the lease did not except so much of the floor as covered the hoist-

way, so as to render the plaintiff a trespasser when he walked upon it for any purpose other than using the hoistway as such. The plaintiff might go there for any purpose not inconsistent with the rights of other tenants. The jury might have thought that, although the entrance door was shut, it was a reasonable precaution for the defendants to shut the trap when their work was over, and that they had delayed unreasonably in closing the trap. Under the facts it would not be unreasonable to require the defendants to put the plaintiff's floor back to the condition in which they found it, as they did put back the entrance door.

2. The plaintiff having set up an agreement or understanding, and a course of dealing which, as he contended, gave him a right to expect to find the bar in place when the trap door was open, a charge was regarded as misleading which thus submitted the question to the jury: "If the defendants made any agreement or had any understanding with the plaintiff as to how they would manage the hoistway and take care of the same after using it, was this understanding and agreement with reference to use of the hoistway outside of and apart from the purpose for which it was designed, or had it reference only to the use of the hoistway as a hoistway? Did they put themselves, and did the plaintiff understand that they put themselves, under obligation as to the care of the plaintiff while using the hoistway for some other purpose than that of a hoistway?"

(Suffolk—Filed May 10, 1877.)

ON plaintiff's exceptions. *Sustained.*

Action of tort to recover for personal injuries received through alleged negligence of defendants. Tried in the superior court before Dewey, J.

The case is fully stated in the opinion.

Messrs. Gaston & Whitney, for plaintiff.

There was some evidence, as against the defendants, that the particular use made by the plaintiff of this space on the day of the accident—for storing the basket of chickens—was known to the defendants' agent.

See *Lord v. Bigelow*, 124 Mass. 185, 190; *Philadelphia, W. & B. R. v. Howard*, 13 How. 307, 383 (54 U. S. bk. 14, L. ed. 157, 168); *Perry v. Simpson W. M. Co.* 40 Conn. 313.

The actual use made of premises under a doubtful deed is often regarded as a practical construction of its terms.

Greenl. Ev. § 298.

Whatever may have been the terms of the lease, it is clear that the bars and trap doors were constructed and used in such a way as to indicate that the space covered by the trap doors when in position could in fact be used in connection with the stores, and that the bars were put up or not, according as parties had occasion to go on the trap doors; and it was the duty of the defendants, even though the plaintiff may have been a trespasser as between

himself and his landlord, to use proper care in opening the trap door, that the plaintiff should not, in the use which he actually made of the premises, suffer injury.

Hall v. Ripley, 119 Mass. 185; *Marble v. Ross*, 124 Mass. 44; *Davies v. Mann*, 10 Mees. & W. 546.

Mears. Samuel Hoar and William P. Harding, for defendants:

The first and second prayers for instructions, which leave out all question of lease or agreement, and make no distinction as to the party bringing the action, whether they be sound or not as general propositions of law, were properly refused, because they are not applicable to the facts proved, and, if given, would be likely to mislead the jury.

Pratt v. Amherst, 140 Mass. 187, 1 New Eng. Rep. 197.

The rights of the plaintiff and defendants to use the hoistway are derived entirely from their leases, but for which they would both be trespassers if they used the hoistway for any purpose whatever; and it follows that they are also trespassers if they use the hoistway for any purpose not authorized by their leases. It is obvious, from the construction of the hoistway,—described in the bill of exceptions as a complete structure in itself, from basement to roof, partitioned off from the various rooms through which it passes,—that it was designed and adapted for no other purpose than that of a hoistway, and that its use for any other purpose would greatly interfere with its use as a hoistway.

It follows that, under the lease, the defendants owe the plaintiff the duty of not interfering with or obstructing the latter in his use of the hoistway for hoisting goods, and of keeping the same in a condition reasonably safe for that purpose; it also follows that, while the plaintiff was using said hoistway for the purpose of storing chickens, he was a trespasser, and that the defendants were under no legal obligation to protect him while so using it in a manner not authorized by his lease, unless there was some agreement or understanding with the defendants to protect him in such unauthorized use; and the plaintiff, while so using said hoistway, took his own risk.

"In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault or negligence or breach of duty, where there is no act or service or contract which a party is bound to perform or fulfill." "So, a licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils."

Sweeney v. Old Colony & N. R. R. Co. 10 Allen, 868, 870; *Zosbisch v. Tarbell*, 10 Allen, 885; *Gilbert v. Nagle*, 118 Mass. 278; *Sweeney v. Nickerson*, 120 Mass. 306; *Ioay v. Hedges*, L. R. 9 Q. B. Div. 80; *Heaven v. Pender*, Id. 302. 2 Mass.

Holmes, J., delivered the opinion of the court:

This is an action of tort for damages suffered by the plaintiff in consequence of falling through a hoistway. The plaintiff was tenant of the second, and the defendants of the first, story of the building where the accident happened. The lease of each party gave him the use of the hoistway in common with the other tenants. The hoistway was partitioned off from the rooms through which it passed, with bolted doors opening into it on each story, and, when not in use could, be closed by two trap doors which made a floor continuous with that of the rest of the story. There was also a bar which could be put across the entrance door when either trap door was open.

The defendants' servant, for the lawful use of the hoistway, unbolted and opened the entrance door, opened one of the trap doors and then shut and bolted the entrance door again. The plaintiff had placed a basket of chickens inside the partition, seemingly in such a way as not to interfere with the use of the hoistway, and, when about to go home, unbolted and opened the entrance door in order to get them, went in, and fell.

The court instructed the jury, in substance, that the plaintiff had no rights in the hoistway under his lease, except to use it for the purposes of a hoistway; that, by the common law (that is, as we understand, apart from agreement), if he used it for the purpose of storing chickens, and went there for the sole purpose of getting the chickens, while he was so using it the defendants were under no legal obligation to him as to the care of the hoistway and bars; and that if the plaintiff was entitled to recover, it must be by virtue of some agreement, which it lay on him to prove, and also to prove that the agreement covered uses for other purposes than that of a hoistway.

The first of these instructions, we think, limits the plaintiff's rights too strictly. We construe the lease as excepting so much of the floor as covered the hoistway, so that the plaintiff was a trespasser when he walked upon it for any purpose other than using the hoistway as such. It appears to us a more reasonable construction to hold that the plaintiff might go there for any purpose not inconsistent with the rights of the other tenants; and this view is confirmed by the fact that one of the windows on the plaintiff's floor, which the plaintiff seems to have been bound to keep in repair, and which a tenant would naturally expect to open or shut at pleasure, could only be reached by crossing the hoistway.

The other rulings are based on the premise that the plaintiff was a trespasser; and this error, as we must regard it, did undoubtedly tend to prejudice the plaintiff's case, even if, on other grounds, we should reach some of the conclusions stated by the learned judge at the trial. In one branch of the case in particular, we think it probable that the jury were misled. The plaintiff set up an agreement or understanding and course of dealing which, as he contended, gave him a right to expect to find the bar in place when the trap door was open. The language of the charge was as follows: "If the defendants made any agreement or had

any understanding with the plaintiff as to how they would manage the hoistway and take care of the same after using it, was this understanding and agreement with reference to some use of the hoistway outside of and apart from the purpose for which it was designed, or had it reference only to the use of the hoistway as a hoistway? Did they put themselves, and did the plaintiff understand that they put themselves, under obligation, as to care, to the plaintiff while using the hoistway for some other purpose than that of a hoistway?"

In a sense, this is all true, but coming, as it did, after a statement that the plaintiff had no right, under his lease, to be where he was for the purpose for which he went there, it must have been understood, and probably was intended to be understood, that a general agreement as to the way in which the defendants would use the hoistway would do the plaintiff no good unless there was some express reference to his use of it for other purposes than those of a hoistway. We are of opinion that if the defendants had given the plaintiff the right to expect that, when they opened the trap, they would put up the bar as well as bolt the entrance door, the plaintiff had the same right to rely on that expectation when going to the hoistway for chickens as when going there to open the window or to prepare to receive goods.

Although the exceptions must be sustained for the reason which we have given, it seems advisable to give a little consideration to the general question which was dealt with by the court below, and which must arise again. What, if any, were the plaintiff's rights, in the absence of any agreement or understanding? For even if the plaintiff was not a trespasser, it is still by no means clear whether the defendants owed him any duty, and, if so, whether it was not performed. In *Williams v. Groucott*, 4 B. & S. 149, the defendants, who were entitled to the minerals under a field, had lawfully opened a mine shaft in it, but had left the shaft improperly guarded against horses. The plaintiff occupied the field, and his horse fell into the shaft and was killed. It was held that the defendants were liable, although the question was regarded as nice and novel.

Assuming that we should have decided that case the same way, it will be seen that this is much nearer the line, so far as any duty and breach of duty to guard the hoistway are concerned. The reason given by Cockburn, *Ch. J.*, for the decision was "that it is more reasonable to expect that the man whose act produces the danger should do all that is reasonably necessary to prevent injurious consequences to the owner of the surface soil, who does not know that a shaft will be sunk, or, if so, when or where it will be sunk." Here the plaintiff knew of the hoistway; the damage was done to his own person; and while, in the English case, the defendants had possession of the shaft, here the plaintiff was in possession of the *locus*. These facts add to the strength of the position for the defendants, stated by Chief Justice Cockburn, that they did no more than they had a right to do, and if dangerous consequences were likely to arise to the plaintiff, it was for him to guard against them.

However this may be, apart from agreement or understanding, what duty to guard the hoistway could there have been which the defendants did not perform? It cannot be argued that, on general principles, the defendants were bound to put up two guards, one behind the other. If a man cannot complain when he knowingly walks through a door which he knows leads to a hole that may or may not be covered over (*Taylor v. Carey Mfg. Co.* 140 Mass. 150, 1 New Eng. Rep. 210; *S. C.* 143 Mass. 470, 8 New Eng. Rep. 875), he cannot complain because a person who has lawfully opened the hole, and has also locked the door leading to it, has not put up a second less effectual barrier behind the door, unless that person has given him a right to expect it.

Suppose, however, that the jury had thought that, although the entrance door was shut, it was a reasonable precaution for the defendants to shut the trap when their work was over, and had found that their work was over, and that they had delayed unreasonably in closing the trap, we think that if the plaintiff was in a position to recover, the defendants might believe on that ground. The extent of duty under such circumstances is a matter of expediency and degree, which different minds might fix at different points. But we think that it would not be unreasonable to require the defendants to put the plaintiff's floor back to the condition in which they found it, as they did put back the entrance door. The exceptions are not clear on this point, but there seems to have been some evidence which the jury were prevented from considering by the ruling of the judge.

Exceptions sustained.

Benjamin H. WELSH, Admr.,

v.

Charles O. WOODBURY, Admr.

1. The objection that a limitation over is an attempt to take away one of the incidents of ownership, and to say that, if the owner does not dispose of his property in his lifetime or at his death, it shall devolve otherwise than as the law has provided, does not apply to a remainder after a life estate, even when the life estate is coupled with a power.
2. The objection to the uncertainty of what will be the subject of the limitation over has never been applied to a life estate coupled with a power.
3. Where a testator's wife took a life estate coupled with a power, and the limitation over was to his sister, whether the legacy to his sister was contingent or vested, it passed to her administrator upon her death before the death of the life tenant.

(Middlesex—Filed May 20, 1887.)

A PPEAL by defendant from a judgment of the Superior Court of Middlesex County in favor of plaintiff in an action to recover a legacy. *Affirmed.*

This action was brought by Benjamin H. Welsh, administrator of Lydia Hobbs, deceased, against Charles O. Woodbury, administrator *de bonis non* with the will annexed of Aaron Jacks, deceased, to recover a legacy given by the will of the said Aaron Jacks.

The case was heard in the superior court before Thompson, J., on agreed facts, from which it appeared that Aaron Jacks died in 1879, aged eighty-one, without issue, leaving a widow, Mary Jacks, who died in December, 1883, aged eighty-four years. Lydia Hobbs, the sister of Aaron Jacks, died in October, 1880, aged ninety-one years, leaving children. The estate left by Aaron Jacks consisted of about \$8,000 personal estate and \$3,000 real estate. At the death of Mary Jacks, the widow, the real estate had not been sold, and no change or transfer had been made in the securities or deposits of which the personal estate consisted, except that said Mary Jacks, as executrix of the will of Aaron Jacks, had drawn from time to time the interest on such deposits, and a small portion of the principal. Aaron Jacks left the following will :

"I, Aaron Jacks, of Methuen, in the county of Essex and Commonwealth of Massachusetts, farmer, make this my last will and testament :
"After the payment of my just debts and funeral charges, and after my executrix hereinafter named shall have taken from my estate, personal or real, a sufficient sum of money to purchase a lot in the cemetery where I shall be buried, if at my decease I shall not own one, and put the same in good condition, and to purchase a monument not to cost less than \$500, to erect to my memory in said lot, if one shall not have been erected there previous to my decease, I give and devise as follows:

"1st. To my beloved wife, Mary Jacks, the use and income, during her natural life, of all my property and estate, personal and real, for her support, comfort, and enjoyment, or for any other purpose as she may in her judgment deem necessary; and if said income shall, in her judgment, be insufficient for her support, comfort, enjoyment, or for any other purpose for which she may wish to spend money, it is my will that she may spend the proceeds arising from the sale of any of my personal or real estate. And I hereby give her power to sell, in her sole and individual name, any of my personal or real estate, and to convey and transfer by deed or other instrument, in her own name, for the above-named purposes, or for investment or reinvestment.

"2d. Of the property and estate remaining at the death of my said wife I give and devise to the Orthodox Congregational Society in said Methuen, known as the First Parish, the sum of \$5,000, upon the express condition that the income arising therefrom shall always be spent for the support of the gospel in the church connected with said society. It is my will that said sum of \$5,000 shall be invested and taken care of by three trustees. It is my will that said trustees shall be elected at the next annual meeting, after the decease of my said wife, of said parish, or at a special meeting called and held by said society after the decease of my said wife, and that one of said trustees shall be elected for one year, one for two years, and one for three years; and that thereafter, at

every annual meeting of said society, one trustee shall be elected for the term of three years.

"3d. All the rest and residue of my estate, personal and real, remaining at the death of my said wife, I give and devise as follows:

"To my sister, Lydia Hobbs, of Cambridgeport, in the county of Middlesex and Commonwealth aforesaid, one half of the same.

"To my wife's sister, Eliza J. Woodbury, of Salem, in the county of Rockingham and State of New Hampshire, one fourth of the same.

"To Olive S. Woodbury, of Boston, in the county of Suffolk and Commonwealth aforesaid, another sister of my said wife, one fourth part of the same.

"Said legacy to the Orthodox Congregational Society in Methuen is given upon the express condition that they shall keep my lot in the cemetery, where I and my said wife are buried, in good condition.

"I hereby nominate my said wife to be the executrix of this my will."

The will was duly executed and admitted to probate.

The court found for plaintiff and ordered judgment accordingly, and defendant appealed to this court.

Mr. E. T. Burley, for defendant:

By the case stated the parties seek to present two questions:

First. What is the nature of the estate in the personal property given to Mary Jacks by her husband's will? If she took an absolute estate therein, the gift over is void, and therefore this action cannot be maintained.

Bacon v. Woodward, 12 Gray, 376; *Burbank v. Whitney*, 24 Pick. 146; *Hale v. Marsh*, 100 Mass. 468; *Gifford v. Choate*, 100 Mass. 846; *Whitcomb v. Taylor*, 122 Mass. 243; *Dunn v. Sargent*, 101 Mass. 386; *Kuhn v. Webster*, 12 Gray, 3; *Ayer v. Ayer*, 128 Mass. 575; *Kelley v. Meins*, 135 Mass. 231, and cases cited.

Second. If the gift over to Lydia Hobbs can be supported, then, did the interest of Lydia Hobbs vest in her administrator, or did it, upon her death or thereafter, pass directly to heirs under the will? If the latter, then this action cannot be maintained.

See *Winslow v. Goodwin*, 7 Met. 363; *Clapp v. Stoughton*, 10 Pick. 468, 469; *Putnam v. Story*, 133 Mass. 210; *Johnson v. Battelle*, 125 Mass. 453; *Taft v. Taft*, 180 Mass. 461.

Messrs. W. L. Thompson and H. C. Holt, for plaintiff:

The first question to be settled in this case is: What estate did Mrs. Jacks take by her husband's will? Did she take an absolute estate in the real and personal property of her husband, or a life estate only therein, with the power of disposal during her lifetime, with a gift over to the plaintiff's intestate and others, of what remained undisposed of at her death? If the former, then it is conceded that the gift over is void. If the latter, the plaintiff contends that he is entitled to recover. The latter is the true construction of the will. The intention of the testator, from the language used, is manifest. "When a life estate only is given to one person, with a power to dispose of the land in which the life estate only is given, and, on the death of the first taker, the portion of the land remaining undisposed of is given to another, the gift over is valid, and

takes effect, as to all the land remaining undisposed of on the death of the life tenant, as a remainder."

Kelley v. Meins, 135 Mass. 231; *Smith v. Snow*, 123 Mass. 223; *Gibbins v. Shepard*, 125 Mass. 541.

The language above quoted exactly describes what was intended by the testator in this will in reference to the real estate; and the gift over of the real estate is valid. There is no established rule of law to prevent the manifest intent of the testator in this case being carried out as to the personal property as well as the real.

Smith v. Bell, 6 Pet. 68 (31 U. S. bk. 8, L. ed. 823); *Homer v. Shelton*, 2 Met. 194; *Surman v. Surman*, 5 Madd. 123; 2 Redf. Wills, 3d ed. pp. 393, 394, §§ 20, 22, and cases cited; *Ayer v. Ayer*, 128 Mass. 575; *Kuhn v. Webster*, 12 Gray, 3.

The administrator of Lydia Hobbs, deceased, is the proper person to sue to recover the legacy to her under the will, and he can maintain this action; for the interest of Lydia Hobbs under the will, if any, in the personal property, was either a vested interest simply, or a vested interest in a contingent remainder. If the former, the legacy is, beyond question, payable to the administrator; if the latter, it is transmissible, like a vested interest, and also payable to the administrator.

Winslow v. Goodwin, 7 Met. 363; *Dunn v. Sargent*, 101 Mass. 336.

The final vesting of personal property may be postponed to the same extent as in an executory devise of real estate.

4 Kent, Com. 269, 271; *Fosdick v. Fosdick*, 6 Allen, 41; *Sears v. Russell*, 8 Gray, 86-100.

A full power to sell or devise the premises may be given to the life tenant without affecting the validity of the limitation over, in case the power is not exercised.

Hatfield v. Sohler, 114 Mass. 48-53; *Moore v. Weaver*, 16 Gray, 305; *Stockbridge v. Stockbridge*, 99 Mass. 244; *Johnson v. Battelle*, 125 Mass. 453; *Gibbins v. Shepard*, 125 Mass. 541; *Hoyt v. Jaques*, 129 Mass. 286; *Taft v. Taft*, 130 Mass. 461.

And where the power is, by the terms of the will, to be exercised only in a certain contingency, and the contingency never happens, the validity of the remainder over is not affected.

Stevens v. Winship, 1 Pick. 318; *Minot v. Prescott*, 14 Mass. 496; *Paine v. Barnes*, 100 Mass. 470.

Holmes, J., delivered the opinion of the court:

The testator's wife, Mary Jacks, took a life estate coupled with a power, and the limitation to his sister, Lydia Hobbs, was valid. *Ayer v. Ayer*, 128 Mass. 575, 577; *Smith v. Snow*, 123 Mass. 323; *Kuhn v. Webster*, 12 Gray, 3. The suggestion which has been made—that it is hard to distinguish between enjoyment for life with absolute power of disposition, and absolute ownership (*Bradley v. Westcott*, 13 Ves. 445, 451)—is met by these cases, and by the testator's clear expression of his intent to give an estate for life only. See also *Kelley v. Meins*, 135 Mass. 231, 234; *Anon.* 3 Leon. 71, pl. 108; 13 Ves. 453; *Reith v. Sey-*
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mour, 4 Russ. 263; Sugd. Powers, 7th ed. 123, 125. And the technical doctrine of *Kelley v. Meins* is avoided by this technical distinction. For the ground of *Kelley v. Meins*, and that class of cases, whether concerning personal or real estate, is that the limitation over is an attempt to take away one of the incidents of ownership, and to say that if the owner does not dispose of his property in his life or at his death, it shall devolve otherwise than as the law has provided. This objection does not apply to a remainder after a life estate, even when the life estate is coupled with a power.

The objection to the uncertainty of what will be the subject of the limitation over, which was once thought to be a further ground for the doctrine of *Kelley v. Meins*, as applied to personal property, seems to be discredited by the later English decisions cited in that case, and never has been applied to a life estate coupled with a power. Cases *supra*; *Surman v. Surman*, 5 Madd. 123; *Re Thomson's Estate*; *Herring v. Barrow*, 13 Ch. D. 144; *Burleigh v. Clough*, 52 N. H. 267. See *Ross v. Ross*, Jac. & W. 154, 158; *Cuthberts v. Purrier*, Jac. 415, 417; *Green v. Harvey*, 1 Hare, 423, 432.

Whether the legacy to the testator's sister was contingent (*Johnson v. Battelle*, 125 Mass. 453; *Taft v. Taft*, 130 Mass. 461; 135 Mass. 235) or vested (*Burleigh v. Clough*, *ubi supra*), it passed to her administrator, upon her death before the wife. *Winslow v. Goodwin*, 7 Met. 363; *Dunn v. Sargent*, 101 Mass. 336; *Putnam v. Story*, 132 Mass. 205, 210.

Judgment for plaintiff affirmed.

Harriet DELORY

v.

Patrick CANNY.

Where the plaintiff occupied apartments accessible only through a door opening on the sidewalk, the building containing both the apartments and the door of entrance being the property of the defendant; and, in leaving her rooms and passing from the door on to the pavement, the plaintiff stepped upon the cover of a coal hole in the sidewalk, in front of the doorstep, which gave way, and she fell into the hole, and was injured.—*Held*, in an action against the defendant for the injury, it was improper for the court to take the case from the jury, where there was evidence of a witness that, at the time of the accident, the cover had no weight upon it, and that, the evening before, it slipped off the hole when he stepped upon it; although he stated on cross-examination that, a month before the accident, he saw a stone weight attached to the cover,—such testimony on cross examination being met by other testimony that the cover could not be seen from the place from which he said he saw it.

(Suffolk—Filed May 9, 1887.)

ON plaintiff's exceptions. *Sustained.*
Action of tort to recover damages for in-

juries sustained by the plaintiff from falling into a coal hole in the sidewalk in front of door No. 461 Hanover Street, Boston.

The plaintiff having died *pendente lite*, the administrator of her estate was allowed to come in to prosecute said action.

At the trial in the superior court before Knowlton, J., it was admitted that the defendant was, at the time of said fall, the owner of the house into which said door No. 461 Hanover Street opened. There was evidence that said house was a tenement house containing fifteen or sixteen tenements of two rooms each, let by the week, the rent of which was paid to defendant; that there was no entrance to said house other than said door No. 461 Hanover Street; that between the threshold of said door and said sidewalk there was one stone step; that in said sidewalk, and within the line of the public highway, and directly in front of said door, and about a step from the center of said stone step, was the coal hole in question; that said coal hole opened into an excavation leading into the cellar under and belonging to said house; that said cellar contained a watercloset for the common use of the occupants of said tenements. There was also evidence that there was a woodshed in said cellar; that defendant, within a year preceding, caused repairs to be made in one of said tenements; that a servant of defendant was seen cleaning the watercloset, yard, stairs, and cellar of said house, within a year preceding the accident; that a servant of defendant at one time made repairs about said house.

The plaintiff, in a deposition which was read to the jury, testified upon her direct examination that, at the time of said fall, she and her husband had been occupying one of said tenements about two weeks, which said tenement was hired of the defendant, and the rent of which was paid to him by them; that she never made any use of said cellar; that she was never told by defendant that she might do so; that she used the watercloset which was in the cellar under said house, but did not know if it was in the same apartment with said coal hole or not; that in the month of March, 1884, she was coming out of said house between eight and nine o'clock in the morning, that she stepped upon the cover of said coal hole, that the cover gave way, and that she fell into said hole; that she observed nothing particular about the cover, only that it gave way by turning over when she stepped upon it; that a boy named Lawrence Perrow came out of the house, and saw her getting out of the hole; that she had no knowledge whatever that it was unsafe to step upon said cover before she did so; that if she had known she would not have stepped upon it; that she did not step upon it knowing that it was unsafe to do so; that she had no reason to believe that it was unsafe; that it was usual to step upon it in going out of and coming in said door; that one would have to exercise care and thought to avoid walking upon it; that she was not guilty of any negligence in the manner in which she stepped out of said door on said cover.

Upon cross-examination she testified that she probably saw the cover the day before she

fell in the hole, and probably saw it every day that she lived in the house; that she did not particularly observe said cover before she stepped upon it, upon the occasion; that when she stepped on it she did not see it, and could not say what position it was in; that she did not see it, to observe it, on the day of the accident previous to the occurrence; that she had never seen said cover out of its position; that she knew of no person who saw her fall in the coal hole but Lawrence Perrow, who occupied rooms in Mr. Patrick Canny's building at the time; that, about one month after the accident, the defendant ordered her out of said house, and she then left it.

The plaintiff called as a witness one Lawrence Perrow, who testified upon direct examination that he was living in said house at the time of plaintiff's fall; that he came out of said door on the morning in question, and saw the plaintiff lying upon the sidewalk, with one foot in said coal hole; that said cover was partly off and partly on said hole, and wrong side up; that there was attached to said cover a piece of wire about five or six inches long, the size of a telegraph wire; that there was no weight or anything attached to the other end of the wire. He further testified, against defendant's objection, that he came out of said door the evening before this occurrence; that he then stepped upon said cover; that said cover slipped off of said hole, and that his foot went into said hole.

Upon cross-examination said Perrow testified that, a month before the plaintiff's fall, he saw a stone weight attached to said cover; that he saw the same from the watercloset in said cellar, and that said cellar was light enough by day to see it. There was evidence that one tenant was seen at one time taking coal in at the coal hole; there was no other evidence regarding the use of it by anybody. Upon redirect examination he testified that he remembered that it was a month before plaintiff's fall that he saw said stone weight.

There was evidence from two other witnesses for plaintiff that said cellar was too dark by day to distinguish objects, except that from foot of the cellar stairs one could see the watercloset and woodshed; and one witness for plaintiff testified that said coal hole and cover could not be seen from the watercloset.

One Mrs. Carver testified, in behalf of the plaintiff, that she lived in said house at the time of the plaintiff's fall, and had lived there about nine or ten months; that she occupied a tenement of two rooms up one flight and directly over said door; that in the month of November, 1883, she stepped on said cover and fell into said hole.

The plaintiff offered to show by this witness that she (witness) had, during said period of nine or ten months' occupancy, seen said cover lifted from its position five or six times, and laid over upon the sidewalk (the manner in which it was lifted), and that at such times there was no fastening or weight attached to said cover. The court ruled that the evidence offered was inadmissible, and the plaintiff duly excepted to such ruling.

On this evidence the plaintiff rested, and, the defendant requesting that the case be

taken from the jury, the court ruled that the plaintiff could not maintain her action upon the evidence.

To this ruling the plaintiff alleged exceptions.

Mr. Frank Paul, for plaintiff:

It is claimed that plaintiff's intestate was, at the time of receiving her injury, a traveler upon the public highway, and injured by a defect in the highway, for which the defendant, as well as the city of Boston, is responsible.

The "duty" in regard to the coal hole was upon the defendant, because (1) he was the owner; (2) he was the "occupier" in the legal sense; (3) he was the actual "occupier," the one in control, and responsible.

"If the control and duty of keeping a building in repair remain upon the owner, he is responsible for defects."

Cunningham v. Cambridge Sav. Bank, 188 Mass. 482.

Where the separate parts of a building are let to different tenants, and a general supervision of the whole is retained by the landlord, there is no such occupancy by the tenants as would cast upon them the obligation of keeping the building in repair, or make them responsible for damages resulting from its defects; but the liability in that respect continues to rest upon the owner.

Kirby v. Boylston Market Asso. 14 Gray, 249. For instances, see *Readman v. Conway*, 126 Mass. 374; *Milford v. Holbrook*, 9 Allen, 17; *Shipley v. Fifty Associates*, 101 Mass. 251; *Larue v. Farren Hotel Co.* 116 Mass. 67; *Looney v. McLean*, 129 Mass. 33; *Watkins v. Goodall*, 188 Mass. 533; *Learoyd v. Godfrey*, 188 Mass. 331.

"Where a landlord leases a building piece-meal,—room by room, and floor by floor,—there the tenant is only a lessee of, and responsible for, so much of the building as the lease gives him. He can make use of the appurtenances,—as, for instance, the entry and stairway going up to the upper floor, and the pavements; but still, not being in exclusive possession of such ways and appurtenances, I think it would be the duty of the landlord to keep those portions of the building and premises in repair."

Brown v. Weaver, 1 Cent. Rep. 928.

If it shall be contended that this action cannot be maintained because the plaintiff's intestate lived upon the premises, was the wife of a tenant of one out of fifteen or sixteen tenements, although the declaration in the case makes no mention of such relationship, still, it is submitted that the defendant had a duty towards her in respect to this coal hole.

Where a portion of a building is let, and the tenant has rights of passageway over staircases and entries in common with the landlord and the other tenants, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of that portion of which he still retains control and which he is bound to keep in repair; as to such portion, he still retains the responsibilities of a general owner to all persons, including the tenants of his building.

Looney v. McLean, 129 Mass. 33.

The case of *Woods v. Naumkeag Steam Cotton Co.* 134 Mass. 357, does not apply, because

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the proximate cause of the injury in that case was an accumulation, on steps, of ice and snow; and there was no duty on the defendant to remove from the steps the ice and snow which naturally accumulated thereon.

In the case of *Bow v. Hunking*, 185 Mass. 380, the tenant hired the whole house.

Negligence should be presumed from the mere fact that the cover turned. If the defendant would contend that it may have been left out of its socket by some third person, under such circumstances as to relieve him from liability, he should have met the *prima facie* presumption by showing that the cover and socket were in proper condition; the undisputed evidence shows that there was no fastening.

The maxim, *res ipsa loquitur*, was applied in the following cases:—

Byrne v. Boadle, 2 Hurl. & C. 722; *Scott v. London Docks Co.* 3 Hurl. & C. 596; *Kearney v. London & B. R. R. L. R.* 5 Q. B. 411, L. R. 6 Q. B. 759; *Briggs v. Oliver*, 4 Hurl. & C. 403; *Ware v. Gay*, 11 Pick. 106; *Stokes v. Sallonsall*, 13 Pet. 181 (38 U. S. bk. 10, L. ed. 115); *Rose v. Stephens, etc.* Co. 18 Rep. 421.

It should have been left to the jury to say whether there was not a defect, and one which the defendant, by the use of ordinary care and diligence, would have known of.

Wolf v. Kilpatrick, 101 N. Y. 146; *Nelson v. Godfrey*, 12 Ill. 20.

That plaintiff's intestate was, at the time of her fall, in the exercise of due care, plainly appears from the evidence. The evidence was conclusive upon that point. But if it could have been questioned, then it was a question for the jury to pass upon.

Watkins v. Goodall, 188 Mass. 533; *Whitford v. Inhabs. of Southbridge*, 119 Mass. 564; *Dewire v. Bailey*, 131 Mass. 169; *Looney v. McLean*, 129 Mass. 33; *Lyman v. Hampshire County*, 140 Mass. 311, 1 New Eng. Rep. 227; *Fleck v. Union R. Co.* 134 Mass. 480; *Gilbert v. Boston*, 189 Mass. 813.

"A person walking along the streets need not expect pitfalls."

Brown v. Weaver, 1 Cent. Rep. 928.

Messrs. William Gaston and Charles F. Donnelly, for defendant:

The offered testimony of Mrs. Carver was immaterial. The most it could have shown would have been negligence on other occasions; and evidence of specific acts of negligence and carelessness on the part of the defendant on other occasions was clearly incompetent.

Collins v. Dorchester, 6 Cush. 396; *Robinson v. Fitchburgh & W. R. R. Co.* 7 Gray, 92; *Maguire v. Middlesex R. R. Co.* 115 Mass. 239.

It is not sufficient for the plaintiff to show that the injury may have been occasioned by the negligence of those she seeks to charge with it. If there were other causes which also might have produced it, she is in some way to show that these did not operate.

Kendall v. Boston, 118 Mass. 234; *Hutchinson v. Boston Gas Light Co.* 122 Mass. 219; *Berrenberg v. Boston*, 187 Mass. 231; *Woodcock v. Worcester*, 188 Mass. 268.

This is clearly not one of those cases where negligence of the defendant can be inferred from the happening of the accident alone.

Mahoney v. Libbey, 123 Mass. 20; *Smith v.*

First Nat. Bank of Westfield, 99 Mass. 605; *Ham-mack v. White*, 11 C. B. N. S. 588; *Higgs v. Maynard*, 12 Jurist, N. S. 705; *Murray v. Met. R. Co.* 27 L. T. N. S. 762; *Welfare v. London & B. R. Co.* L. R. 4 Q. B. 692.

Holmes, J., delivered the opinion of the court:

The ground on which the defendant seeks to sustain the ruling that the plaintiff could not maintain her action is that the plaintiff offered no evidence that the cover to the coal hole into which she fell was insufficiently guarded, and that one of the plaintiff's witnesses, Perrow, testified that, a month before the accident, he saw a stone weight attached to the cover, which, it is suggested, may have been removed, just before the accident, by a stranger to the defendant. But this testimony of Perrow was on cross-examination, and was met by other testimony that the cover could not be seen from the place from which Perrow said he saw it. The jury might have disbelieved Perrow on this point, and might have believed his direct testimony that, at the time of the accident, the cover had no weight upon it, and that, the evening before, it slipped off the hole when he stepped upon it. They might have inferred from these facts—connecting the earlier condition of the hole with them if necessary (*Berrenberg v. Boston*, 137 Mass. 231)—that the cover was not provided with any weight or suitable appliance to prevent its being displaced. It is not argued that the defendant, who was the owner of the house, and, so far as appears, the actual occupant of the cellar, was not responsible for the permanent condition of the cover to the hole, or that the plaintiff could not have been found to have exercised due care.

Exceptions sustained.

Henry FULLER

v.

C. A. PEASE.

1. The only mode of contesting a discharge granted to a bankrupt under the United States Bankruptcy Act is by application made by the creditor, within two years, in the United States district court (U. S. Stat. 1867, chap. 176, § 34), whether the creditor actually knew of the proceedings and discharge, or not.
2. The Act provides for personal notices and notices by publication of the various stages of the proceedings, which are deemed sufficient for the protection of creditors, and creditors are bound thereby.
3. The fact that defendant fraudulently omitted to insert plaintiff's name in his schedule of creditors will not estop defendant from setting up his discharge in an action brought upon plaintiff's claim.

(Suffolk—Filed May 7, 1887.)

ON plaintiff's exceptions. *Overruled.*
Action of contract upon a promissory

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note made by Susan M. Van Doren, dated at Newtonville, July 6, 1872, and made payable to Henry Fuller or order, for the sum of \$2,000, in one year from date, with interest. The note was indorsed in blank by C. A. Pease. On the back of the note was also written the following:

"I guarantee the payment of this note until paid, waiving demand, notice of protest. July 8, 1873. C. A. Pease."

There were also indorsements of payment of interest and part of the principal, the last payment being made May 22, 1875.

The plaintiff's declaration contained three counts, declaring against the defendant: (1) as an indorser; (2) as a guarantor; (3) as a maker. The answer set up a discharge in bankruptcy on the 15th day of April, 1879, under the Act of Congress of March 2, 1867. By order of the court the plaintiff filed a replication to defendant's plea of discharge in bankruptcy, as follows:

"The plaintiff further states that if such a discharge has been granted the defendant in the manner stated in his answer, then such discharge was obtained without the knowledge of the plaintiff, who avers that he received no notice in any manner of the filing of defendant's petition in bankruptcy, if any such was filed by him; and, further, that he had no knowledge of said petition, either at the filing or during the pendency thereof, or any knowledge of any of the proceedings, if any, founded thereon; and if any such proceedings were ever had, the plaintiff's claim was not included in defendant's schedule of creditors, and that such omission was made knowingly, wilfully, and fraudulently by the defendant: so that, if the defendant shall prove the fact of his discharge in bankruptcy as alleged, then the plaintiff says it in no manner constitutes a defense to this cause of action."

At the trial in the superior court before Knowlton, J., the plaintiff proved the making of the note and the indorsements by Pease.

The discharge in bankruptcy set up in the defendant's answer was put in evidence. There was introduced in evidence a certified copy of defendant's schedule of creditors, from which plaintiff's claim was omitted. Evidence was introduced tending to prove the other facts mentioned in the replication. The plaintiff further testified that he had no knowledge of defendant's discharge in bankruptcy until the expiration of the year 1881, over two years from the date of same; that, during the interval from the maturity of the note up to the expiration of the year 1881, plaintiff had frequent interviews with defendant, in which defendant made numerous allusions to plaintiff's claim, saying, among other things, "I have not forgotten you; I shall never forget your kindness; and I hope soon to be able to pay all my creditors." No other evidence was introduced as to the time when defendant's liability as guarantor became absolute. Upon the foregoing, the plaintiff requested the court to rule as follows: "1. If the defendant knew, at the time of filing his schedule in bankruptcy, that the plaintiff was a creditor, and omitted his name from the schedule, such omission was wilful, and, as a presumption of law, fraudulent.

"2. If the defendant knew, at the time of filing his schedule in bankruptcy, that the plaintiff was a creditor, and willfully and fraudulently omitted his name from the schedule, and if the plaintiff had no knowledge of the defendant's bankruptcy proceedings until after two years from his discharge, the plaintiff, as a matter of law, is not a party to the proceedings, and the discharge is not *res judicata* as to him.

"3. If the defendant willfully and fraudulently omitted the plaintiff's name from his schedule in bankruptcy, and the plaintiff had no notice of the bankruptcy proceedings until after two years from the defendant's discharge therein, such discharge is not necessarily a bar to the plaintiff's claim, and may be inquired into by this court.

"4. If the defendant willfully and fraudulently omitted plaintiff's name from his schedule in bankruptcy, and, by reason of defendant's conduct, plaintiff was kept in ignorance of the defendant's discharge until the time for impeaching same in the district court had elapsed, the defendant is estopped by such fraud from pleading his discharge in this court.

"5. If the defendant's liability as guarantor had not become fixed at the time of his discharge in bankruptcy, the plaintiff's claim is not barred thereby; and the burden of showing that said claim had become fixed and absolute before said discharge is upon the defendant.

"6. If the defendant's liability as guarantor had not become fixed within six years of the date of the plaintiff's writ, the plaintiff's claim is not barred by the Statute of Limitations; and the burden of showing the time when said claim accrued and became absolute is upon the defendant."

But the court declined to so rule, and found, as a fact, that the defendant was absolutely liable on the note before the commencement of his proceedings in bankruptcy, and ruled that all the facts set up in the replication or offered in evidence by the plaintiff, if admitted to be true, could not be availed of by the plaintiff to invalidate the discharge as to the plaintiff's claim, and would not estop defendant from pleading same in this court, and found for defendant, and plaintiff alleged exceptions.

Messrs. Charles H. Drew, and Perkins & Lyman, for plaintiff:

The plaintiff contends: (1) that the discharge is not *res judicata* as to this plaintiff; and (2) that the defendant is estopped from pleading his discharge as to this plaintiff.

U. S. Stat. § 5019, requires notice to all creditors.

"Unless the defendant's discharge is a judgment of a court of competent jurisdiction, differing essentially from the judgments of other courts, it would not be valid against a person not a party to the proceedings. Whatever are the peculiar incidents of the discharge in bankruptcy, it is an adjudication upon the proceedings, of which all parties interested should have the notice provided by law; and when the debtor fraudulently deprives such parties of all the direct notice which the law entitles them to have, and proceeds to judgment without such notice to them, the judgment,

such as it is, although it may be valid as to all persons who had notice, in justice and equity ought to be void as to those who did not receive notice."

Batchelder v. Low, 43 Vt. 662. See also *Day v. Bardwell*, 97 Mass. 248, citing *Ogden v. Saunders*, 12 Wheat. 366 (25 U. S. bk. 6, L. ed. 656).

In *Burpee v. Sparhawk*, 108 Mass. 114, the court say: "We are not required in this case to decide the general question of the effect of a certificate of discharge in bankruptcy against a creditor fraudulently omitted in the schedule, and having no actual notice of the proceedings in bankruptcy."

It was not intended by any of the provisions of the Bankrupt Act that the bankrupt court should pass, in a plenary manner, upon the question whether a particular claim will or will not be released by a discharge. That inquiry is one properly to be made only by the court in which a direct suit on the debt is pending. When the discharge is pleaded, the question whether the particular debt is or is not discharged by it comes up for determination by the court in which it is pleaded; and the determination will be a binding judgment between the parties.

Re Kimball, 2 B. R. 204; *Re Rosenberg*, Id. 236; *Re Wright*, Id. 142.

"The discharge will not bar the claim of a party who has not been properly served with a notice of the commencement of proceedings in bankruptcy. It is not a case analogous to one in admiralty, where the seizure of the thing itself gives the court jurisdiction *in rem*, and is notice to all the world; but is a case where the creditor of a party is entitled to have his day in court. He has no such opportunity unless he has been properly notified. When this has been omitted, he has not had the opportunity to resist the application for a discharge. He has had no legal means allowed him by which he could test the validity of the discharge."

Burnes v. Moore, 2 B. R. 573.

The plaintiff testified that he was in ignorance of defendant's discharge until the expiration of the year 1881, and he is therefore remediless should it be held that the provision of the Bankrupt Act for impeaching the discharge in the district court gives the plaintiff all the relief to which he is entitled, as § 34 of this Act provides that the discharge cannot be impeached after the lapse of two years.

The doctrine of estoppel has been repeatedly recognized by the Federal and English courts, by contract (*Evory v. Candee*, 17 Blatchf. 201; *Brooks v. Morehouse*, 13 Off. Gaz. 499); by matter in pais (*Crossley v. Dixon*, 10 H. L. 293; *Eureka Clothes W. Mach. Co. v. Bailey Washing & Wringing Mach. Co.* 11 Wall. 488 (78 U. S. bk. 20, L. ed. 209); *Rumsey v. Buck*, 20 Fed. Rep. 697; *Faulks v. Kamp*, 5 Bann. & Ard. 73; *Underwood v. Warren*, 21 Fed. Rep. 573; *Stanley Rule & Lever Co. v. Bailey*, 14 Blatchf. 510).

The above citations discuss this doctrine mainly as applied to suits for infringement of letters patent, where the defendant, in addition to the general issue, is allowed by statute to set forth a variety of special pleas.

See U. S. Rev. Stat. § 4920.

In *Maybin v. Raymond*, 15 Nat. Bk. Reg.

354, it was held that the discharge of the bankrupt did not bar the right of his assignee to recover property afterwards discovered, which the bankrupt had failed to put in his schedule, although it was claimed that the discharge of the bankrupt was an adjudication that he had surrendered all his property for the benefit of his creditors, and that the assignee had no right, although he might afterwards discover property of the bankrupt which the bankrupt had failed to put in his schedule, without first setting aside the discharge of the bankrupt; that this had never been done; and that the time in which it could be done had elapsed.

Mr. Frank T. Benner, for defendant:

1. By signing his name in blank on the back of the note before delivery, the defendant became a joint promisor.

In *Woods v. Woods*, 127 Mass. 141, the court said (p. 149): "By the law of Massachusetts it has been too long settled and too many times adjudged to be now questioned that, before Stat. 1874, chap. 404, if a party not the payee of a note signed his name upon the back of it before delivery to the payee, he thereby became an original promisor upon the note." The court said substantially the same thing in *Gilson v. Stevens Mach. Co.* 124 Mass. 546, and in many previous cases.

Defendant became absolutely liable as promisor at the maturity of the note, July 9, 1878. And the court "found as a fact that the defendant was absolutely liable on the note before the commencement of his proceedings in bankruptcy."

2. By signing the guaranty, "waiving demand and notice of protest," the defendant became liable as guarantor on the day when the note was dishonored, viz., July 9, 1878.

Bickford v. Gibbs, 8 Cush. 154.

3. The defendant's liability, having become absolute before the commencement of his proceedings in bankruptcy, was barred by his discharge.

Black v. Blazo, 117 Mass. 17; *Way v. Howe*, 108 Mass. 502; *Burpee v. Sparhawk*, 108 Mass. 111.

C. Allen, J., delivered the opinion of the court:

It has been held in several cases that the only mode of contesting the validity of a discharge granted under the United States Bankruptcy Act is in the mode provided in the 34th section (U. S. Stat. 1867, chap. 176, § 34), by application made within two years in the United States district court. *Way v. Howe*, 108 Mass. 502; *Black v. Blazo*, 117 Mass. 17; *Kempton v. Saunders*, 180 Mass. 236. The plaintiff seeks to distinguish the present case from the above on the ground that the present plaintiff did not know of the granting of the discharge, or of the institution of the proceedings in bankruptcy, till after it was too late to make such application in the United States district court; and that the defendant, having fraudulently omitted to insert the plaintiff's name in his schedule of creditors, is estopped to rely on the discharge. But we are of the opinion that this distinction will not avail. It was the intention of the Bankruptcy Act that the granting and the validity of a discharge to the bankrupt should be determined

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only in the United States courts. In addition to all the personal notices which are to be given, notices by publication in such newspapers as the court may order must be given, of the issuing of the warrant, of the appointment of the assignee, and of the application for a discharge. U. S. Rev. Stat. §§ 5019, 5054, 5109. This, in contemplation of the statute, is deemed sufficient for the protection of creditors, and vests jurisdiction in the court to determine the question of the granting of the discharge. A discharge granted after such notice is duly granted, and is effectual to release the bankrupt from all claims which were provable against his estate, with certain exceptions not now material; subject, however, to revision upon the application of a creditor within two years. The language of § 34 (U. S. Rev. Stat. § 5119) as to the effect of a discharge is broad and sweeping. The creditor is bound by the public notice given, in the same way as is a debtor of the bankrupt who has been fraudulently induced to pay his debt to the latter, after publication of the notice of the issuing of the warrant. *Stevens v. Mechanics Sav. Bank*, 101 Mass. 109. To hold that the defendant is estopped from setting up his discharge against the plaintiff would be equivalent to importing an exception into the statute not contemplated by its provisions.

Exceptions, overruled.

Mary FOLEY

v.

CITY OF HAVERHILL.

Edward FLYNN

v.

Peter A. BOURNEUF *et al.*

1. In an action to recover a betterment tax paid under protest, the tax being assessed in respect of improvement of a street in a city, ordered by the board of aldermen and afterwards by the common council in concurrence, made on the footing of the validity of two previous orders,—neither of the previous orders can be impeached for the reason that the notice was defective in not stating the intention of the board of aldermen to lay out the ways. Certiorari is the only method for a party to avail himself of such a defect.
2. If the point were open, in such an action, to the objection that the adjudication did not declare that the estates assessed received any benefit beyond the general advantage to all real estate in the city, still, if it does not appear that any benefits have in fact been estimated except the special benefit accruing to the estate beyond the general advantage, no illegal element will be assumed to have entered into the computation.
3. If the point is fairly open, still the court will not construe the grading as excluded from the declared purpose to proceed under the Betterment Act in

- the taking, and, at the same time, construe the benefit derived from it, if distinguishable from that derived from the widening, as included in the betterments assessed, although not mentioned.
4. Where there is nothing to show that the assessment took grading into account, an instruction will not be given that any assessment, upon the plaintiff's land, of a share of the expenses of grading, is void, even if this be the correct rule.
 5. That the records do not show the actual expense of the widening would not be ground even for *certiorari*, where it is admitted that the actual expense was over \$30,000, and the total assessment \$10,258.53; still less where the record discloses a liability for \$23,907.40 for land damages fixed by lapse of time.
 6. The charter of the city of Haverhill (Stat. 1869, chap. 61, § 24) does not contemplate action by the board of aldermen and the common council in joint convention.
 7. An action on a covenant against incumbrances in a deed of land assessed for the betterment in question is governed by the principles already stated.

(Essex—Filed May 5, 1887.)

ON report. *Judgment for defendant in first action. Judgment for plaintiff in second action.*

The first of these cases is an action of contract to recover the amount of a betterment tax assessed on the plaintiff's land by an order of the board of aldermen of the city of Haverhill, passed December 9, 1884. The second is an action of contract brought by the plaintiff Flynn on a covenant against incumbrances contained in a deed given to him by defendants Bourneuf and others, the plaintiff Flynn claiming that, at the time said deed was delivered, the premises therein described were liable to an assessment on the aforesaid betterment tax. The cases were tried in the superior court before Mason, J., without a jury. In the case of *Foley v. City of Haverhill*, the court found for the defendant, and in the case of *Flynn v. Bourneuf*, the court found for the plaintiff, and reported the cases for the determination of this court.

The facts are sufficiently stated in the opinion.

Messrs. J. P. & B. B. Jones, for plaintiff *Foley* and defendants *Bourneuf et al.*

The plaintiff submits that in 1884, when the order of widening and grading was passed, what was called River Street was not a way, within the meaning of the statute, and that the board of city officers had not jurisdiction to widen or grade it, or to assess the betterment in question.

The notice given was not the notice required by statute; and by failing to give the statutory notice, the board failed to acquire jurisdiction to pass said order, and the same was void.

Fitchburg R. R. Co. v. Fitchburg, 121 Mass. 182.

The decision in *Fitchburg R. R. Co. v. Fitch-*

burg is supported by a great preponderance of authority. "So notice of the proceedings to take property for public use is, when required to be given, the basis of jurisdiction, and if not given, or if not given in the required manner, the proceedings are unauthorized and void."

Dill. Mun. Corp. 3d ed. § 606.

The order of May 26, 1884, is based upon a notice to abutters and owners of property on River Street, "that the board intend to improve the street before mentioned by taking a portion of their land and laying out the same as a public street, * * * and that Thursday, the 22d day of May, at 7.30 o'clock, P. M., is assigned as the time for hearing any objections which may be made to said taking and laying out."

Chapter 49, § 67, requires that notice should be given of the time and place at which the board intend to lay out the way. In the present case the notice should have stated that the mayor and aldermen intended, at the time appointed, to take the land and lay it out.

Fitchburg R. R. Co. v. Fitchburg, *supra*

Instead of that, the notice stated that the mayor and aldermen, at a certain time, would hear objections to their intentions to take and lay out the land as a public way.

The records in the present case not only fail to disclose an adjudication of special benefit, as provided by Pub. Stat. chap. 51, § 1, but disclose an adjudication of general benefit. This is not a formal error in the record which could have been amended, for it was proved at the trial that there was no adjudication other than that shown.

It cannot be inferred from the fact of assessment that there was an adjudication of special benefit; for there is no presumption in favor of the legality of the assessment.

Lowell v. Wheelock, 11 Cush. 391; *Simonds v. Turner*, 120 Mass. 328; *Crandell v. Taunton*, 110 Mass. 421.

The board of aldermen and mayor, with relation to these proceedings, is a court of limited and inferior jurisdiction. The decree of such a court can be impeached collaterally for want of jurisdiction.

Lowell v. Wheelock, 11 Cush. 391; *Piper v. Pearson*, 2 Gray, 120; *Jenks v. Howland*, 3 Gray, 526.

In the case of inferior courts, the jurisdiction may be collaterally impeached in case all the facts necessary to give jurisdiction are not spread upon the record.

Bigelow, Estop. 8d ed. p. 153, and cases cited in the note.

The decree may be void because the court had no jurisdiction of the subject matter.

Piper v. Pearson, 2 Gray, 124.

In the present case, although the board had jurisdiction to widen and grade public ways, it had no jurisdiction to widen and grade what was not a public way; and, although it had jurisdiction to assess land which it adjudged to have been specially benefited, the statute gave it no jurisdiction to assess land which had not been specially benefited.

Or the decree may be void because, having jurisdiction of the subject-matter, it failed to acquire jurisdiction of the parties to be affected by it.

Smith v. Rice, 11 Mass. 507; *Rossiter v. Peck*, 8 Gray, 538; *Fitchburg R. R. Co. v. Fitchburg*, 121 Mass. 132; *Bloom v. Burdick*, 1 Hill, 130.

In the present case the orders of 1871, 1874, and 1884 are void because the board failed to give the statutory notice.

Or the decree may be void because the court, having jurisdiction of the subject-matter and parties, rendered a judgment in excess of its jurisdiction.

Folger v. Columbian Ins. Co. 99 Mass. 287.

If this assessment is void, the present action can be maintained to recover back the amount paid by the plaintiff.

Pub. Stat. chap. 51, § 2; chap. 12, § 84.

A party aggrieved by a void assessment may pay it, and maintain an action to recover it back (*Bigelow v. Boston*, 123 Mass. 150); or, after sale of his premises under the assessment, may, if in possession, maintain a bill in equity to quiet his title (*Davis v. Boston*, 129 Mass. 277).

Mr. William H. Moody, for plaintiff Flynn:

Assuming that an objection to the form of the notice of May 12, 1884, is open in this action, it is clear that the objection is not well founded. The statute (Pub. Stat. chap. 49, § 67) provides that a "notice of the intention * * * to lay out or alter" must be given. The notice in this case was "that this board intend to improve the street before mentioned by taking a portion of their land, and laying out the same as a public street." There is here a distinct notice of an intention to take the land.

A failure on the part of the city to give proper notices is not an objection in this action, but should be made on a petition for a writ of *certiorari*.

Rutland v. County Comrs. 20 Pick. 71; *Brimmer v. Boston*, 102 Mass. 19; *Taber v. New Bedford*, 135 Mass. 162; *Sisson v. New Bedford*, 137 Mass. 255; *Gilkey v. Watertown*, 141 Mass. 317, 1 New Eng. Rep. 608.

The doings of a competent tribunal in laying out ways cannot be questioned in a collateral proceeding, except for reasons which affect the jurisdiction; and informalities in notices have been held not to affect the jurisdiction.

Rutland v. County Comrs., *Sisson v. New Bedford*, and *Gilkey v. Watertown*, *supra*.

This rule does not apply where ways are laid out by selectmen, as *certiorari* does not lie to them, and there is no way to take advantage of errors in proceedings, except collaterally.

Robbins v. Lexington, 8 Cush. 292; *Hooper v. Bridgewater*, 102 Mass. 512.

For this reason, *Fitchburg v. Fitchburg*, 121 Mass. 132, is not an authority in the case at bar.

Mr. John J. Winn, for defendant city of Haverhill:

The questions raised by the plaintiff as to the legality of laying out of River Street for 1871, 1874, and 1884 are not open in this action. Her remedy should be by petition for a writ of *certiorari*. These proceedings cannot be impeached collaterally.

Gilkey v. Watertown, 141 Mass. 317, 1 New Eng. Rep. 608; *Taber v. New Bedford*, 135 Mass. 162.

Unless the plaintiff could show that she was damaged by a defective notice, she could not prevail in a petition for a writ of *certiorari*.

Hancock v. Boston, 1 Met. 122.

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She is not in a position to object to the notice, as none of her land was taken, and, so far as she had any rights to a notice, a general notice was sufficient.

Blackie v. Hudson, 117 Mass. 181; *Pickford v. Lynn*, 98 Mass. 491.

This action cannot be maintained upon facts and records which would not warrant the issuing of a writ of *certiorari*.

Taber v. New Bedford, *supra*.

Sisson v. New Bedford, 137 Mass. 255-262, holds that if there were objections to the proceedings of the city, on account of a failure to give the proper notices, such objections should have been made under a petition for a writ of *certiorari*. In said case a street was altered by a change of grade, where the same notice is required as in laying out streets. Pub. Stat. chap. 49, § 65-67.

Gilkey v. Watertown, *supra*, holds that the insufficiency of the notice given affected only the formality and regularity of the proceedings, and did not affect the jurisdiction.

A writ of *certiorari* will lie to quash the irregular proceedings of city councils or county commissioners.

Dwight v. Springfield, 4 Gray, 107; *Powers v. Springfield*, 116 Mass. 84; *Boston & Alb. R. R. Co. v. County Comrs.* 116 Mass. 73; *Blake v. County Comrs.* 114 Mass. 583.

But *certiorari* will not lie to remove the record of the proceedings of a town, in the location and establishment of a town or private way. The legality of these ways may be tested, by any party aggrieved, in actions of trespass or case, when their legal existence is material to be shown.

Robbins v. Lexington, 8 Cush. 292, 293.

In *Hooper v. Bridgewater*, 102 Mass. 512, 513, citing *Robbins v. Lexington* with approval, it was held that the failure to give the notice required by law (a notice which Gen. Stat. chap. 38, § 38, required to be the same as that used in laying out town ways) might be taken advantage of in a writ of entry, for the simple reason that *certiorari* would not lie against a town.

The notice given by the board of aldermen in 1884 was in accordance with the requirements of Pub. Stat. chap. 49, § 67, in every particular.

The words, "This board intend to improve the street before mentioned by taking," etc., show a clearly-expressed and well-defined intention contingent upon nothing whatsoever.

The board of aldermen had no power to assess the plaintiff's estate for any benefit and advantage other than "a benefit and advantage beyond the general advantage to all real estate in the city;" and it must be presumed that this board exercised only the powers which it had.

Jones v. Boston, 104 Mass. 461-469.

If the plaintiff is aggrieved, either because the assessment on her estate is too large, or because it includes an improper charge, her remedy is by a petition for a jury to revise the assessment.

Pub. Stat. chap. 5 § 7; *Whiting v. Boston*, 106 Mass. 89; *Prince v. Boston*, 111 Mass. 226; *Chase v. Springfield*, 119 Mass. 556.

If the records fail to show what the actual expense of the widening or grading was, such failure would not invalidate the assessments.

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Chase v. Springfield, 119 Mass. 556-563.

The duty of laying out streets is entrusted to public officers who are not agents of the city, but have independent functions in regard to this matter. The adjudication made by them cannot be impeached collaterally for errors in the mode of proceeding, not affecting their jurisdiction.

Taber v. New Bedford, 135 Mass. 162; *Brimmer v. Boston*, 102 Mass. 19; *Lowell v. Hadley*, 8 Met. 185.

Holmes, J., delivered the opinion of the court:

The first-named action is brought to recover a betterment tax paid under protest. The betterment was assessed December 9, 1884, in respect of improvements of River Street, ordered by the board of aldermen May 26, 1884, and afterwards by the common council in concurrence. This order of May 26, which took land for the widening and straightening of the street, and laid out one end of it anew over different land from that previously used, was made on the footing of the validity of two previous orders; one in 1871, laying out River Street from Washington Street westerly to land of Jason Gilman; and the other in 1874, extending it to Ayer Street. The plaintiff asked and obtained rulings that these orders were void, on the single ground that the notice in each case was defective, as it was, in not stating the intention of the board of aldermen to lay out the ways. The court, however, sustained the assessment, and found for the defendant.

We are far from intimating that the order of 1884 would not have been valid, at least in part, or that the assessment ought not to have been sustained, even if the orders of 1871 and 1874 were to be treated as void. But we need not consider these questions, as we are of opinion that none of the orders can be impeached in this action for the alleged defects in the notices preceding them. It is settled in this Commonwealth that the only way for a party to avail himself of such a defect is by *certiorari*. *Lowell v. Hadley*, 8 Met. 180, 192; *Taber v. New Bedford*, 135 Mass. 162; *Sisson v. New Bedford*, 137 Mass. 255, 262; *Gilkey v. Watertown*, 141 Mass. 317, 319, 1 New Eng. Rep. 608. There may be a nice distinction between the facts of the cases cited and those before us, but the principle is laid down in general terms. Even if it should be admitted that notice goes to the jurisdiction in any sense, the rule seems to be somewhat analogous to another Massachusetts rule—that a domestic judgment cannot be impeached collaterally upon grounds which would have been open on writ of error or review. *Hendrick v. Whittemore*, 105 Mass. 23; *McCormick v. Fiske*, 138 Mass. 379.

A hasty reading of *Fitchburg R. R. Co. v. Fitchburg*, 121 Mass. 182, might lead to a different conclusion. But the way there was laid out in 1868, when Fitchburg was a town. It only became a city by Stat. 1872, chap. 81; and one point in the plaintiff's argument, not controverted by the defendant, was that, for that reason, "*certiorari* will not lie; * * * the owner of the land may resort to his action of trespass. *Robbins v. Lexington*, 8 Cush. 292; *Holcomb v. Moore*, 4 Allen, 529." See also *Hooper*

v. Bridgewater, 102 Mass. 512. The opinion of the court takes for granted the familiar distinction between the modes of impeaching proceedings of boards like the county commissioners and those of selectmen.

The assessment is assailed, first, because the adjudication, in terms, is only that the estates mentioned have been benefited, and does not declare that they receive any benefit beyond the general advantage to all real estate in the city. Pub. Stat. chap. 51, § 1. It was "proved that there was no adjudication of benefit other than" the above. This objection is disposed of by *Jones v. Boston*, 104 Mass. 461, 469. If the point were open in this action, "it does not appear that they have, in fact, estimated any benefit except the special benefit accruing to the estates beyond the general advantage to all the real estate in the city. * * * It is to be presumed that, in estimating the value of such benefit, they have proceeded according to law. We cannot presume that any illegal element entered into their computation."

Then it is said that the assessment is in respect of benefits due to grading as well as to widening, and that the grading was not done under the Betterment Act. But, if the point is fairly open on the exceptions, the adjudication is that the estates named have benefited "by the widening," and the sums assessed are declared not to exceed "one half the amount of the adjudged benefit to the estates by the said widening," as they did not in fact. We can hardly be asked to be so astute as to construe the grading as excluded from the declared purpose to proceed under the Betterment Act in the taking, and, at the same time, to construe the benefit derived from it, if distinguishable from that derived from the widening, as included in the betterments assessed, although not mentioned.

A ruling was asked that any assessment, upon the plaintiff's land, of a share of the expense of grading, was void. But the expenses, apart from grading, were double the amount of the assessment; and, besides, there is nothing to show that the assessment took grading into account, even if grading could not have been taken into account properly. Whether, if the assessment had been affected by an improper charge, the plaintiff would have had any other remedy than to apply for a jury to revise it, need not be considered. *Prince v. Boston*, 111 Mass. 226, 232. See *Hicks v. Westport*, 130 Mass. 478; *Gerry v. Stoneham*, 1 Allen, 319.

It was objected, further, that the records do not show the actual expense of the widening, etc. But this would not be a ground even for a *certiorari*, in view of the admission that the actual expense was over \$30,000. The total assessment was \$10,258.53. *Chase v. Springfield*, 119 Mass. 556, 564, at page 563; *Foster v. Park Comrs.* 131 Mass. 225, 133 Mass. 321. A fortiori the defect will not sustain this action. *Taber v. New Bedford*, 135 Mass. 162. Moreover the record does disclose a liability for \$22,907.40 land damages fixed by lapse of time.

Finally, it is objected that the orders of 1871, 1874, and 1884 were void because passed by the board of aldermen and common council in concurrence, and not in joint convention, the argument being that the power to pass the or-

ders was conferred upon the city council by the charter (Stat. 1869, chap. 61, § 24), and that, by § 2, the board of aldermen and the common council, "in their joint capacity, shall be denominated the city council." But § 24 shows very plainly that it does not contemplate action in joint convention, as it requires all petitions to be first acted on by the mayor and aldermen, and gives appeals to "any person aggrieved by any proceedings of the mayor and aldermen, or of the city council, under this provision."

The second action is brought on a covenant against incumbrances in a deed of land assessed for the betterment in question, and is governed by the same principles as the first. See also *Coburn v. Litchfield*, 132 Mass. 449.

In first action, judgment for defendant.

In second action, judgment for plaintiff.

Alice E. WHITE, *Per Pro Ami*,

v.

BOSTON & ALBANY R. R. CO.

Where a passenger was injured, while riding in a car, by the falling of pieces of a porcelain shade from the upper part of the car, the fact that the act of the railroad company in placing and using the fixture in the car caused the injury would be evidence that it was caused by the negligence of the defendant; that it broke and fell from the use for which it was intended would be evidence that it was defective and unsafe, and, if not explained or controlled, would be sufficient evidence to authorize the jury to find that the defendant was negligent in regard to it, and liable for the injury resulting.

(Suffolk—Filed May 7, 1887.)

ON defendant's exceptions. *Overruled*.

Action of tort for personal injuries received by the plaintiff by the fall of a portion of one of the porcelain shades of a lamp fixed in the upper part of the car of the defendant, in which the plaintiff was a passenger. Trial in the superior court before Knowlton, J. The whole of the evidence touching the question of the defendant's negligence was as follows:

The plaintiff was a passenger on the train, and was a minor about four years of age. The lady who accompanied and had charge of her testified that they took the train leaving Boston at 8.45 P. M., on April 9, 1885, to go to Faneuil. The lamps in the cars were not lighted. Before reaching Columbus Avenue station, which is the first station out of, and two or three minutes' ride in the cars from, Boston, she heard a crash over her head; and an instant afterwards several pieces of the porcelain shade fell from the upper part of the car into her lap; one struck the plaintiff on the face, and inflicted the injuries complained of. A Miss Barker testified that she saw a piece of the shade falling, and saw it strike the child. It came from the porcelain shade of a lamp directly overhead, and in the top of the car, which was a fixture in the car. A Mrs.

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Huk testified that she saw pieces of the shade on the floor of the car, and saw the conductor take down the remaining portion of the porcelain shade, which he did by standing with his feet on the two opposite seats, and reaching up to the lamp fixture in the top of the car. It appeared that, just after the accident, the conductor took the names of several witnesses of the accident.

The defendant rested its case upon the plaintiff's evidence.

Upon this evidence the defendant requested the court to rule that the plaintiff could not recover; but the court refused so to rule, and ruled that, upon that evidence, the question of the defendant's negligence was a question of fact for the jury; to which ruling and refusal to rule the defendant excepted.

Mr. Samuel Hoar for defendant:

"A presumption of negligence from the simple occurrence of an accident seldom arises, except:" (1) "Where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases;" or (2) "where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible."

Transportation Co. v. Downer, 11 Wall. 129, 134 (78 U. S. bk. 20, L. ed. 160, 161). See *Curtis v. Rochester & S. R. R. Co.* 18 N. Y. 534, 586, 537; *Ingalls v. Bills*, 9 Met. 1.

It is submitted by the defendant that the foregoing is a complete and precise statement of the principle underlying the cases in which it is sometimes loosely stated that a presumption of negligence arises from the mere proof that an accident had occurred.

Feital v. Middlesex R. R. Co. 109 Mass. 398; *Ware v. Gay*, 11 Pick. 106; *Carpue v. London & Brighton R. R. Co.* 5 Ad. & E. N. S. 747; *Welfare v. London & Brighton R. R. Co.* L. R. 4 Q. B. 693; *Smith v. Boston Gas Light Co.* 129 Mass. 318; *Curtis v. Rochester & S. R. R. Co.* *ubi supra*, and cases cited. See *Le Barron v. East Boston Ferry Co.* 11 Allen, 316; *Kendall v. Boston*, 118 Mass. 234; *Transportation Co. v. Downer*, 11 Wall. 129 (78 U. S. bk. 20, L. ed. 160).

There is nothing in the case that will justify an inference that the accident could have been prevented by the exercise of the utmost care, skill, and diligence on the part of the defendant that human foresight could have dictated; for there is nothing from which we can infer that the accident happened through any act or omission of the defendant or its servants. "When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof."

Smith v. First Nat. Bank of Westfield, 99 Mass. 605, 612; *Crafts v. Boston*, 109 Mass. 519.

It is therefore submitted that all the evidence in the case will not justify a presumption that the accident resulted from the negligence of the defendant.

Kendall v. Boston, 118 Mass. 234; *Blanchett v. Border City Mfg. Co.* 143 Mass. 21, 3 New Eng. Rep. 92; *Transportation Co. v. Downer*, *Welfare v. London & Brighton R. Co. supra*.

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Messrs. Gaston & Whitney, and Fred E. Snow, for plaintiff:

It is well established that, in certain cases, the proof of an accident, without evidence directly connecting the accident with negligence of the defendant, affords a presumption of negligence against the defendant. *Res ipsa loquitur*. In such cases the plaintiff makes out a *prima facie* case by proof of the accident.

Ware v. Gay, 11 Pick. 106; *Thomas v. Western Union Tel. Co.* 100 Mass. 156; *Feital v. Middlesex R. R. Co.* 109 Mass. 398; *Kearney v. London & Brighton R. Co.* L. R. 5 Q. B. 411, L. R. 6 Q. B. 759; *Stokes v. Saltonstall*, 13 Pet. 181 (38 U. S. bk. 10, L. ed. 115). See also collection of cases in *Patterson Railway Accidents*, pp. 438-441.

This presumption arises where the nature of the accident is such that it would not be likely to happen without negligence on the part of someone, and the causes of the accident are within the control of the defendant.

Accordingly, where the plaintiff was injured by the fall of a building, by the fall of a barrel out of a warehouse, or of bags of salt, there was held to be a presumption of negligence against someone; for such accidents do not generally happen unless someone has been careless.

Byrne v. Boadle, 2 H. & C. 722; *Scott v. London & St. Catharine Docks Co.* 3 H. & C. 596; *Mullen v. St. John*, 57 N. Y. 567.

And if the buildings, barrels, or bags of salt were within the control of the defendant, there is a presumption that the defendant was negligent.

See the authorities just above cited, and *Feital v. Middlesex R. R. Co.* 109 Mass. 398.

The decision in the case of *Kendall v. Boston*, 118 Mass. 234, was put on the ground that the defendant did not appear to have any exclusive control of the place where the bust which fell was situated.

In the present case, the presumption that the accident was caused by the negligence of the defendant is stronger by reason of the fact that it alone possessed the means of explaining the cause of the accident, and did not, in fact, offer any explanation. The conductor, at the time, took the names of witnesses to the accident, but none of these witnesses were put upon the stand by the defendant. The defendant alone could know whether the accident was caused by a defect in the shade, or by

reason of its being insecurely fastened, or whether the accident happened from some extraneous cause. It was its duty to offer an explanation; and, in the absence of such explanation (it appears that the defendant rested its case upon the plaintiff's evidence), it is to be presumed that the explanation would not have tended to free it from liability.

See *Le Barron v. East Boston Ferry Co.* 11 Allen, 312; Remarks of Channell, B., in *Bridges v. North London R. Co.* L. R. 6 Q. B. 377, 391; Instructions to jury of Denman, Ch. J., in *Carpue v. London & Brighton R. Co.* 5 Ad. & E. N. S. 747, 751.

W. Allen, J., delivered the opinion of the court:

If the shade was defective and unsafe, the question whether it was in that condition through the negligence of the defendant would be for the jury; and the fact that it broke and fell from the use for which it was intended would be evidence that it was defective and unsafe, and, if not explained or controlled, would be sufficient evidence to authorize the jury to find that the defendant was negligent in regard to it. The fact that the act of the defendant in placing and using the fixture in the car caused the injury would be evidence that it was caused by the negligence of the defendant. The contention of the defendant is that there was not sufficient evidence of that fact; that it did not appear that the accident was not caused by the act of a stranger, or by some external force for which the defendant was not responsible. We think that the question was for the jury, and that they were authorized to infer, from the situation of the fixture, from the absence of evidence of any other cause of the accident, and the probability that there would have been such evidence had such cause existed, and from all the attending circumstances in evidence, that the accident must have been caused by the insufficiency of the fixture. It was not necessary that the evidence should show that it was impossible that there should be any other cause; it was sufficient if it satisfied the jury that there was none. *Ware v. Gay*, 11 Pick. 106; *Feital v. Middlesex R. R. Co.* 109 Mass. 398; *Kendall v. Boston*, 118 Mass. 234; *Le Barron v. East Boston Ferry Co.* 11 Allen, 312.

Exceptions overruled.

RHODE ISLAND.

SUPREME COURT.

Henry B. WOOD and Anthony G. Wood,
Copartners,

v.

Thomas MORIARTY.

1. **Held, that parol evidence was admissible to prove that the assignee in an instrument under seal, assigning a contract for the building of a house, in which a certain money consideration was expressed, also agreed to pay bills incurred by the assignor under the contract, such evidence going merely to prove an additional consideration, and not to alter the effect of the instrument.**
2. **An agreement to answer for the debt of another, to come within the Statute of Frauds, must be an agreement with the creditor. A promise by one to a debtor, to pay a debt due from such debtor to a third person, is not within the Statute of Frauds, and need not be in writing.**
3. **The creditor may maintain assumpsit against the promisor in such agreement, for the amount of the debt; but he cannot have the benefit of such new contract between said promisor and the original debtor without assenting to its terms, thereby releasing the original debtor.**
4. **As to the creditor suing such promisor for the debt, the liability of the promisor in such agreement is not collateral, but direct and substitutional, and is therefore not within the Statute of Frauds.**

(Providence—Decided March 19, 1887.)

PLAINTIFFS' petition for a new trial **Granted.**

The case is stated in the opinion.

Messrs. Daniel R. Ballou and Frank H. Jackson, for plaintiffs:

An oral promise by B to C, and upon consideration passing between him and C, to pay a debt due from C to the plaintiff, is a valid promise, and the plaintiff can maintain an action thereon.

Barker v. Bradley, 1 Am. Rep. 521; 42 N. Y. 316; *Townsend v. Long*, 18 Am. Rep. 488; 77 Pa. 146; *Barker v. Bucklin*, 2 Den. 45; *Beasley v. Webster*, 64 Ill. 459; *Jordan v. White*, 20 Minn. 91; *McDowell v. Laeo*, 35 Wis. 175; *Joslin v. N. J. Car Spring Co.* 36 N. J. L. 141; *Urquhart v. Brayton*, 12 R. I. 169; *Merriman v. Social Mfg. Co.* 12 R. I. 175.

"A consideration which does not appear in the written transfer or contract can be shown by parol proof, if it is consistent with the one named in the contract."

Barker v. Bradley, 1 Am. Rep. 521; 42 N. Y. 316; 1 Greenl. Ev. §§ 285, 304; *Miller v. Goodwin*, 8 Gray, 542; *McCrea v. Purmort*, 16 Wend. 460; *Murray v. Smith*, 1 Duer, 412; *Jordan v. White*, 20 Minn. 91.

The contract being implied, as between plaintiff and defendant, is not within the Statute of Frauds, and, not being under seal, may

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be enforced by an action of assumpsit.

Urquhart v. Brayton, 12 R. I. 169, and cases cited.

Mr. James Tillinghast, for defendant.

Durfee, Ch. J., delivered the opinion of the court:

This is assumpsit for the price of lumber furnished to one Joshua W. Tibbetts for use in the erection of two houses for the defendant; Tibbetts having entered into a written contract with the defendant to build the houses, before the lumber was furnished. Tibbetts, after going on for a while in the execution of the contract, released it or assigned it to the defendant, by an instrument under seal. The instrument begins by reciting the existence of the contract, and proceeds as follows, to wit:

"Now know ye that for good and sufficient reasons and in consideration of the sum of \$25 paid to me this day by said Moriarty, I hereby transfer and assign said contract back to said Thomas Moriarty, he hereby agreeing to relieve me from further obligation under it, and I hereby releasing him from all claims or demands of whatever kind I may have or have had up to this day, Aug. 26, 1885, against said Moriarty; I hereby acknowledging full payment for said claims and demands; and this shall be his receipt in full for the same to date, meaning hereby to convey to said Moriarty all my right, title, and interest in, to, and under said contract, desiring to relieve myself from completing the work under the contract, and hereby agree to withdraw from said work on said houses, and leave them to his sole charge and care."

At the trial, testimony was introduced, or offered, to prove the purchase of the lumber, the execution of the release or assignment; that the defendant, besides paying the consideration recited therein, agreed, by way of further consideration, to pay all bills incurred by Tibbetts on account of the contract released; that among these bills was the bill of the plaintiffs for lumber; and that notice of the arrangement between Tibbetts and the defendant was given by Tibbetts to the plaintiffs. The testimony as to the agreement to pay the bills incurred by Tibbetts was allowed to go in *de bene esse*, and at the close of the testimony for the plaintiffs the court directed a nonsuit. The plaintiffs petition for a new trial.

The questions are whether the plaintiffs were entitled to prove by oral testimony that the defendant agreed to pay the bills incurred by Tibbetts, under his contract, by way of further consideration for the release or assignment; and if so, whether, upon proof thereof, the plaintiffs could maintain their action.

The general rule is that parol evidence is inadmissible to contradict, add to, subtract from, or vary the terms of any written instrument. But when the instrument is a deed, it is held to be no infringement of the rule to permit a party to prove some other consideration than that which is expressed, provided it be consistent with that which is expressed, and do not alter the effect of the instrument. 1 Greenl. Ev. § 304. In *Miller v. Goodwin*, 8 Gray, 542, it was held that an agreement under seal, by a man with a woman who afterwards became his wife, to convey certain real estate to her in con-

sideration of past services, could be supplemented by parol proof that the agreement was for the further consideration of marriage between the parties. See also *Villers v. Beaumont*, 2 Dyer, 146, a; 2 Phill. Ev. *655. In *McCrea v. Purnort*, 16 Wend. 480, the consideration of a deed conveying land was expressed to be money paid; and it was held that parol evidence was admissible to show that the real consideration was iron of a specified quantity, valued at a stipulated price. *Murray v. Smith*, 1 Duer, 412; *Jordan v. White*, 20 Minn. 91; *Tyler v. Carlton*, 7 Me. 175; *Nickerson v. Saunders*, 36 Me. 413; *National Exchange Bank v. Watson*, 13 R. I. 91; 2 Phill. Ev. *655, Cow. & H. Notes, No. 490. We think the nonsuit is not sustainable on this ground.

The defendant contends that the agreement was within the Statute of Frauds, being an agreement, not in writing, to answer for the debt of another. But an agreement to answer for the debt of another, to come within the Statute of Frauds, must be an agreement with the creditor. A promise by A to B, to pay a debt due from B to C, is not within the Statute of Frauds. *Eastwood v. Kenyon*, 11 A. & E. 438; *Browne*, Fr. § 188. The contract here, as made between Tibbetts and the defendant, was certainly not within the statute. The question therefore takes this form, namely: Whether the plaintiffs are entitled to take advantage of the contract and bring suit upon or under it; and, if so, whether to such suit the statute is not a good defense. Some of the cases cited for the plaintiffs cover both these points completely. *Barker v. Bucklin*, 2 Denio, 45; *Johnson v. Knapp*, 36 Iowa, 616; *Barker v. Bradley*, 42 N. Y. 816; 1 Am. Rep. 521; *Beasley v. Webster*, 64 Ill. 458; *Jordan v. White*, 20 Minn. 91; *Joslin v. N. J. Car Spring Co.* 36 N. J. L. 141; *Townsend v. Long*, 77 Pa. 143, 146. Similar citations might be multiplied if we cared to load our opinion with them. See *Browne*, Fr. §§ 166 a, 166 b, and notes.

On the other hand the cases are numerous which hold that such an action is not maintainable for want of privity between the parties. Mr. Browne, in § 166 a, says that this is the settled doctrine in England, Michigan, and Connecticut; that in North Carolina and Tennessee the question seems to remain open; and that in Massachusetts the English doctrine seems to be growing in favor, contrary to the earlier cases; but that in the other States the creditor's right to sue has been generally recognized. The course of decisions in this State favors the creditor's right to sue, and in principle, we think, recognizes it, though it has not hitherto extended to a purely oral contract. *Urquhart v. Brayton*, 12 R. I. 169; *Merriman v. Social Mfg. Co.* 12 R. I. 175. Courts that allow the action generally hold that it is not affected by the Statute of Frauds, though, as Mr. Browne remarks, they do not unite in the reasons which they give for so holding. Mr. Browne himself suggests that the contract, as between the creditor and promisor, arises by implication out of the duty of the promisor under his contract with the debtor, and that, being implied, it is not within the Statute of Frauds. *Browne*, Fr. § 166b. The view accords with the doctrine of *Brewer v. Dyer*, 7 Cush. 337, where the court remarks (p. 340)

"that the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded."

The diversity of decisions shows that the action cannot be maintained without resorting to implications or assumptions which the courts do not always find it easy to allow, and which they sometimes refuse to allow. It seems to us that we shall best find the grounds, if there are any, on which the action can be maintained, by an analysis or explication of the contract with the debtor. The contract is this: A agrees with B, for a consideration moving from B, to pay to C the debt which B owes to C. The contract is absolute. If A does not pay the debt, and B has to pay, it is broken. It is therefore a contract by A to pay the debt in lieu of B, or, in relief of B, to take it on himself, and become, so far as he can, independently of C, the debtor of C in place of B. The contract as between A and B is not collateral, but substitutional. But this being so, how does C, who is not a party to it, get the right to sue A upon or by reason of it? It has been held that he gets this right directly from the contract itself; because B, in making it with A, makes it for C—if C desires to accede to it—as well as for himself, so that C has only to ratify or assent to it—which he does unequivocally by suing on it—in order to become a party to it. But in this view, if C accepts the contract, he must accept it as made; that is, as a contract by which A agrees that he, instead of B, will pay the debt which B owes to C. C cannot, at the same time, assent to the contract and dissent from the terms of it. Accordingly, if he sues A on the contract, he must sue him instead of B, and cannot also sue B, and B is therefore released. But, as we have seen, another view has been taken. It has been held that the contract between A and B imposes a duty upon A to pay to C the debt which B owes to him, and that from this duty the law implies a promise by A in favor of C to pay B's debt to C. But if a promise is implied from the duty, the promise must correspond to the duty. The duty which the contract imposes upon A is that he, instead of B, shall pay the debt which B owes to C, and, accordingly, so must be the promise to be implied from it. If, therefore, C sues A upon the implied promise, he must sue him as liable instead of B, for the debt of B to him, C; he cannot consistently sue both A and B, and consequently B is released.

We do not claim that either of these views is free from difficulty. Either of them, however, is free from one difficulty which other views encounter, and which is a principal reason why the courts which refuse to allow the action refuse to do so. Other views give the creditor the benefit of the new contract for nothing, since they allow him still to retain his hold upon the original debtor; whereas, according to either of the views above set forth, the creditor cannot have the benefit of the new contract without assenting to the terms of it, thereby releasing the original debtor, so that the assent is in itself a consideration. As cases which support these views, we will refer to *Warren v. Batchelder*, 16 N. H. 580; *Bohannon*

v. *Pope*, 42 Me. 93. See also *Clough v. Giles*, 2 New Eng. Rep. 870. Of course, if either view be correct, the liability under the contract is not collateral, but direct and substitutional, and therefore not within the Statute of Frauds.

We do not think this case is distinguishable in principle from *Urquhart v. Brayton*, 12 R. I. 169. The doctrine of the latter case is not only just and convenient, but also consonant with the purposes of the parties; and we are not prepared to recede from it. As is remarked by the court in *Lehew v. Simonton*, 3 Col. 346, "It accords the remedy to the party who in most instances is chiefly interested to enforce the promise, and avoids multiplicity of actions."

We think the declaration is proper in point of form, and we do not think the nonsuit is justifiable on the ground of variance.

In *Warren v. Batchelder*, 16 N. H. 580, the court held that a demand on the defendant was requisite before suit. Whether this is so we need not decide; for the evidence in this case shows a demand before suit.

Petition granted.

George B. BARROWS, Assignee,
v.

Samuel D. KEENE.

1. If a married woman has or acquires money which is her own, and lends it in good faith to her husband upon his promise to repay it in diamonds or any other chattel, and he does so repay it by direct delivery, she gets good title which will avail against his assignee under a subsequent assignment for the benefit of his creditors.
2. A transfer of property, real or personal, by husband to wife, without the intervention of a third person, is good in equity.
3. Something more than a demand of the husband of personal property, and a refusal by him to deliver it, is necessary to prove a conversion by him, where he has no possession of the property, and has parted with whatever title he had to his wife.
4. Property held in trust by the assignor will not pass under his general assignment for the benefit of creditors, without special words to pass it.

(Providence—Decided March 5, 1887.)

DEFENDANT'S petition for a new trial.
Granted.

The case is stated in the opinion.

Messrs. Charles A. Wilson and Thomas A. Jenckes, for defendant.

Mr. John D. Thurston, for plaintiff.

Durfee, Ch. J., delivered the opinion of the court:

This is a petition by defendant for a new trial, for erroneous instructions. The petition is imperfectly drawn, since it contains no statement of the evidence, or of the purport of the

evidence, upon the points under question, but simply reports a part of the charge of the court and the requests to charge, with exceptions to said parts of the charge, and to refusals to charge as requested. Of course we do not mean that the petitioner ought to have reported the testimony in full; for such a report might unnecessarily cumber the files of the court, and might be censurable for another reason, namely, that it might oblige the court to go through a great heap of testimony—much of it irrelevant—to find and sort out that which is pertinent. This is a labor which properly belongs to the petitioner's counsel. A petition like this ought to state the testimony, or its purport, with such fullness as will show the nature of the case and bring out clearly the points on which the rulings were given or refused, so that the court can see whether any error was committed which calls for correction. Fortunately for the defendant, this is a petition for the new trial of an action originally tried in this court; and in such a case the court has a wider discretion than in a case which comes before it by bill of exceptions. Fortunately, too, it is possible to make out from the part of the charge before us, though not so perfectly as we could wish, the nature of the evidence on which the instructions were given and refused.

The plaintiff, as assignee of the defendant under an assignment for the benefit of creditors, sues the defendant in trover for the conversion of certain chattels claimed under the assignment,—among them a pair of diamond earrings. The defense is that the earrings are the separate property of the defendant's wife; and in support of this defense it is assumed, if not stated in the charge, that testimony was submitted that they came to her in manner following, to wit: That she lent to her husband from time to time divers sums of money, which were her separate property, for payment of household expenses, or laid out her money for such expenses, upon his promise that he would, when he was able, bring her in repayment some diamonds, she being very desirous of some; and that the earrings were bought by the defendant and delivered to her in fulfillment of this promise, for the purpose of repaying her loans.

Upon this testimony the court charged the jury that the defendant was incapable of contracting with his wife or of transferring title to her, and consequently that the earrings remained his property, notwithstanding their delivery, and, as such, passed under the assignment; so that the plaintiff, as assignee, was entitled to demand and receive them. To this ruling the defendant excepted.

The question is whether, if a married woman has or acquires money which is her own, and lends it to her husband upon his promise to repay it in diamonds or any other chattel, and he does so repay it by direct delivery, she gets any title which will avail against his assignee under a subsequent assignment for the benefit of his creditors; good faith in the transaction being, of course, assumed. In *Steadman v. Wilbur*, 7 R. I. 481, this court held that where a married woman, having property of her own under the statute, lends her own money to her husband on his promise to repay it, he can convey real estate to her, through a third person,

by way of repayment, if the estate is no more than a fair equivalent for the loan; and the conveyance will be good at law as against his creditors. And to the same effect see *Atlantic Nat. Bank v. Tavenor*, 180 Mass. 407. The case differs from the case at bar only in this: That there the property used as repayment was transferred from husband to wife through the medium of a third person. The question then is whether the intervention of such third person is necessary to make the transfer effectual in a suit at law; for it is well settled that a transfer of property, real or personal, from husband to wife, without such intervention, is good in equity, even when the transfer is a gift, if reasonable, unless it be a fraud upon creditors; and, *a fortiori*, when it is a payment for money lent. *Jones v. Clifton*, 101 U. S. 225 [Bk. 25, L. ed. 908]; *Hunt v. Johnson*, 44 N. Y. 27; *Putnam v. Bicknell*, 18 Wis. 351; *Deming v. Williams*, 26 Conn. 226; *Underhill v. Morgan*, 38 Conn. 105; *Wheeler v. Wheeler*, 43 Conn. 503; 2 Story, Eq. Jurisp. § 1375.

In *Underhill v. Morgan*, *supra*, the action was assumed by a widow against the administrator of her deceased husband, for money absolutely given to the plaintiff by her husband in his lifetime. The court held that in case of such a gift the legal title remained in the husband as a mere trustee for the wife's protection and benefit during coverture; but, upon his death, the legal and equitable titles unite in her, and she can recover against his representatives at law. In Massachusetts, where the gift is regarded as revocable by the husband, it is held that, if retained by the wife until after his death, her right will prevail as against his next of kin. *McCluskey v. Provident Inst. for Savings*, 103 Mass. 300; *Marshall v. Jaquith*, 134 Mass. 135.

In *Savage v. O'Neil*, 44 N. Y. 298, the husband transferred and delivered a stock of goods directly to his wife in payment for money borrowed from her separate statutory estate; and the court decided that the wife held the goods so transferred by a strictly legal title, good against her husband and all his creditors. This decision has been followed, or virtually followed, in later cases in New York. *Rawson v. Pennsylvania R. Co.* 48 N. Y. 212-216; *Seymour v. Fellows*, 77 N. Y. 178.

In *Armitage v. Mace*, 48 N. Y. Super. Ct. 107, the court says (page 109): "The tendency of the later decisions has been to hold that the effect of the statutes has been, if not to convert the wife's equitable title into a legal one, at least to clothe it with all the incidents of a legal title." By "equitable title," here, the court means the title communicated by direct transfer from husband to wife by way of gift or payment. The case related to the gift of a horse from husband to wife. See also *Beard v. Dedolph*, 29 Wis. 136.

According to these cases, taking the view most favorable for the plaintiff, the defendant's wife became at least the equitable owner of the earrings by the delivery of them to her, if they were delivered as payment, in good faith, for money lent, a naked legal title only remaining in the defendant. Now suppose that this naked legal title passed to the plaintiff. Now does it follow that he has a right to demand and receive the earrings from the defendant,

who has no possession, and who, having parted with whatever title he had, has no longer any right to dominion over them? We think that under such circumstances there is no presumption that the possession of the wife is the possession of the husband, and that something more than a demand and refusal is necessary to prove conversion. It is well settled, however, that property held in trust by the assignor will not pass under his general assignment for the benefit of creditors, without special words to pass it; since, if it were to pass, the trust would still attach so that it could not be rightfully used for the creditors; and the law will not presume that the trustee intended a breach of trust. 1 Perry, Trusts, §§ 336, 345. For the same reason, when equity makes the husband trustee for his wife of property which he has transferred to her, the assignment should be construed not to pass it, unless the trust is a fraud upon the creditors.

The second exception is because the court refused to instruct the jury that if the earrings were on the person of the defendant's wife at the time he refused to deliver them to the plaintiff on demand, trover could not lie for the refusal; but did instruct the jury that, to excuse the defendant, there should be at least some evidence of attempt on his part to get the earrings; some instructions that he was unable to deliver them, or something to satisfy the jury that they were so out of his control that he could not comply with the demand. Doubtless, if the earrings belonged to the defendant absolutely when he made the assignment, the presumption was that his wife's possession was his possession so long as they lived together; and in that case it would have been the duty of the jury to find him guilty, if he refused to deliver the earrings on demand, unless he adduced evidence to show that they were retained by the wife without his concurrence. The instruction, however, was broadly given, so that it would apply not only to such a case, but to the case which we have been considering; and, as applied to the case which we have been considering, in the view which we have taken, it was erroneous.

Petition granted.

Louis J. DOYLE *et al.*

Henry MELLEN.

1. In case of discrepancy in area, the lines of ascertained boundaries must control, unless there is such an averment or defendant of quantity as to show that the exact quantity was the thing granted.
2. Possession by the grantee of a mortgagor, under a deed of warranty, will not be deemed to be adverse to the mortgagee, without an explicit denial of holding under him, brought to his notice.
3. A tenant's possession does not change its character by the owner's giving a deed to another.

(Kent—Decided March 19, 1837.)

DEFENDANT'S petition for a new trial.
Dismissed.

The case is stated in the opinion.

Mr. Patrick J. McCarthy, for defendant.

Mr. Irving Champlin, for plaintiffs.

Stiness, J., delivered the opinion of the court:

David G. Hall, in September, 1869, owned a farm in Warwick, called the Battey farm, containing about 100 acres. This included a triangular lot of 2 or 3 acres at the southwest corner of the farm, which had previously been deeded to the owner of the Wightman farm, adjoining, by heirs of Russell Battey, although they held no legal title. The purchaser, however, took possession of the lot and fenced it off, but the whole had come into Hall's possession at this time, as the owner of both farms. He then gave a mortgage of the Battey farm to Sarah T. Battey, describing it as such, and by boundaries which included the triangular lot in question; by measurement as "containing 97 acres more or less;" and also by reference to a previous deed to him reciting the same boundaries, but much smaller measurement. In May, 1871, Hall sold the Wightman farm and this triangular lot to the defendant, making no mention of the mortgage then outstanding on the Battey farm, and under this deed the defendant entered into possession. We make no other reference to the deeds from the Batteys, because they had no title to convey; and whether they had or not is immaterial, since Hall was the sole owner of both farms when the mortgage was given.

In May, 1884, the Battey farm was sold, under the mortgage, to Walter M. Greene; who in December, 1885, sold to George E. Aldrich, and Aldrich sold to Mrs. Doyle, who now sues for possession. At the trial the court directed a verdict for the plaintiffs, and the defendant petitions for a new trial. He contended that there was an uncertainty and inconsistency in the description which entitled the jury to find that the triangular lot was not included in the mortgage, and so did not pass to the plaintiffs. If the only description were the Battey farm, evidence to show what it included would be pertinent. But that is not the case. Boundaries are given which include the lot sued for. The only question, then, is whether the fact that the area mentioned is smaller than it should be with the triangular lot included makes such an inconsistency in the description as to warrant the inference that the description by boundaries is uncertain or incorrect. The rule is well settled that, in case of discrepancy in area, the lines of ascertained boundaries must control, unless there is such a severment or covenant of quantity as to show that the exact quantity was the thing intended. 3 Washb. Real Prop. 8d. ed. 680, and cases cited.

The case of *Waterman v. Andrews*, 14 R. I. 27, was within this exception. The boundaries in a deed did not include a lot which had been part of a farm, and which, with the remainder of the farm, exactly made up the area of 46 acres given in the deed. Reference to another deed, by way of comparison, showed that the two were partition deeds, and

that, if the area of 46 acres was not maintained, a small lot of trifling value was left undivided. It was evident that the thing granted was the whole area. It was mentioned first in the description and was necessary to a complete division of the land. It was held, therefore, that the description by area must control. But this case is widely different from that one. The reference to area here is "more or less,"—an estimate or approximation; while the deed referred to has the very same boundaries, and the lot in question was always included in the Battey farm. There is no inconsistency, and nothing to show that the description by boundaries was not what it was intended to be.

The defendant also contended that the deeds from Greene and Aldrich did not convey title to Mrs. Doyle, because the grantors were disseised when they gave them, by reason of his own possession of the land. Much of his argument is devoted to the occupation of the lot before Hall's purchase, which is of no consequence in this case, for both the title and possession were in Hall at the time of the mortgage. When the defendant bought the lot, he had a right to enter and occupy until his title should be determined by a sale under the mortgage. The effect of his occupation after the sale is therefore the only matter that concerns us. In the recent case of *Whittington v. Flint*, 43 Ark. 504; S. C. 51 Am. Rep. 572, this subject has been carefully examined, and it is there held that possession by the grantee of a mortgagor, under a deed of warranty, will not be deemed to be adverse to the mortgagee, without an explicit denial of holding under him, brought to his notice.

The mortgagor and his assigns hold in privity with the mortgagee, and in subordination to his rights. There has been some diversity of opinion about the character of the mortgagor's holding, but none about the result. Shaw, Ch. J., in *Hunt v. Hunt*, 14 Pick. 874, at pp. 885, 886, says: "It is very clear that a mortgagee cannot be disseised by the mortgagor; being tenant at will, his possession is not adverse." In *Doe v. Williams*, 5 Ad. & El. 291, Mr. Justice Patterson said, p. 297: "One is much at a loss as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee. In *Partridge v. Bere*, 5 Barn. & A. 604, such mortgagor is held to be tenant to the mortgagee. Sometimes he is said to be the bailiff of the mortgagee, and in a late case Lord Tenterden said that his situation was of a peculiar character. But it is clear that his possession is, at all events, not adverse to the title of the mortgagee." See also Jones, Mort. § 703, and cases cited.

In *Zeller's Lessee v. Eckert*, 4 How. 289 [45 U. S. bk. 11, L. ed. 979], it is held that where possession is subordinate to, and in privity with, the title of the rightful owner, nothing short of an explicit disavowal of a holding under that title can be taken as an adverse holding. Whether we regard one who had owned the equity of redemption as a tenant or as one holding in privity with, and subject to, the mortgagee's right of entry, his holding is not inconsistent with the title of the purchaser at the mortgagee's sale. There is therefore no adverse holding, no ouster of the owner, and

no disseisin "until the possession, before consistent with the title of the real owner, becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued, and notorious, so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the owner." *Zeller's Lessee v. Eckert*, 4 How. 289 [45 U. S. bk. 11, L. ed. 979]; 1 Jones, Mort. §§ 672, 708, and cases cited.

A tenant's possession does not change its character by an owner's giving a deed to another. If one was not in hostile occupation before the deed was given, he would not be afterwards, until some change should show that the possession had ceased to be subservient and had become adverse. In this case the defendant was rightfully in possession at the time of the sale; his holding was not adverse to the purchaser who permitted him to remain in occupation, and nothing occurred afterwards to change the character of the holding on the part of the defendant. It follows, therefore, that there was no disseisin of the mortgagee and his assigns, and that their deeds were not invalid on that account. We see no defense to the plaintiffs' title, and think the verdict in their favor was rightly directed.

Petition dismissed.

Re The REPRESENTATIVE VACANCY.

1. The provision of R. I. Pub. Stat. chap. 11, § 6, that if no person have a majority of the legal votes for **representative in Congress**, the General Assembly shall order a **new election**, is intended to apply only when the count in the General Assembly shows a failure to elect.
2. A person having been declared by the General Assembly to have been elected a representative in Congress was thereafter **declared by the United States House of Representatives not to have been elected**, and the seat was declared vacant. *Held*, that in such case the **governor has power**, under art. 1, § 2, of the Federal Constitution, to **issue a writ of election to fill the vacancy**.

(February 9, 1887.)

THE Public Statutes of Rhode Island, chap. 11, §§ 5, 6, are:

"§ 5. The ballots given in at such elections (*i. e.*, of representatives in Congress) shall be returned to the General Assembly at its session next ensuing such election; and those given in each district shall be separately counted; and the candidate having a majority of legal votes therein shall be declared elected, and shall be furnished by the governor with a proper certificate thereof.

"§ 6. If no person have such majority, the General Assembly shall order a new election at such time as they shall deem most expedient; and the ballots given in at such election shall be returned to, examined, and counted by the General Assembly or by the governor, at such time as the General Assembly shall direct; and the candidate in each district having a plurality of the legal votes given in at such second elec-

tion shall be declared elected, and shall receive a certificate accordingly."

Under art. 10, § 3, of the Constitution of the State, which provides that "the judges of the supreme court * * * shall * * * give their written opinion upon any question of law whenever requested by the governor or by either House of the General Assembly," the governor addressed the following communication to the justices of the court:

STATE OF RHODE ISLAND,
EXECUTIVE DEPARTMENT,
PROVIDENCE, FEBRUARY 4.

To the Honorable Judges of the Supreme Court:

I have the honor to represent:

1. That William A. Pirce was by the General Assembly declared to have been duly elected, November 4, 1884, a representative in the Forty-ninth Congress of the United States from the Second Congressional District of this State.

2. That the National House of Representatives, on the 25th day of January, 1887, adopted a resolution in the words following, viz.:

"Resolved, that William A. Pirce was not elected a member of the House of Representatives from the Second Congressional District of Rhode Island, and that the seat be declared vacant."

3. That the reason for the adoption of said resolution was, as appears from the report of the majority of the House Committee on Elections and from the records of the House of Representatives, that no one of the candidates at said election received a majority of the legal votes given in at said election, and that there had been no election in accordance with the laws of this State.

4. That the Constitution of the United States, art. 1, § 2, provides: "When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies."

5. That the Public Statutes, chap. 11, § 6, provide that if no person have a majority of the legal votes for representative in Congress, the General Assembly shall order a new election at such time as they shall deem most expedient.

Under the provisions of art. 10, § 3, of the Constitution, I request the opinion of your honors whether the above resolution of the House of Representatives creates a vacancy within the meaning of U. S. Const. art. 1, § 2, and so imposes on the governor the duty of issuing a writ of election as required by that section; or whether it is a case in which the General Assembly should order a new election under the provisions of said chap. 11, § 6, of the Public Statutes.

GEORGE PEABODY WETMORE,
Governor.

OPINION.

February 9, 1887.

To His Excellency, George Peabody Wetmore, Governor of the State of Rhode Island and Providence Plantations:

We have received from your Excellency a communication requesting our opinion on a question stated therein. The statement is, that William A. Pirce was by the General Assembly declared to have been elected, November 4,

1884, a representative in the Forty-ninth Congress of the United States from the Second Congressional District of this State, and that, January 25, 1887, the National House of Representatives adopted a resolution declaring that said William A. Pirce was not elected, and that the seat was vacant, the reason being that neither said Pirce nor any other person received a majority of the legal votes cast at said election of November 4, 1884. Your question is, "whether said resolution creates a vacancy within the meaning of art. 1, § 2, of the Constitution of the United States, and so imposes on the governor the duty of issuing a writ of election, as required by that section; or whether it is a case in which the General Assembly should order a new election under the provisions of R. I. Pub. Stat. chap. 11, § 6."

We do not think the statement shows a case for the action of the General Assembly, under chap. 11, § 6; for, in our opinion, § 6 has reference to the preceding section, and is intended to apply only when the count in the General Assembly, provided for in the preceding section, shows a failure to elect. After such a count, according to your statement, the General Assembly declared that William A. Pirce was elected, and therefore it could not order a new election, under § 6.

We pass to your alternative inquiry. The language (art. 1, § 2, of the Constitution of the United States) referred to is as follows, to wit:

"When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies."

There can be no doubt that a vacancy exists; the only question is whether a vacancy which exists by reason of a failure to elect is, within the meaning of the provision above quoted, a vacancy which has happened in the representation; since the word "happen" may be thought to import a vacancy occurring in the course of the representation after it has been filled. We think it is, even under such a construction; for we suppose we may assume that William A. Pirce received a certificate of election, and that on the faith of it he was admitted to a seat in Congress, which he continued to occupy, as representative *de facto* at least, until the seat was declared vacant by the resolution aforesaid. We think, therefore, that your Excellency has power, under the provision above quoted, to issue a writ of election to fill the vacancy; and, having the power, we think it is for your Excellency to decide whether, considering how soon the Forty-ninth Congress will terminate, it is your duty to exercise it.

THOMAS DUFFEE,
CHARLES MATTESON,
JOHN H. STINNESS,
P. E. TILLINGHAUST,
GEORGE A. WILBUR.

Re SPECIAL ELECTIONS FOR REPRESENTATIVES TO CONGRESS.

Where there is a failure (ascertained by the General Assembly on its counting

R. I.

of the ballots), at a regular biennial election, to elect a representative to Congress, the duty of ordering a new election is imposed upon the General Assembly; and this is so, whether such new election be ordered before or after the 4th of March next succeeding a regular election.

(April, 1887.)

RESOLUTION calling for an opinion of the Judges:

STATE OF RHODE ISLAND, &c.,

IN GENERAL ASSEMBLY,

JANUARY SESSION, A. D. 1887.

Whereas, a difference of opinion having arisen as to whose duty it is to call an election of representative in the Western District,

Resolved, That the opinion of the supreme court is hereby requested by the House of Representatives on the following resolution: "Resolved, that in case there is a failure at any election to elect a member of the House of Representatives to represent any district in the Congress of the United States, and no new election is called previous to the expiration of the term of service of the member holding office at the time of such failure to elect, is it the duty of the General Assembly or of the governor to call a new election?"

In House of Representatives, April 1, 1887:

I hereby certify that the foregoing is a true copy of preamble and resolution adopted this day by the House of Representatives.

GEO. LEWIS GOWER,
Clerk House of Representatives.

OPINION.

To the Honorable the House of Representatives of the General Assembly of the State of Rhode Island:

We have received from your honorable body the enclosed copy of a resolution adopted April 1, 1887. The question propounded in the resolution is expressed in very general terms, but as we know of no occasion which your honorable body has of asking the question, except in so far as it is applicable to the failure to elect a representative to Congress at the election held in the Second Congressional District on the 2d day of November last, we shall presume that the question was intended only to relate to failures to elect at regular biennial elections. Our opinion is that the question, so limited, is very clearly answered by the following citations from the Constitution and statute law of the United States, and from the statute law of the State.

The Constitution of the United States, art. 1, § 4, declares: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the Legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators."

The statute law of the United States (U. S. Rev. Stat. § 26) enacts: "The time for holding elections in any State, District, or Territory for a representative or delegate to fill a va-

cancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively."

The statute law of this State, after appointing the times for holding the regular biennial elections, as the times are appointed in U. S. Rev. Stat. § 26, and prescribing the manner in which such elections shall be conducted, provides as follows, to wit:

"§ 5. The ballots given in at such elections shall be returned to the General Assembly at its session next ensuing such election; and those given in each district shall be separately counted; and the candidate having a majority of legal votes therein shall be declared elected, and shall be furnished by the governor with a proper certificate thereof.

"§ 6. If no person have such majority, the General Assembly shall order a new election at such time as they shall deem most expedient, and the ballots given at such election shall be returned to, examined, and counted by, the General Assembly, or by the governor, at such time as the General Assembly shall direct; and the candidate in each district having a plurality of the legal votes given in at such second election shall be declared elected, and shall receive a certificate accordingly."

These provisions seem to us to be entirely clear, and to impose upon the General Assembly the duty of ordering a new election whenever there is a failure to elect, ascertained by the General Assembly, at any regular biennial election.

It has been suggested to us that there are some members of your honorable body who doubt whether the provision for ordering a new election, in § 6, above quoted, can govern, if "no new election is called previous to the expiration of the term of service of the member holding office at the time of the failure to elect," their theory being that, as soon as such term expires, a new term begins, and there is a vacancy in the representation, to be filled by the governor, under the Constitution of the United States, art. 1, § 2. Our statute, however, does not recognize any such distinction; and our statute, whether it be applied to a new election ordered before or ordered after the 4th of March next succeeding a regular election, is within the authority expressly given by U. S. Rev. Stat. § 26, above quoted. We think, too, that, independently of any Act of Con-

gress, it is within the authority given by the Constitution of the United States, art. 1, § 4, above quoted. The provision, with some differences immaterial to the question, has existed since 1798. From 1822 to 1868 the times of the regular biennial elections were August or April next preceding the December meetings of the new Congresses. During that period there were five failures to elect; to wit, in 1825, 1833, 1847, 1849, and 1859. The new election in the case of every one of these failures was ordered by the General Assembly, and in every case the person elected at such new election took and held his seat without question or opposition. The power of the General Assembly to order a new election after the 4th of March is supported by an unbroken series of precedents.

We also understand that it has been supposed that our opinion recently given to his Excellency, the governor [*ante*, p. 274], is in conflict with this view. That opinion was given in answer to a very different question. The case was this: The regular election for representatives to the Forty-ninth Congress was held November 4, 1884. The ballots cast in the two districts were duly returned to the General Assembly, and the General Assembly, upon counting the ballots cast in the Second District, found that William A. Pirce had a majority of sixteen, and declared him elected. He received a certificate of election, took his seat, and held it until near the close of the term, when the seat, upon contest, was declared vacant. We gave the opinion that the case did not fall under the provision of our statute above quoted, because we considered the provision as applicable only where a failure to elect is found by the General Assembly on its own counting of the ballots. The case to which the question now submitted to us applies is a case in which the failure to elect has been found by the General Assembly on its own counting of the ballots.

We are of opinion, therefore, that the statute imposes the duty of ordering the new election upon the General Assembly, and that the governor, even if he has power under the Constitution of the United States, may well wait for the General Assembly to act, so long as it is in session.

THOMAS DUFFEE,
CHARLES MATTESON,
JOHN H. STINESS,
P. E. TILLINGHAST,
GEORGE A. WILBUR.

MAINE.
SUPREME JUDICIAL COURT.

George W. COLLINS

v.

Calvin BLAKE.

When a statute giving a lien provides for its enforcement in the same manner as another specified lien is enforced, the repeal of the mode of remedy in the latter case will not affect the remedy applicable to the former.

(Aroostook—Decided March 8, 1887.)

ON report upon agreed statement of facts.
Plaintiff nonsuited.

Trespass by the owner of three colts against a deputy sheriff who seized and sold the colts upon an execution issued in a process to enforce a lien for feeding and sheltering the animals.

Messrs. Wilson & Lambert, for plaintiff:
It is well settled that an officer is protected only when he proceeds under a precept regular on its face and issued from a tribunal having jurisdiction of the subject-matter.

Nowell v. Tripp, 61 Me. 480, citing 14 Wall. 613 (81 U. S. bk. 20, 757.) See also *Memore v. Longfellow*, 76 Me. 128; *Wilmarth v. Burt*, 7 Met. 259; *Clarke v. May*, 2 Gray, 418; *Donahoe v. Shed*, 8 Met. 826; 2 Hill. Torts, 4th ed. 126.

Now in this case these two necessary facts do not exist.

The petition was dated November 23, 1882, and was to enforce a lien for feeding and sheltering the colts from and including the winter season of 1880-81, to the date of the petition. The case is the same which is referred to in *Lord v. Collins*, 76 Me. 448.

The supreme judicial court at that time had no jurisdiction of such liens.

The remedy provided for innholders and keepers of boarding-houses at that time was a sale at auction under Pub. Laws 1876, chap. 90.

"Liens are in derogation of the common law, and the court is not authorized to extend the law beyond the objects specifically provided for, or enforce a remedy by statute, except in accordance with the items thereof."

Lord v. Collins, 76 Me. 444.

This precept was issued by virtue of a proceeding not according to the course of the common law; and, although the court was one of general jurisdiction, there was no presumption of jurisdiction.

Prentiss v. Parks, 65 Me. 562; *Penobscot R. Co. v. Weeks*, 52 Me. 456; *Commonwealth v. Blood*, 97 Mass. 588; *Morse v. Presby*, 5 Foster, 382.

Everybody is bound to know the law and what it authorizes.

Vinton v. Weaver, 41 Me. 430.

The execution was therefore illegal on its face, and was issued by a court having no jurisdiction of the subject-matter.

Fisher v. McGirr, 1 Gray, 45; *Greene v. Briggs*, 1 Curtis, C. C. 385; *Commonwealth v. Rusty*, 10 Allen, 405; *Smith v. Keniston*, 100 Me. 178.

"It is well settled that a warrant issuing

from a court or magistrate having no jurisdiction of the case confers no authority on the officer who executes it."

Bouker v. Lowell, 49 Me. 480, *Goodnow, J.*; 2 Hill. Torts, 4th ed. p. 125.

Every fact essential to the special jurisdiction must appear upon the record.

65 Me. 562; 52 Me. 456.

"It is held that, where the subject-matter of the suit is not within the jurisdiction of a court, all the proceedings are absolutely void, and the officer is a trespasser."

2 Hill. Torts, 4th ed. p. 180, § 8.

Mr. J. O. Bradbury, for defendant:

"A precept which appears upon its face to have been issued by competent authority affords a justification to the officer who executed it."

Guptill v. Richardson, 62 Me. 267.

Where the process is issued by the court or a magistrate having jurisdiction, and is right on its face, it is a protection to the officer who executes it.

Gray v. Kimball, 42 Me. 807; *Horton v. Auchmoody*, 7 Wend. 200; *Fisher v. McGirr*, 1 Gray, 1.

A precept or process, though voidable for irregularity and mistake, is a protection to the officer who serves it, if the magistrate by whom it was issued had jurisdiction of the subject-matter.

State v. McNally, 84 Me. 210; *Gurney v. Tufts*, 87 Me. 180; *Gray v. Kimball*, 42 Me. 299.

An officer may be protected in the service of an execution, although there was such irregularities in the writ and in the service of it as, if pleaded, would have abated the suit, and although, for such informalities, the judgment was afterwards reversed on a writ of error.

Wilton Mfg. Co. v. Butler, 84 Me. 481.

Lord v. Collins, 76 Me. 444, clearly states the construction given by the court as to statute rights in the enforcement of lien claims on goods and personal baggage; also for keeping of animals.

Peters, Oh. J., delivered the opinion of the court:

We think the *in rem* judgment which is attacked by the plaintiff in this case was not erroneously granted. The statute gave a lien on animals for feeding and sheltering them, the lien "to be enforced in the same manner as liens on goods and personal baggage by innkeepers or keepers of boarding-houses."

That meant enforcement in the manner then existing,—not as it might be in the future by a new enactment. A reference was the readiest way to describe the process to be employed for enforcement. The repeal of the process in the one case does not repeal the process in the other, there being no words in the Act of repeal including the latter. Suppose the innholder's lien had been wholly abrogated. Would it be pretended that the lien on animals would fall with it? There is no dependency between the two classes of liens or their enforcement. 76 Me. 448, by implication, so settles the question.

The Act affecting this case was passed before the present Revised Statutes, which retain, on this subject, a reference to a law after it has

been changed or repealed. The complication needs the notice of the legislative department to prevent misadventure.

Plaintiff nonsuited.

Walton, Danforth, Emery, Foster, and Haskell, JJ., concurred.

Ada F. DURELL

v.

Samuel F. GIBSON, Admr.

1. Where a guardian settled his account with his ward after her arrival at twenty-one years of age, and filed the same in probate court, where it was allowed and recorded, the court will not, after the death of the guardian, open that settlement on the ground of fraud or mistake, unless the fraud or mistake is clearly proved by the petitioner.
2. Where the judge of probate, on petition to open such account, allows the petitioner a certain sum in correction of errors, the burden is on the petitioner, on her appeal from the decree, to prove to the appellate court that the estate of the guardian should have been charged with a greater sum.

(Oxford—Decided March 2, 1887.)

ON report of the evidence introduced at the hearing on the petitioner's appeal from decree of judge of probate. *Decree affirmed.*

The opinion states the material facts.

Mr. R. A. Frye, for plaintiff.

Mr. S. F. Gibson, for defendant.

Per Curiam: This is a petition to the judge of probate to open the accounts of David F. Brown, as guardian of the petitioner, on the ground that, in his accounts, he did not account for all his ward's estate that came into his hands.

The guardian was appointed and qualified in 1864, and in March, 1866, returned an inventory of his ward's estate, amounting to \$1,769.76. In 1879 he settled his first account of guardianship, in which he charged himself with the amount of the inventory and \$1,388.21 interest. In 1880, his ward, the petitioner, having arrived at the age of twenty-one years, he settled his final account with her, and paid her the amount in his hands as shown by that settlement, and she receipted therefor, and certified the account to be correct. This account was then filed in probate court, and at the September Term, 1880, it was allowed and ordered recorded.

The guardian died before this petition was filed; and if the petitioner would open that settlement on the ground of fraud or mistake, the burden is on her to clearly prove the fraud or mistake. The case was fully heard by the judge of probate, and, upon the evidence presented to him, he found certain mistakes or omissions stated in his decree, amounting in all to \$378.79, and charged the guardian with that sum in addition to what he had accounted for, as of September 18, 1880. From that decree this appeal is taken.

The burden is upon the appellant to prove that her guardian should be charged with a

larger sum. A careful examination of the evidence reported fails to satisfy the court that the findings of fact, or the legal conclusions thereon, by the judge of probate in his carefully-considered decree, are erroneous, and should be reversed. Upon the case as presented to us, we think that decree sufficiently favorable to the petitioner.

Decree of the Probate Court charging the guardian with \$378.79 in addition to what he had accounted for, as of September 18, 1880, affirmed, with interest from that date.

John A. WATERMAN

v.

Kate H. DOCKRAY *et al.*

1. Where an administrator gives only a common-law bond, it must be sued in the name of the obligee, but it is available for the enforcement of all legal obligations assumed by the makers.
2. The writ in a suit on such a bond, in the name of the judge of probate named therein, may be amended by inserting the name of a person as prosecutor.
3. The obligee (judge of probate) is a party to such an action in trust for all persons interested.

(Cumberland—Decided February 24, 1887.)

ON exceptions by the plaintiff to the *pro forma* ruling of the court in refusing to allow an amendment to the writ filed by the plaintiff. *Sustained.*

The opinion sufficiently states the facts.

Mr. C. W. Goddard, for plaintiff.

Mr. H. D. Hadlock, for Kate H. Dockray:

The recent case of *McFadden v. Hewett*, 1 New Eng. Rep. 334, while it goes so far as to allow a declaration in a suit on a guardian's bond to be amended by adding the averment that the interest of the person suing had been specifically ascertained by probate decree, fails to intimate that other parties and new causes of action may be introduced, or that a case may be taken out of the Statute of Limitations by allowing it to be inserted by amendment into a writ pending in court between other parties.

By Me. Rev. Stat. chap. 72, § 8, "Every action against sureties on an administrator's or executor's bond must be commenced within six years."

From the above-quoted section, it is obvious that suit on the bond now set out in this proposed amendment cannot be sustained in any action to be hereafter brought.

The case of *Waterman v. Dockray* fully settles this question.

1 New Eng. Rep. 659.

The bond declared on is not a statutory bond, and the obligors are not liable to the provisions of Rev. Stat. 72, chap. 15, for any penalties, but only for actual damages resulting from a breach of the bond.

Cleaves v. Dockray, 67 Me. 124.

The rule of law as stated in the case of *Annis v. Gilmore*, 47 Me. 158, precludes the allowance of such an amendment.

The proposed amendment falls within the principles laid down in *Wyman v. Kilgore*, 47 Me. 184, and *Cooper v. Waldron*, 50 Me. 80.

As the writ stated no cause of action which could be maintained at the time when the demurrer was filed, the proposed amendment, if it states anything, states a new cause of action, and therefore the proposed amendment cannot be allowed.

Milliken v. Whitehouse, 49 Me. 536; *Farmer v. Portland*, 63 Me. 46.

Peters, Ch. J., delivered the opinion of the court:

The bond in suit, being a common law bond, is necessarily sued in the name of the person who was judge of probate when it was given, instead of in the name of his successor; is destitute of power to enforce statutory penalties; but is available, for the enforcement of all legal obligations assumed by the makers, in the same manner as if it were a statutory bond. *Cleaves v. Dockray*, 67 Me. 118; *Schoul. Ev.* § 143, and cases.

When this case was presented to the court before (78 Me. 189), the writ charged that the action was prosecuted in John A. Waterman's name by the administrator *de bonis non* of the estate of Dockray. That was held not maintainable, because the administrator had no adjudged claim of his own to recover, and no authority from the judge of probate to prosecute the action in behalf of the estate generally. The court says that Ammi R. Mitchell, a creditor, might have prosecuted the action, having had leave to do so, and that the plaintiff might amend his writ and declaration on payment of costs. The costs were paid by the plaintiff, and accepted by the defendants.

How to amend? If the writ was not a valid writ, was it not to amend so as to make it valid? If the decision was that the action could only be prosecuted by the creditor Mitchell, was it not to so amend as to make Mitchell the prosecutor? Have not the defendants voluntarily received a consideration for allowing an amendment that will give the proceedings full force and efficacy? Were the costs received to allow merely a useless amendment? In our opinion the plaintiff is entitled to amend to any extent necessary to make his pleadings sufficient.

But it will be a change of parties and of the cause of action, it is argued by the adverse party. We think not, in any substantial sense. The real parties will be the same after as before amendment; the plaintiff was and still will be John A. Waterman. In his name the judgment must be recovered for all the creditors, and in his name alone will execution be issued. The original action was not commenced under Rev. Stat. chap. 72, § 10. No particular claim was sought to be recovered. The attempt was to sue the bond, under § 16, for the estate,—for the benefit of all. The essential party is John A. Waterman, the obligee in trust of all persons interested in the bond.

Nor is the cause of action changed in the least by the amendment. The cause of action is the same whether the suit be promoted by one or another person. It is essentially the same thing to the defendants, whoever the secondary parties may be. In any case the cause of action is the bond and a forfeiture under it.

ME.

When a judgment is recovered, the judge of probate assigns it to the new administrator to collect for the benefit of the estate generally. Rev. Stat. chap. 72, § 18.

In the earlier practice such suits were brought by the judge of probate in his own name, upon the indemnity of some interested party, to save him harmless of costs. In the present Massachusetts practice, the requirement is that the writ shall be indorsed "by the person for whose benefit or at whose request the suit is brought, or by his attorney." In *Bennett v. Woodman*, 116 Mass. 518, it is said: "The judge of the probate court, and not the indorser of the writ, represents the rights upon which the action is to be maintained, if at all," in an action for the general benefit of the estate. It was there held to be immaterial that the person upon whose representation the action was brought would receive no benefit from a recovery on the bond. The party permitted to commence the action is merely a promoter or prosecutor,—a person who volunteers to carry on the suit at his own risk and expense for the common good. He is not the party,—he merely supports the party. In an action under § 10, commenced without leave of court, it would be different.

It has never been decided that an amendment such as is offered here is inadmissible. In *Potter v. Cummings*, 18 Me. 55, an amendment of the kind was not rejected. In *Sturtevant v. Tallman*, 27 Me. 78, it was held that "such an amendment could be allowed only on terms." In *McFadden v. Hewett*, 78 Me. 24, 1 New Eng. Rep. 384, an amendment of as much substance as this was allowed. Bear in mind that our statutes now allow, on payment of costs, a change of parties by way of amendment, by either lessening or increasing the number of either plaintiffs or defendants.

It appears from the facts stated in the proposed amendment that a large amount of unadministered property has remained in the principal defendant's hands for more than ten years, and that creditors have been thus far baffled in their attempt to recover their claims by her maladministration of the estate. The liability under the bond seems to be doubly fixed: first, by neglecting to account when required to do so; secondly, by a failure to turn over the property to her successor when demanded of her. Escape from liability altogether,—a consequence that might ensue if an amendment be not allowable,—would be a stigma on the law itself, occasioned by the remissness of some of its servants or officers. That need not be.

Perhaps it would leave the writ and declaration more consistent to strike Pierce's name therefrom, although not necessary to do so, and allege that the action is prosecuted by Ammi R. Mitchell, a party interested, for the benefit of the estate, he having been expressly authorized to do so by the judge of probate.

At all events the plaintiff should be allowed to make the amendment asked for, or any other which would not be a substantial departure from the limit indicated.

Exceptions sustained; motion of defendants overruled; amendment allowed.

Walton, Virgin, Libbey, Emery, and Haskell, JJ., concurred.

Charles A. BAILEY

v.

John N. KNAPP, Jr.

1. A petition for partition is a proceeding at law, and not in equity.
2. In such a proceeding the defendant cannot show that the plaintiff's title, though by a deed absolute in form, was that of an equitable mortgage, and the debt had been paid.
3. A conveyed to B an undivided half of a lot of land "which was conveyed" in a certain deed, describing it. A, at the time, held the title of the other half through a different conveyance. *Held*, B took the title derived through the conveyance named, though that was incumbered by mortgage.

(Penobscot—Decided March 1, 1887.)

ON exceptions by defendant. *Overruled.*
Petition for partition of land.

In 1868 Adam Blackman, while seised of the one undivided half part of a certain tract under the Pinhorn mortgage, gave a quitclaim deed to George V. Blackman (referred to in the opinion) as follows:

"One undivided half part of a certain tract of land * * * containing 1,773 acres more or less, same known as the 'Eaton Tract,' intending hereby to release and convey all right and title to all that undivided half part of said premises which were conveyed in mortgage by Luke P. Rand to Amasa Stetson, by deed bearing date Aug. 8, 1857, recorded in Penobscot Registry, book 280, page 160, and since assigned to said George; which I derived by deed, Charles D. Gilmore, sheriff, to me, dated Feb. 26, 1861, and recorded as aforesaid, book 310, page 62; and all title to said half which I have, by virtue of any and all deeds for taxes, and especially by the two deeds from Edwin Eddy, one dated Jan. 18, 1861, recorded book 809, page 119, and the other dated Jan. 11, 1862; also including all other title which I have to said half part, reference to said deeds to be had."

Other material facts stated in the opinion.

Mr. A. W. Paine, for defendant:

It was decided in early cases that when a demandant set up a claim of seisin, to disprove such seisin, evidence was admissible to prove that the demandant's grantor had conveyed the title previously to another, under whom he did not claim.

Stanley v. Perley, 5 Me. 369. This was followed by *Chaplin v. Barker*, 58 Me. 275, and, still later, by *Morse v. Sleeper*, 58 Me. 329.

These cases, in effect and principle, are the same as ours.

Motts v. Alger, 15 Gray, 323.

In the language of Meilen, *Ch. J.*, speaking of a similar state of facts: "It is a disclaimer of all pretense of title or claim to it," a "disavowing expressly any intention of considering his expression as adverse," which is not only pertinent, but important.

Little v. Libby, 2 Greenl. 242, 247.

As the court say in *Schwartz v. Kuhn*, 1 Fairf. 274, it is a question for the jury; and, as bearing on that question of disseisin, what evi-

dence could be more pertinent and impressive than the fact that the deed was made simply to secure the other party for a loan, and had since been paid, and left no title equitably in him? *Boothby v. Hathaway*, 20 Me. 251, is quite impressive as showing how the hunting up, or, as the court say, "raking up, of this supposed adverse title," has a tendency to disprove any rightful claim. *Morse v. Sleeper*, 58 Me. 329, before cited, is to the same point.

Messrs. Davis & Bailey, for plaintiff.

Peters, Ch. J., delivered the opinion of the court:

This is a petition for partition, and is to be governed by legal and not equitable principles.

The respondent contested a portion of the petitioner's apparently legal title, upon the ground that one of the deeds under which he claimed his portion of the land was no more than an equitable mortgage, and that the debt had been paid. The judge correctly ruled that the attempted defense was inadmissible in this proceeding. The question whether the deed is an equitable mortgage or not belongs to the equitable jurisdiction to determine: it cannot be determined at law. *Jewett v. Mitchell*, 73 Me. 28.

Adam Blackman, while owner of one half of a tract of land, conveyed to his son all his right and title in the half of the land which was mortgaged by one Rand to Amasa Stetson,—which was the other half. The respondent contended that by the deed the son took a moiety of the land, whether it was the Rand half or any other half; that he could take an unincumbered half. The very statement is its own refutation.

Exceptions overruled.

Walton, Danforth, Emery, Foster, and Haskell, JJ., concurred.

Waldo G. BROWN *et al.*

v.

Thomas MOORE and Trustee.

The justice of the Superior Court for the County of Aroostook is authorized to set aside the verdict and grant a new trial in a case tried before him, when, in his opinion, the case demands it.

(Aroostook—Decided March 3, 1887.)

ON exceptions by the defendant to the ruling of the court in setting aside the verdict, which gave one cent damages, on motion of the plaintiff. *Overruled.*

Mr. John P. Donworth, for defendant:

The power to set aside verdicts does not exist unless so expressed *in totidem verbis*; for an Act conferring such power is in derogation of the common law, and cannot be extended by construction so as to embrace causes not fairly within the scope of the language used.

See 46 Me. 377.

The Superior Court in Aroostook County was not created by force of a general law, so that Rev. Stat. chap. 82, § 40, does not apply. Stat. 1885, chap. 324, establishing that court,

does not confer the power to set aside a verdict.

Messrs. Powers & Powers, for plaintiffs:
Rev. Stat. chap. 82, § 40, expressly confers this power upon all presiding justices of superior courts.

As well might it be argued that the statutes relating to towns do not apply to towns incorporated after the passage of those statutes, or the statutes relating to trial justices do not apply to those thereafter appointed, as that this statute itself only applies to the superior courts already existing.

Peters, Ch. J., delivered the opinion of the court:

The question is whether the judge of the Superior Court for Aroostook County has the power to set aside a verdict and grant a new trial in a case tried before him; when, in his opinion, the evidence demands it. We have no doubt that he has.

The language of Rev. Stat. chap. 82, § 40, is comprehensive enough to admit such construction. "Any justice * * * of a superior court" may do so. The argument on the other side of the question is that it cannot be so because the Aroostook County Court was not in existence when the statute referred to was passed, and that the extent of jurisdiction granted to the local court must be found only in the Act creating it. We are not strongly impressed with this argument. The statutory provision pertaining to the subject is found in a chapter of rules regulating proceedings in courts generally, most of which are as applicable to one court of record as to another. Before the last Revised Statutes, the provision applied specifically to superior courts in Cumberland and Kennebec counties. Acts 1881, chap. 44. But the idea of the revising committee, adopted by the Legislature, was that the power had better be general, and apply to present or future superior courts.

There is no good reason why the Aroostook court should not possess such power while other courts have it. In fact, it is a power usually belonging to courts exercising common-law jurisdiction, and the new trial was, in early times, granted only by the trial judge or judges. It remained so until statutory provisions supervened, altering the practice. The statutes rather take from, than add to, the powers of a single judge in this respect.

The historical aspect of the question in this State is fully stated in the case of *State v. Hill*, 48 Me. 241. The origin of the practice of granting new trial is of extremely ancient date. Blackstone gives an interesting and satisfactory account of it. 3 Bl. Com. 887, 888; Bouv. L. Dic. *New Trial*.

Exceptions overruled.

Walton, Danforth, Virgin, Emery,
and **Foster, JJ.**, concurred.

Edward T. DUGAN

v.

Charles E. THOMAS et al.

say "defendant," where the mistake was obvious, and the judge's attention was not called to it before the jury retired.

2. When a person making an entry upon real estate for condition broken takes and holds possession, the act speaks for itself, and it is not important that a witness to the entry knows the purpose of it.

3. A father is not legally bound by an agreement, in his deed to a son, that if any controversy arise between them about the father's support, for which the deed was given, it should be settled by an arbitrator mutually agreed upon.

4. Courts cannot be ousted of their jurisdiction by agreements between parties.

(Piscataquis—Decided March 8, 1887.)

ON exceptions and motion by plaintiff to set aside a verdict for defendant in a real action. *Overruled.*

The nature of the case, the facts, and questions raised appear from the opinion.

Messrs. Peaks & Everett, for plaintiff:

Forfeitures for condition broken are not favored by the law.

1 Washb. Real Prop. title, *Estate Upon Condition*.

Conditions subsequent, especially when relied upon to work a forfeiture, must be created by express terms or clear implication, and are construed strictly.

Merrifield v. Cobleigh, 4 Cush. 178; *Bradstreet v. Clark*, 21 Pick. 889; *Ludlow v. New York & Harlem R. R. Co.* 12 Barb. 440.

Now, in the construction of this deed, one of the conditions is that there shall be no forfeiture without arbitration, if either party desires it. This plaintiff did desire it. This plaintiff had taken a conditional deed. Under it he had supported his father and mother nine years. He had put into the conditions a stipulation that there should be no forfeiture until there had been an arbitration. He had a right to have his deed construed strictly.

Merrifield v. Cobleigh, *Bradstreet v. Clark*, *supra*.

Mr. Ephriam Flint (*Mr. Josiah Crosby* with him), for defendants:

Any misstatement of facts by the presiding justice could not be a subject of exceptions, unless the attention of the judge had been called to the error in season for correction before the case had been given to the jury.

Stephenson v. Thayer, 68 Me. 148; *Gilbert v. Woodbury*, 22 Me. 246; *Frankfort Bank v. Johnson*, 24 Me. 500; *Dyer v. Greene*, 28 Me. 464; *Hayden v. Bartlett*, 85 Me. 208; *Loud v. Pierce*, 25 Me. 238; *Eaton v. New England Tel. Co.* 68 Me. 69.

Plaintiff failed to call the attention of the judge to the mistake inadvertently made, or to ask for different instruction.

Ozward v. Swanton, 39 Me. 125; *Lyman v. Redman*, 28 Me. 289.

In *Jenks v. Walton*, 64 Me. 100, the court says: "It is not necessary to turn the grantee off the premises, or to take possession in his presence, or to give an actual notice to him.

1. An exception does not lie to an instruction that the burden was on the plaintiff, when the judge intended to

Still, the act itself must be of such a character as would serve to indicate to the person in possession that his right to the *locus* was regarded as terminated."

It was not necessary that William Dugan's entrance should be made by any direct and positive assertion of his right, or any words spoken. His acts and conduct were significant and decisive of his purpose.

See *Brickett v. Spofford*, 14 Gray, 519.

In *Bishop v. Williamson*, 8 Me. 162, the court refused to set aside the verdict on the ground that some of the jury misapprehended the testimony; and in *Sawyer v. Nichols*, 40 Me. 212, refused to set aside the verdict where the evidence was weak and unsatisfactory, having only a tendency to sustain it.

The fact that the members of the court sitting as jurors might have reached a different conclusion from that of the jury is not alone sufficient reason for setting aside a verdict, where the testimony is sufficient to account for the verdict.

Darby v. Hayford, 56 Me. 246; *Milo v. Gardiner*, 41 Me. 549; *Cunningham v. Magoun*, 18 Pick. 15; *Reeve v. Dennett*, 187 Mass. 818; *Beal v. Cunningham*, 42 Me. 364; *Cook v. Brown*, 39 Me. 443; *Handley v. Call*, 27 Me. 35; *Marshall v. Baker*, 19 Me. 402; *Weeks v. Parsonsfield*, 65 Me. 285; *Maynell v. Sullivan*, 67 Me. 314; *Wyman v. Banton*, 66 Me. 171.

The court will not set aside a verdict as against evidence upon one branch of the case, when the evidence is sufficient to warrant it upon another branch.

Jennings v. Wayne, 63 Me. 468.

If the plaintiff prevails, it must be upon the strength of his title, and not upon the weakness of that of the defendants, who may rest upon their possession until the plaintiff has shown some right to disturb it.

Gibson v. Norway Savings Bank, 69 Me. 579; *Chaplin v. Barker*, 58 Me. 275.

Peters, Ch. J., delivered the opinion of the court:

This is a real action between a son and father,—another defendant being coupled with the father,—where the question involved the right of possessing a homestead which the father conveyed by a conditional deed to the son to secure a life support. The son claims that he has by his deed a right to the possession, and the father claims that the right which the son had has been forfeited for condition broken.

An exception is taken that the judge said to the jury that the burden to show forfeiture was on the plaintiff (the son), when he meant to say

"defendant" instead of "plaintiff." It is too late for the plaintiff to urge an objection. He should have called for a correction at the moment, or before the jury retired. It must have been understood to be an inadvertence. The judge was describing the duties imposed upon the plaintiff, and accidentally said, "The burden is upon the plaintiff [meaning the defendant] to show that he has failed to do it." No one could suppose the plaintiff was required to show his own default. Besides, the judge afterwards said that the burden was on the defendant, and such must have been the drift of the whole charge.

An objection is urged, upon the exceptions and motion, that a sufficient re-entry was not effected by the defendant, because a witness called to observe the act did not know the purpose of it. But his presence was not at all necessary. The plaintiff moved away from the premises, virtually abandoning them, and the defendant's agent took repossession for condition broken. The grantor took possession of the farm and held it until his conveyance to the other defendant. The evidence upon that point is plenary.

The deed from father to son contains a clause providing that if a controversy arise, "the parties, or either of them, may submit" the matter to arbitration, "the arbiter to be mutually agreed upon." The judge instructed the jury that this would not bar the defendant from setting up forfeiture, unless the plaintiff asked for a reference and was refused. The plaintiff cannot justly complain of a ruling more favorable to himself than he was entitled to. If the defendant could not justify a re-entry until an arbiter had so awarded, he might be forever deprived of his right, because an arbiter might never be "mutually" agreed upon.

Such a clause of arbitration cannot bind parties. The right of free access to courts is inalienable. *Whart. Cont. § 416*. Parties may by agreement impose conditions precedent with respect to preliminary and collateral matters, such as do not go to the root of the action. But men cannot be compelled, even by their own agreements, to mutually agree upon arbiters whose duties would, as in this case, go to the root of the principal claim or cause of action, and oust courts of their jurisdiction. *Robinson v. Georges Ins. Co.* 17 Me. 181; *Hill v. More*, 40 Me. 515; *Pearl v. Harris*, 121 Mass. 390. The motion has no meritorious grounds to stand upon.

Exceptions and motion overruled.

Walton, Danforth, Emery, Foster, and Haskell, JJ., concurred.

NEW HAMPSHIRE.

SUPREME COURT

Rufus HALL, Admr.,

v.
William W. HALL.

An existing right of action upon a note secured by a chattel mortgage was not taken away by the repeal of the statute which made the period of limitation the same as that within which the plaintiff might bring an action on the mortgage.

(Sullivan—Decided March 11, 1887.)

CASE reserved. *Judgment for plaintiff.*

Assumpsit upon a promissory note dated February 21, 1870. Writ dated December 15, 1885. Plea, the Statute of Limitations. Facts found by the court. The note was originally secured by a personal mortgage of the same date; but none of the mortgaged chattels were in existence at the time the suit was commenced.

Mr. L. W. Barton, for plaintiff:

This action is not barred by the Statute of Limitations. The plaintiff's intestate had a vested right in the note in question before the change of the statute in 1878. Any statute which prescribes new rules for the decision of existing causes, so as to change the ground of action or the nature of the defense, is prohibited as being retrospective, and therefore "highly injurious, oppressive, and unjust."

Bill of Rights, § 23.

It is well settled that a repeal of the Statute of Limitations is a retrospective law as to all actions then pending, and that a law operating retrospectively upon an existing cause of action when no suit is pending is equally prohibited. The right of parties cannot be changed by legislation. The doctrine which the plaintiff relies upon has been repeatedly affirmed and sustained by the courts of our own and other States, to some of which we would cite the court:

Merrill v. Sherburne, 1 N. H. 199; *Woart v. Winnick*, 8 N. H. 481; *Dow v. Norris*, 4 N. H. 19; *Society v. Wheeler*, 2 Gall. 189; *Clark v. Clark*, 10 N. H. 388; *Kennett's Petition*, 24 N. H. 139; *Roby v. West*, 4 N. H. 287; *Gilman v. Cutts*, 23 N. H. 376; *Willard v. Harvey*, 24 N. H. 351; *Briggs v. Hubbard*, 19 Vt. 86; *Rich v. Flanders*, 39 N. H. 304.

Mr. George R. Brown, for defendant:

By Gen. Laws, chap. 221, §§ 3, 5, and by chap. 281, § 12, actions upon notes secured by mortgages of personal property are barred in six years.

The insertion of the words "of real estate," in said § 5, excludes the words "of personal estate," and makes a very material change in the statute from Gen. Stat. chap. 202, § 5. This change was made at the June session of the Legislature, 1878, to take effect and go into operation January 1, 1879.

See Gen. Laws, preface, vi, vii; Gen. Laws, chap. 291, § 1, which gave the plaintiff's testate six months' notice of the change.

It is an elementary principle that persons are presumed to know the law; hence it fol-

lows that, when a law is enacted to take effect in six months from its enactment, changing the time of limitation of actions, persons are presumed to know, six months in advance, what the law will be.

The deceased had a vested right to commence an action, and the Legislature, by the change in the statute, requested him to exercise that right within six months, or be ever afterwards barred.

A law which shortens or extends the time within which actions are limited is not retrospective or prohibited by the Constitution, provided it gives a reasonable time in which, by due diligence, the party could begin his suit. That a part of the time of limitations had expired when the Act was passed restricting the period of limitation is not material.

Willard v. Harvey, 24 N. H. 344.

The Statute of Limitations which is to control is that which is in force at the time when the action is brought.

Gilman v. Cutts, 23 N. H. 376, and cases cited.

Under the circumstances of this case, were six months a reasonable notice, and a reasonable time within which, by due diligence, the administrator's testate could have brought his suit? We say they were amply sufficient.

Allen, J., delivered the opinion of the court:

As the law stood prior to January 1, 1879, when the General Laws went into effect, actions upon notes secured by mortgage might be brought so long as the plaintiff was entitled to bring an action upon the mortgage. Rev. Stat. chap. 181, § 5; Com. Stat. chap. 192, § 6; Gen. Stat. chap. 202, § 5. Assuming (what the case does not show, but what may be inferred to be the fact) that the personal mortgage held by the plaintiff's decedent was under seal, an action might have been brought upon it at any time within twenty years after the action accrued (Gen. Laws. chap. 221, § 4), and a right of action upon the note existed in his favor prior to the time when the General Laws came into effect. *Demeritt v. Batchelder*, 28 N. H. 533; *Alexander v. Whipple*, 45 N. H. 502, 505. By Gen. Laws. chap. 221, § 5, the right to bring suit upon notes secured by mortgage so long as an action could be brought upon the mortgage was limited to cases of real-estate mortgages, leaving actions upon notes secured by personal mortgages to be governed by the general limitation of six years.

This change was a repeal of the law giving a right of action upon a note secured by a personal mortgage as long as an action might be maintained upon the mortgage. There is nothing in the law making the change showing the intention of the Legislature to apply it to actions then pending, or to existing causes or rights of action. And that such was not the intention is plain from the provisions of the General Laws upon the subject, enacted at the same time. "The repeal of any Act shall in no case affect any act done, or any right accruing, accrued, acquired, or established, or any suit or proceeding had or commenced in any civil case, before the time when said repeal shall take effect." Gen. Laws. chap. 1, § 38; chap. 291, § 5. The narrowing of the

time within which an action might be brought and maintained upon a note secured by a personal mortgage, from twenty years to six years, by Gen. Laws. chap. 221, § 5, cannot destroy a right of action then accrued and existing. When the change was made in the statute, more than six years had elapsed since the last promise to pay the note; and if the narrowed limitation of six years left by the statute making the change is applied, the plaintiff's right of action then existing was at once and wholly destroyed by the change. Such a use cannot be made by the repealing statute; and the plaintiff's right of recovery is not affected by it. *Dickinson v. Lovell*, 36 N. H. 364; *Rosell v. B. & M. R. R.* 59 N. H. 85.

Judgment for the plaintiff.

Clark, J., did not sit; the others concurred.

Asa M. GAGE

v.

SCHOOL DISTRICT NO. 7 in Boscawen.

A condition in a deed making a gift of land to an academy, that when said land shall, for the space of two years together, cease to be used as a location for a schoolhouse, teacher's house, and the necessary buildings and other purposes of an academy or public school, said land shall revert to the grantor and his heirs, is not broken, so as to work a forfeiture of the grant, by a conveyance of the land by the grantees to a school district, and the establishment, by the district, of a public school in the schoolhouse erected thereon; or by the failure, for two years together, to keep any school in such schoolhouse.

(Merrimack—Decided March 11, 1887.)

WRIT OF ENTRY for one undivided half of two acres of land. *Judgment for defendant.*

Facts found by the court. February 14, 1866, William H. Gage conveyed the land in question to the Penacook Academy, as a gift, upon conditions as follows: "Provided said corporation and its assigns shall erect and forever maintain a good and sufficient fence between said land and other land now owned by said grantor; and provided, further, that said corporation shall, within two years, build a schoolhouse on said land; and said land, nor any part of the same, shall ever be devoted to any other use than a location for a schoolhouse, teacher's house, and the necessary buildings and other purposes of an academy or public school; and when said land shall, for the space of two years together, cease to be used for such purposes, said land shall revert to said grantor and his heirs; but said corporation shall have the right to remove their buildings from said land."

Within two years the corporation built thereon a brick schoolhouse, in which, from the time of its completion until April, 1883, an academic or high school was kept and maintained. From April, 1883, to September, 1885,

no school was kept in the building; but neither it nor the land was devoted during that time to any other use or purpose. February 26, 1887, the corporation mortgaged the land to H. H. Brown and seven others, to secure notes for \$10,500 for money loaned. All but one of the mortgagees were then trustees of the academy. This mortgage was never foreclosed. In 1883, Isaac K. Gage, John S. Brown, and David A. Brown, three of the mortgagees, acting for the mortgagees, offered the entire property for sale, and, August 19, 1885, sold and conveyed it, with full covenants of warranty, to the defendant, who opened a school therein early in September. March 18, 1886, the academy quitclaimed to the defendant all its right, title, and interest in the premises.

Wm. H. Gage died in 1872, leaving a will in which he devised his right and interest in one undivided half of the land to the plaintiff, who, in June, 1886, entered and took possession for a breach of the condition in the deed.

Messrs. Chase & Streeter, for plaintiff:

After the breach and entry, the corporation ceased to be the owner of the premises, and the deed of March, 1886, to the defendant conveyed nothing.

Barker v. Cobb, 36 N. H. 844, 848.

"The interpretation of a will is the ascertainment of the testator's intention; and the question of intention is ordinarily determined as a question of fact by the natural weight of competent evidence, and not by rules of law."

Kimball v. Lancaster, 60 N. H. 264.

"In the construction of written instruments, the intention of the parties is what is sought," etc.

Corwin v. Hood, 58 N. H. 401.

The distinctions on this subject are extremely subtle and artificial, and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case. The intention of the party to the instrument is of controlling efficacy.

Chapin v. School District, 35 N. H. 451.

The question whether the amount of a bond is a penalty or liquidated damages is a question of the intention of the parties, to be determined, like a question of fact, by the weight of competent evidence, and not by any technical rule of construction.

Houghton v. Patten, 58 N. H. 326.

Messrs. Albin & Martin, and W. G. Buxton, for defendant:

"Conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms or clear implication, and are construed strictly."

1 Washb. Real Prop. *447; *Emerson v. Simpson*, 48 N. H. 475. See *Hoyt v. Kimball*, 49 N. H. 326, 327; *Bradstreet v. Clark*, 21 Pick. 389; *Merrifield v. Cobleigh*, 4 Cus. 178.

"Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates."

Chapin v. School District, 35 N. H. 450, 451.

Conditions subsequent are to be strictly construed. The following cases are directly in point:

Chapin v. School District, *supra*; *Whitton v. Whitton*, 38 N. H. 186; *Emerson v. Simpson*,

48 N. H. 477; *Barnes v. Union M. F. I. Co.* 45 N. H. 26; *Hoyt v. Kimball*, 49 N. H. 326.

Even a court of equity will not lend its aid to divest an estate for breach of a condition subsequent.

Smith v. Jewett, 40 N. H. 584; *Ricker v. Blanchard*, 45 N. H. 47.

Doe, Ch. J., delivered the opinion of the court:

The deed by which William H. Gage conveyed the land to Penacook Academy contained a proviso that "said corporation and its assigns shall erect and forever maintain" a fence. By another proviso the corporation was to build a schoolhouse on the land within two years, and the land and buildings were never to "be devoted to any other use than a location for a schoolhouse, teacher's house, and the necessary buildings and other purposes of an academy or public school." The words "assigns" and "academy or public school," and the general educational purpose of the grant, are sufficient to show that the academy could convey the land to the defendant for the purposes of a public school.

The mortgage, and what was done by the mortgagees, did not work a forfeiture. A foreclosure of the mortgage is not found, and there is no evidence upon which it can be held, as matter of law, that there was a foreclosure. The mortgagees' conveyance to the defendant may operate as a release of the mortgage; but it did not give a good title. The title passed to the defendant by the deed which the academy gave it. The mortgagees' acts, of which the plaintiff complains, were harmless.

The land was to revert when it ceased, for the space of two years together, "to be used for such purposes." If by "such purposes" the parties meant a school in operation, there was a forfeiture. "Such purposes" were those previously mentioned in the stipulation that the land should never "be devoted to any other use than a location for a schoolhouse, teacher's house, and the necessary buildings and other purposes of an academy or public school." Taken literally, this does not require a school every two years; and it is not such language as would be likely to be chosen for such a requirement. If the parties had intended there should be a forfeiture when two years passed without a school on the premises, this intention would naturally have been expressed in more direct and unambiguous terms. The land was not "devoted to any other use than a location for a schoolhouse;" and there was no abandonment or ruin. The premises remained in good condition and ready for educational use; and there is no evidence on which it can be found that the nonuser was so unreasonable in duration as to defeat the purpose of the grant.

Judgment for the defendant.

Carpenter, J., did not sit; the others concurred.

Lydia ELLIOTT

v.

Lydia D. GILCHRIST.

1. A mortgage of "a tract of land known as the M lot bounded * * * easterly N. H.

by land of W," under the circumstances of this case, conveys the land up to W's line, although a portion of it was known as the S lot.

2. A settlement of the boundaries of land included in a mortgage, made under circumstances which amount to a legal fraud on the part of the mortgagor, is not binding on the mortgagee.

(Merrimack—Decided March 11, 1887.)

CASE reserved. *Discharged.*

Bill in equity to foreclose a mortgage given to the plaintiff March 29, 1879, by David Gilchrist, then the defendant's husband, of lands described as follows:

"A tract of land known as the 'Mowe lot,' bounded northerly by the road; * * * westerly by said Shaw farm; southerly by the Webster pasture so called; easterly by land of George Wilson, * * * containing 50 acres more or less." "Also one lot situated in said Franklin, bounded on the north by land of the late L. D. Stevens; on the west by * * * the Peabody lot; on the south by land of David Gilchrist (the grantor); on the east by land of Moses Morse, containing 14 acres more or less."

The trial court found as follows:

"David Gilchrist died insolvent November 25, 1879, and the title to the land subsequently came to the defendant. The plaintiff had no knowledge of the situation, value, or boundaries of the land; and David gave her no information when the mortgage was made, except that contained in the mortgage, and the assurance that the security was ample. The boundaries of the first tract include the Shaw lot. By the second tract David intended the Twombly lot, the correct boundaries of which were as follows: North by the Peabody lot; east by land of the late L. D. Stevens; south by land of Moses Morse; and west by land of Ward & Pike. David owned no other lot which adjoined both the Peabody lot and the Stevens land.

"In 1879 or 1880 the plaintiff placed her note and mortgage in the hands of B, an attorney, who made some inquiry regarding the location and value of the lands, and, in consequence of the information received, did not present the note to the commissioners for allowance. In September, 1884, B called upon the defendant's agent in regard to a foreclosure, and was informed by him that the description of the land in the mortgage was not correct. To save expense of foreclosure, and to correct the mistakes, it was agreed that the defendant should quitclaim to the plaintiff, by a proper description, the lands covered by the mortgage; and September 18, 1884, the defendant executed, and, through her agent, delivered to B, her quitclaim of the Mowe lot (excluding the Shaw lot) and of the Twombly lot, and B, at her request, gave her a release or discharge from all further claim against the estate of David.

"The agent was familiar with the lands and their boundaries. He understood that B had no knowledge regarding their proper description, and that he relied entirely upon the information which he (the agent) then communicated. He knew, but did not inform B, that the Shaw lot was included within the

boundaries named in the mortgage. He supposed that the particular description was controlled by the words 'Mowe lot,' and that only the latter passed. He had no personal interest in the matter, and no intention to deceive. B, however, was deceived. He understood, and was reasonably warranted in understanding, from the agent's statements, that the 'Shaw lot' was the correct name of the land styled 'Wilson's' in the mortgage. He did not intend to release any land covered by the mortgage, or understand that he did, and would not have accepted the quitclaim if he had known or suspected that it did not convey all the lands described in the mortgage. He had no authority from the plaintiff except his general authority as her attorney.

"The Mowe lot and Twombly lot are not sufficient, but those lots and the Shaw lot are more than sufficient to satisfy the mortgage debt.

"Upon the question whether David did or did not intend to mortgage the Shaw lot, the finding is against the party upon whom rests the burden of proof.

"The parties have leave to amend their pleadings, and to do any other thing necessary to warrant the relief to which they are entitled upon the foregoing facts."

Mr. Daniel Barnard, for plaintiff:

As to the first piece described in the mortgage, it is definitely bounded on the east by land of George Wilson. It will be readily seen that the northerly, westerly, and southerly boundaries would be the same whether the easterly line was by Wilson's land or by the Shaw lot.

George Wilson's land is made a boundary, and, by all authorities, controls the other terms of description.

Peaslee v. Gee, 19 N. H. 278; *Cunningham v. Curtis*, 57 N. H. 157, and authorities.

The defendant claimed that David Gilchrist did not intend to mortgage the plaintiff the whole tract, and that the easterly boundary should have been the Shaw land instead of the George Wilson land. This is a question of fact; and the burden of showing it was upon the defendant. The question is not unlike the one as to the soundness of mind of a testator, or the knowledge of the contents of his will, in which cases the presumption is in favor of the testator's sanity and knowledge.

Pettes v. Bingham, 10 N. H. 514.

The *onus probandi* is with those who make the objection.

Mr. Frank N. Parsons, for defendant:

The plaintiff has brought no proceedings, by way of amendment or otherwise, to set aside the settlement. It is evident that, unless this quitclaim deed is cancelled by the court, the plaintiff cannot proceed on her mortgage, except as against some intervening title.

1 Jones, Mort. § 856.

The parties having in good faith made a settlement and adjusted the questions that might have been litigated, arising from the terms of the mortgage, and having agreed upon and established the boundaries of the lands conveyed, such an agreement and adjustment will not be set aside because it appears now that one or the other might have claimed more or less than he did.

Bisph. Eq. § 189; *Bartlett v. Young*, 63 N. H. 265.

The mistake of the defendant's agent—if it was a mistake, which we deny—in supposing the general description, "Mowe lot," controlled, rather than the particular description, was a mistake of law, from which equity would not have relieved the defendant.

2 Jones, Mort. § 969.

Neither can the plaintiff claim any advantage therefrom. So far as any mistake of fact was made by the plaintiff or her agent, it could have occurred only through their own carelessness and negligence; and to relieve from such error equity will not interfere.

Id.; Bisph. Eq. § 191.

In the construction of written instruments, no technical rules of construction applicable to all cases can be established. The intention in each case is to be determined by the evidence bearing on the question.

Morse v. Morse, 58 N. H. 391; *Houghton v. Pattee*, 58 N. H. 326; *Kimball v. Lancaster*, 60 N. H. 264; *Brown v. Bartlett*, 58 N. H. 511; *Rice v. Seaman's Aid Soc.* 56 N. H. 191; *Crawford v. Parsons*, 63 N. H. 438, 1 New Eng. Rep. 323.

It is not true that a monument controls all other terms of description. The case is similar to *Worthington v. Hyller*, 4 Mass. 196, where the premises are described as a homestead, and the particular description describes entirely another lot.

Bott v. Burnell, 11 Mass. 163; *Warren v. Coggswell*, 10 Gray, 76; *Melvin v. Proprietors*, 5 Met. 15, 28.

Mr. William L. Foster, for plaintiff, in reply:

If the acceptance of the quitclaim deed can be regarded (under the circumstances) as a discharge or cancellation of the mortgage, it was obtained through a mistake of fact on the part of the plaintiff's agent, as well as without her authority. In such a case the discharge or quitclaim deed may be cancelled, and the mortgage may be foreclosed as a subsisting lien; and it would seem that proceedings independent of the plaintiff's bill in equity are not essential for that purpose, even if the court had not already provided for amendment or any other thing necessary to afford equitable relief.

Freeholders of Middlesex v. Thomas, 20 N. J. Eq. 39, 41-43; *Stover's Admrs. v. Wood*, 26 N. J. Eq. 417; 2 Jones, Mort. § 966.

Smith, J., delivered the opinion of the court:

The deed conveys a tract of land known as the "Mowe lot," bounded easterly "by land of George Wilson." The "Shaw lot" lies between the Mowe lot and the Wilson land, so that the inquiry is whether the deed includes the Shaw lot. The other lines are the same whether the easterly line is the Shaw lot or the Wilson land.

In giving construction to the deed, the evidence competent to be considered is the language of the deed and the surrounding circumstances at the time of its execution, including the situation of the parties and the object they had in view. And we think, upon all the evidence, the legal construction of the mortgage

is that it includes the Shaw lot. The boundaries include it. The presumption is that David Gilchrist knew he owned the Mowe, Shaw, and Twombly lots, and their boundaries. It is more probable that he intended to include all the land west of the Wilson land, and extended his Mowe lot so as to include the Shaw lot, than that he intended to exclude the last-named lot, when his description includes it. And it is more probable that he applied the Mowe-lot name—the name of the larger lot—to both lots, than that, in describing the land he intended to convey, he passed over the Shaw lot and bounded by a wrong monument. If the Shaw lot is excluded, the inconsistency of bounding the Mowe lot on the Wilson land cannot be explained except upon the theory that a mistake was made. On the other construction there is no such inconsistency. The balance of probabilities on the evidence is that the boundaries control.

If evidence of value is competent, it is almost conclusive that Gilchrist intended to include the Shaw lot, because his object in giving a mortgage was to give security, and with the Shaw lot the security is ample, and without it, it is not sufficient.

In taking the quitclaim deed, and in giving the release, the case finds the plaintiff's attorney was deceived, and that the deception was without fault or negligence on his part. This was such legal fraud as to set free the release and quitclaim deed.

The finding at the trial term in regard to the Twombly lot was warranted by the evidence, and no question of law is presented by the facts relating to that lot.

The plaintiff is entitled to a decree for foreclosure of the three lots, for the amount equitably due. This involves an accounting for the rents and profits of the Mowe and Twombly lots, received by the plaintiff.

Case discharged.

Blodgett and Carpenter, JJ., did not sit; the others concurred.

Josephine M. BAILEY

v.

Edward SWEENEY.

A railroad corporation has no right, as against the owner of the soil, to give away hay cut by its servants upon land within the limits of its location.

(Sullivan—Decided March 11, 1887.)

ON defendant's exceptions. *Judgment for plaintiff.*

Trespass and trover for taking and carrying away three tons of hay. Facts found by the court.

The hay in question was cut by servants of the Sullivan County Railroad, upon land within the limits of its location, where its road crosses the plaintiff's farm. After it had been cut and before its removal, the corporation refused to allow the plaintiff to take it, but gave it to the defendant, one of their servants, who carried it away to his own use. The rights and title of the corporation in the land where

the hay was cut were acquired by condemning and taking it for railroad purposes, by legal proceedings. Due precaution against fire, and the safe operation of the road, required that the grass and bushes growing by the side of the track should be cut and removed, or burned upon the ground. The court found for the plaintiff, and the defendant excepted.

Messrs. Albin & Martin, for defendant:

The plaintiff could not remove the grass after it was cut, without entering upon the railroad's location. If she could enter for one purpose, she could for another. Her right to recover, as stated in the case, is based upon the ground that the railroad company has a mere right of way, and that she can therefore enter and remove anything that may chance to be growing there. She apparently claims that she has the same right in this land that an adjoining landowner has in a common highway; but such cannot be the case. In order to enable the railroad properly to protect its passengers, its trainmen and other servants, to care for and safely transport its freight, to guard against fire, and to enable it properly to discharge the important responsibilities which it necessarily assumes, its occupation and control of the premises can be nothing short of that of an owner in fee.

"If that interest is regarded as a mere servitude or easement, the land nevertheless becomes so far the property of the corporation that its right is exclusive in its use and possession during its existence, as much so as that of the owner or occupant of the adjoining land. Those from whom the land was taken retain no right to its use or occupation for pasturage or otherwise. The object for which it is appropriated and used is wholly inconsistent with such right on the part of the former owner, as well as with that security to itself and safety to the public which is necessary to enable the corporation to enjoy the franchises granted by its charter."

Hurd v. Rutland & B. R. R. Co. 25 Vt. 121; *Jackson v. Rutland & B. R. R. Co.* Id. 159; *Connecticut & P. R. R. Co. v. Holton*, 32 Vt. 48.

"The annoyance from dust, occasioned by removing the turf, would not result from cutting the herbage, but the instances in which the landowner would wish to remove the turf would be rare, if the right were conceded; but if the right to remove the herbage be conceded, a large part of the adjoining landowners throughout the State would be found at the proper season, within the lines of the roads, with their hired men, tools, and perhaps teams, for the purpose of taking off the herbage; and the detriment to the railroad company, and the danger to teams and passengers, would be increased a thousandfold in the latter case beyond that in the former."

Troy & B. R. R. Co. v. Potter, 42 Vt. 265.

"The right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive."

Haas v. Boston & M. R. R. 2 Gray, 580.

We presume that *Blake v. Rich*, 84 N. H. 283, will be commented upon as an authority against the position here taken by us; but it should be borne in mind that that case was de-

cided thirty years ago, when railroads were in their infancy and but little understood. At that time but few trains were run, few passengers carried, and but little freight transported, as compared with the present time. The miles of railroad then operated in this State were few as compared with the present time; and the danger from accident was correspondingly smaller then than now.

Mr. Ira Colby, for plaintiff:

In the course of the discussion and citation of authorities in this case, the defense has substantially abandoned the ground that the railroad company have a fee in the land taken. All the authorities cited, and, indeed, all the authorities on the subject, treat the right taken in such cases as an easement, an incorporeal right only, the fee still remaining in the landowner. It is so treated in our own statutes and decisions; and the damages, in the case of a railway, and the mode of estimation, are the same as in case of an ordinary highway.

Gen. Laws, chap. 160.

The question is fully discussed and decided in *Blake v. Rich*, 34 N. H. 282. This case is cited and apparently approved in *Eaton v. B. C. & M. R. R.* 51 Vt. 515.

In an earlier case, *Dearborn v. Boston, C. & M. R. R.* 24 N. H. 185, that being an appeal from an award of land damages by railroad commissioners, it is said that the damages which a jury are to find in such case are the same selectmen would assess in taking land for a highway. The appraisals in all cases hitherto in which lands have been taken for a railroad have undoubtedly been made with reference to the rules established by our own decisions. It seems, therefore, a necessary conclusion from the premises that in case of a railroad, as well as that of the ordinary highway, the right of property in the trees and herbage upon the surface of the land taken, and minerals below it, remains unchanged and in the original landowner.

It would further seem to follow, and to be reasonable and just, that, whenever the railroad company find it necessary to remove any of these things valuable to the landowner for use, from their limits, it would be their duty to deliver them to the owner thereof, and not to a stranger. And so it has been held in all highway cases.

Baker v. Shepard, 24 N. H. 208, and cases there cited.

On this point there is no ground for distinction between the ordinary highway and the railroad. Such disposition would be without danger or hardship to the company, and would in no way interfere with its possession of the land within its lines. In the case under consideration, the plaintiff, after the hay was cut and lay upon the ground, asked permission to remove it, and stood ready to receive it. But the railroad company refused permission, refused to recognize any rights in the plaintiff, and gave the hay in question to the defendant, one of its workmen. It is the plainest and most obvious matter of fact that neither the interest nor the protection of the railroad company in any view required or justified such disposition of the plaintiff's property. The attempt to so give it away vested no right

thereto in the defendant, and he is liable for its conversion to his use.

Allen, J., delivered the opinion of the court:

The Sullivan County Railroad, whose servant the defendant is, and by whose direction and gift the grass was taken and used, assumes the defense of the case. The grass grew within the limits of the railroad, upon land that had been a part of the plaintiff's farm and taken for railroad purposes. The fee in the land taken for a railroad remains with the owner from whom the land was taken. The railroad has the possession and control of the land to use for constructing, maintaining, and operating a railroad. *Blake v. Rich*, 34 N. H. 282. If there was a reasonable necessity for the defendant in interest to remove the grass for the safety of passing trains, or as a precaution against the spread of fire, for the damages from which the railroad is liable, it was not necessary to sell or give away the grass; nor did its possession of the land for railroad purposes entitle it to appropriate the hay. *Chapin v. Sullivan R. R.* 39 N. H. 564, 570; *Aldrich v. Drury*, 8 R. I. 554; *Taylor v. New York & L. B. R. R. Co.* 38 N. J. L. 28; *Pierce, R. R.* 160.

If the safe operation of the railroad and the protection of its business made it necessary to exclude the plaintiff from the land occupied by the road, there is nothing to show that the defendant could not have left the grass or placed it where the plaintiff could conveniently have taken it. *Blake v. Shepard*, 24 N. H. 208, 218. The servant of the railroad, by its direction, appropriated and used the grass for his own benefit; and this, not being necessary to, or having any connection with, the management of the road, was a conversion of the plaintiff's property by the defendant.

Judgment for the plaintiff.

Clark, J., did not sit; the others concurred.

LANE

v.

BARRON.

A declaration against a surviving partner as indorser of a note may be amended by the addition of a count against him as an individual indorser.

(Hillsborough—Decided March 11, 1887.)

CASE reserved. Discharged.

Assumpsit. Plea, the general issue, and the Statute of Limitations.

Replication, a new promise within six years. Facts agreed.

Messrs. Sulloway & Topliff, for plaintiff:

The defendant cites *Cross v. Gannett*, 39 N. H. 140, 142, apparently as if he thought it an authority in point. He doubtless read it hastily. An examination of that case and the opinion will show that it has not the slightest similarity or analogy to the case at bar.

Meredith Bridge Sav. Bank v. Ladd, 40 N. H. 472, 473, is directly opposed to the position of the defendant, holding it to be a question of fact whether the right of action is barred by the Statute of Limitations.

Our case finds a new promise conceded by the defendant. In *Cross v. Gannett* no promise had been made for more than fifteen years. Could dissimilarity be greater?

Messrs. R. E. Walker and David Cross, for defendant:

Ordinarily, an indorser or a surety on a promissory note is not liable to the holder, when the right of action against the principal has expired or has been discharged.

Story, Prom. N. §§ 424, 425.

"When no action lies upon the mortgage to foreclose it, in order to apply the land to the payment of the debt, because it has already been so applied by a foreclosure, the plaintiff is no longer entitled to commence an action upon the mortgage, as such, within the meaning of the statute; and he is entitled to maintain his action upon the notes, after it would otherwise be barred, only so long as he has such right of action upon the mortgage."

Cross v. Gannett, 39 N. H. 140, 142; *Meredith Bridge Sav. Bank v. Ladd*, 40 N. H. 459.

When the maker of a note goes into bankruptcy, it may be that the holder, being bound by the bankruptcy proceedings, may prove his claim and receive the percentage without discharging the indorser; because the maker's discharge is not brought about by the voluntary act of the holder.

Story, Prom. N. § 428.

But in *Phelps v. Borland*, 87 N. Y. Sup. Ct. 371, the acceptor of a bill was decreed a bankrupt in England, where his discharge was an extinguishment of the debt, and the holder, a resident of New York, proved his claim there and received the percentage; it was held that the drawer, in New York, was discharged. It was in consequence of the voluntary act of the holder that the discharge of the acceptor became the discharge of the drawer.

Gardner v. Oliver, 11 Barb. 559, 565.

The Statute of Limitations is a bar to an action on a promissory note, brought by the payee against the maker, although the former, after the expiration of six years from the time the note became payable, paid the amount of it to his indorsee, and thus became repossessed of it. This statement of the law is fully sustained by—

Woodruff v. Moore, 8 Barb. 171; *Turner v. McCarter*, 42 Ga. 491, 498; *Williams v. Durst*, 25 Tex. 667, 679; *Kennedy v. Carpenter*, 2 Whart. 344; *Cowley v. Dunlops*, 7 T. R. 565, 568; *Wood, Lim.* 321, 322.

Having deprived the defendant of a right which he had, he ought not to be allowed to make the defendant suffer on that account. It will not be contended that his promise amounted to a promise by the makers.

Buckminster v. Wright, 59 N. H. 153; *Whipple v. Stevens*, 22 N. H. 219, 226.

It is not merely a matter of intention on the part of the mortgagee; it is an absolute presumption that he has opened the foreclosure.

Deming v. Comings, 11 N. H. 474; *Batchelder v. Robinson*, 6 N. H. 12; *Gould v. White*, 36 N.

H.

N. E. R., V. IV.

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H. 178; *Green v. Cross*, 45 N. H. 577; *Moore v. Beasom*, 44 N. H. 215.

After selling the estate, the presumption that the mortgagee was willing to regard the land as payment of the debt is as reasonable and equitable as the presumption that the mortgagor, after foreclosure, is willing to lose the land for the debt, or the presumption that the receipt of money from the mortgagor after foreclosure is a waiver of the foreclosure, so long as the title to the estate remains in the mortgagee.

Perry v. Barker, 8 Ves. 527; *S. C.* 18 Ves. 198; *Dashwood v. Blythway*, 1 Eq. Cas. Abr. 317; *Lockhart v. Hardy*, 9 Beav. 349; *Andrews v. Scotton*, 2 Bland. 666.

In Connecticut, foreclosure was held to be a discharge of the debt (going farther than we claim) in—

McEwen v. Welles, 1 Root, 202; *Derby Bank v. Landon*, 8 Conn. 62; *Goddard v. Selden*, 7 Conn. 515.

Mr. J. L. Spring, also for defendant:

"If the creditor, on his bill in equity, has a decree to foreclose, and nothing more, he is held to have obtained that kind of satisfaction of his claim for which he stipulated." "And if he has placed it out of the mortgagor's power to redeem, by aliening the estate after the decree, he will be perpetually barred from proceeding on the bond."

Andrews v. Scotton, 2 Bland. 666; *McEwen v. Welles*, 1 Root, 202; *Derby Bank v. Landon*, 8 Conn. 62; *Perry v. Barker*, 18 Ves. 197; *S. C.* 8 Ves. 528; *Lockhart v. Hardy*, 9 Beav. 349; *Stat.* 1833; *Goddard v. Selden*, 7 Conn. 515.

Doe, Ch. J., delivered the opinion of the court:

The defendant is sued as indorser of notes which, within six years, he promised to pay. The notes were payable to a firm of which he was a member, and were indorsed by the firm and also by him. If the action is brought against him as surviving partner, another count, declaring against him as an individual indorser, will justly dispose of the question of the capacity in which he made the new promise. The plaintiff's foreclosure of the mortgage by which the notes were secured was a payment to the amount of the value of the land. *Dearborn v. Nelson*, 61 N. H. 249; *Fletcher v. Chamberlin*, 61 N. H. 438. The value is a matter of fact to be determined at the trial term. The debt is not barred by the Statute of Limitations. There is nothing to avoid the new and absolute promise.

Case discharged.

Smith, J., did not sit; the others concurred.

John P. BALL

v.

GRANITE STATE MUTUAL AID ASSOCIATION.

1. A mutual aid association may waive a condition in its certificate of membership or policy, that the same shall be void if any untrue answers have been given to questions in the applica-

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tion, although the contract contains an express warranty by the applicant that the answers are true.

2. It will be such a **waliver, if, with knowledge** that the applicant has catarrh, and for many years has been subject to a catarrhal cough, the association **accepts the premium** and issues a policy, **although the applicant**, in answer to direct questions in the application, without intending to misrepresent the facts or deceive the association, **stated that he had no disease** of the throat or lungs, and, to the best of his knowledge and belief, no other disease, **when, as he knew**, he had catarrh, by which both his **throat and lungs** were more or less **affected** and his health impaired.
3. By **continuing to receive** from the member his **annual dues and assessments**, with such knowledge, the **association is estopped** to set up the condition in its policy, or the warranty of the member as to the truth of his answers, as a defense to an action on the policy.

(Cheshire—Decided March 11, 1887.)

ON defendant's exceptions. *New trial.*

The case is stated in the opinion.

Messrs. Batchelder & Faulkner, and E. M. Forbes, for defendant:

The application and certificate, by the express language contained in each, constitute one entire contract between the parties. In this contract the applicant unequivocally agreed that his application was a warranty of the truth of the statements therein contained. The word "warranty" is expressly used by the contracting parties, and, by every rule for the construction of written agreements, the parties must be held to intend what the plain meaning of the terms used imports. The language of the contract is neither ambiguous nor uncertain. The interrogatories in the application are clear, definite, and related to matters wholly within the applicant's knowledge; they admitted only of direct and definite answers; and the applicant's answers to questions 18 and 16 A, being simple negatives, were as direct and definite as could be made by him. There was nothing, then, in the contract for the court or jury to give construction to; and, the untruthfulness of the answers being conceded, the defendant was entitled to judgment.

Dwight v. Germania L. Ins. Co. 4 Cent. Rep. 529.

But in cases where the term "warranty" is not expressly used, and the application is referred to in the policy, and by express terms made a part of it; or where the application is declared to be the basis upon which the contract is made; or where the policy is declared to be issued upon the faith of the application,—the contract must be construed as a contract of warranty.

Miles v. Connecticut Mut. L. Ins. Co. 3 Gray, 582; *Kelsey v. Universal L. Ins. Co.* 35 Conn. 225; *Cushman v. United States L. Ins. Co.* 70 N. Y. 72; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519 (Bk. 29, L. ed. 984);

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Anderson v. Fitzgerald, 4 H. L. Cas. 484; *Cazenove v. British Eq. Ins. Co.* 6 C. B. N. S. 487; *Footes v. Manchester Assur. Co.* 3 B. & S. 917; *Seales v. Scanlan*, 6 Ir. L. 367; *Jeffries v. Economical Mut. L. Ins. Co.* 23 Wall. 47 (89 U. S. bk. 22, L. ed. 838); *Aetna L. Ins. Co. v. France*, 91 U. S. 510 (Bk. 23, L. ed. 401); *Dwight v. Germania L. Ins. Co. supra*.

But even if the contract in this case should be held not to be a contract of strict warranty, but one entered into upon the faith of the statements and declarations made in the application, the legal conclusion must be the same.

Campbell v. New England Mut. Life Ins. Co. 98 Mass. 381. See also *Vose v. Eagle L. & H. Ins. Co.* 6 Cush. 42; *McCoy v. Metropolitan L. Ins. Co.* 133 Mass. 85; *Day v. Mut. Ben. L. Ins. Co.* 1 McArthur, 41; *S. C.* 29 Am. Rep. 565.

The plaintiff predicates his brief upon the physician's certificate, which found its way into this case because it was upon the back of a piece of evidence introduced by him at the trial. Nothing was submitted to the jury upon which this certificate had any bearing as evidence. The jury was not so instructed as to give it any occasion to consider this certificate as evidence; the court was not requested to so instruct the jury as to make the certificate evidence; and the plaintiff took no exception to the instructions which were given. Hence, under rule 54, this isolated piece of evidence, even if correctly reported, is not properly before the court; any more than would be the stenographer's minutes of the testimony of any witness who was called at the trial.

There is no room, under the contract of insurance, to consider the question whether the applicant misstated the facts with fraudulent intent, or from carelessness—which amounts to legal fraud. The effect upon the company is the same, and the only questions are: Did Ball make the statements? and, Were they true? while the instruction to the jury submitted the question of actual fraud only.

May, Ins. 2d ed. § 800; *Dwight v. Germania Life Ins. Co.* 4 Cent. Rep. 529; *Hartwell v. Alabama Gold Life Ins. Co.* 89 Am. Rep. 294; *S. C.* 33 La. Ann. 1853; *Thomson v. Woems*, 36 Moak's Eng. Rep. 228; *S. C. H. L.* 9 App. Cas. 671.

Messrs. Albin & Martin, for plaintiff:

As to construction of warranties in a policy of insurance, see—

Bliss, Life Ins. 2d ed. § 55, p. 80.

As to waiver and estoppel, see—

Hale v. Union Mut. F. Ins. Co. 82 N. H. 299; *Anson v. Winneshiek Ins. Co.* 23 Iowa, 84; *Miller v. Mut. Ben. L. Ins. Co.* 31 Iowa, 216; *Bevin v. Connecticut Mut. L. Ins. Co.* 23 Conn. 244; *Ames v. New York Union Ins. Co.* 14 N. Y. 253; *Frost v. Saratoga Mut. Ins. Co.* 5 Den. 154; *Commercial Ins. Co. v. Spanknehl*, 52 Ill. 53; *Masters v. Madison County Mut. Ins. Co.* 11 Barb. 624; *Combs v. Hannibal Sas. & Ins. Co.* 48 Mo. 148; *North American F. Ins. Co. v. Throop*, 22 Mich. 146; *People's Ins. Co. v. Spencer*, 53 Pa. 353; *Campbell v. Merchants & Farmers Mut. F. Ins. Co.* 37 N. H. 45; *Wheeler v. Traders Ins. Co.* 1 New Eng. Rep. 319; *Mullin v. Vermont Mut. F. Ins. Co.* 2 New Eng. Rep. 483.

Clark, J., delivered the opinion of the court:

This is an action of debt upon a certificate of membership issued to Alvin W. Ball, dated November 30, 1883, wherein the defendant agreed to pay to the plaintiff if living, if not, to the heirs at law of Alvin W., "within sixty days after due proofs of the death of said member, a sum equal to the amount received from one death assessment, but not to exceed \$5,000, provided said member continues to observe and comply with the covenants and conditions specified in this certificate during his life; otherwise, the membership, with all moneys paid to the association, and all claims against the same, shall be forfeited, and this certificate shall be null and void." There was a verdict for the plaintiff for \$5,278. 23.

The certificate of membership upon which the action is founded declares that it is issued and accepted under the covenants and conditions "that no misrepresentations have been made; no untrue answers given to the questions contained in the application, which is hereby made a part of this certificate and a warranty on the part of the said member and the beneficiary; no facts suppressed; and no fraud or deception used by the said member calculated to deceive or mislead the agent or officers of the association." The application contained the following clause: "It is hereby agreed that the above and foregoing application, with the declarations and statements therein made, shall form the basis of the contract by and between the above-named applicant and the Granite State Mutual Aid Association; and if any of these statements and answers therein made are untrue and false, or any facts touching the health of the applicant are concealed, or any statements or untrue answers made tending to deceive the association; or if the applicant neglects to pay any of the assessments or annual payments, * * * that then, in either event, this contract shall become null and void, and all moneys which shall have been paid shall be forfeited, and the policy issued to the applicant hereupon shall not be binding upon the association."

In answer to questions contained in the application, Ball stated that he had never been afflicted with any disease of the lungs or throat, and that he was then free from all diseases and complaints, to the best of his knowledge and belief. It is conceded that these answers were untrue, and that Ball then had, and for several years had, to his knowledge, had, a disease called the catarrh, by which both his throat and lungs were more or less affected and his health impaired. Unless these facts are controlled or modified by other circumstances, the contract of insurance was void. The statements of Ball in answer to the inquiries in the application concerning his health, whether they are regarded as warranties or representations, were made conclusively material by the express agreement of the parties; and the policy was to be void if they were untrue; and it being conceded that they were untrue, the forfeiture contemplated by the agreement necessarily follows, unless it has been waived. May, Ins. § 206; *Jeffries v. Economical Mut. L. Ins. Co.* 23 Wall. 47 (89 U. S. bk. 22, L. ed. 833); *Aetna L. Ins. Co. v.*

France, 91 U. S. 510 (Bk. 23, L. ed. 401); *Foot v. Aetna L. Ins. Co. of Hartford*, 61 N. Y. 571; *Bartau v. Phoenix Mut. L. Ins. Co.* 67 N. Y. 595; *Price v. Phoenix Mut. L. Ins. Co.* 17 Minn. 497; *Day v. Mut. Ben. L. Ins. Co.* 1 McArthur, 41; *S. C.* 29 Am. Rep. 565; *Vose v. Eagle L. & H. Ins. Co.* 6 Cush. 42; *Miles v. Connecticut Mut. L. Ins. Co.* 3 Gray, 580; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Lowell v. Middlesex Mut. F. Ins. Co.* 8 Cush. 127; *Hartwell v. Alabama Gold L. Ins. Co.* 83 La. Ann. 1858; *S. C.* 29 Am. Rep. 294; *Thomson v. Weems*, H. L. 9 App. Cas. 671; *S. C.* 86 Moak's Eng. Rep. 228.

But it appears that, in addition to the statements and answers of Ball, the application contained the certificate of the examining physician, in which he stated that Ball had catarrh, and had been subject to a catarrhal cough for many years, and that he considered him a medium risk. This certificate, furnished by Ball as a part of his application, and containing a true statement of the condition of his health, was before the officers of the association when they accepted the risk, received the premium, and issued the policy. It was issued with the knowledge on the part of the association that the answers of Ball were not true in every particular, if the certificate of the examining physician was correct; and, under instructions that the plaintiff could recover, although Ball knew of the disease, if he made the answers accidentally and with no intention to misrepresent the facts or to deceive the defendant, the jury have found by their verdict that there was no intentional concealment or misrepresentation on the part of Ball.

It is not to be assumed that the association issued and received the premiums and assessments upon a policy which they knew to be worthless to the holder; and the acceptance of the risk with knowledge that Ball had catarrh, and had been subject to a catarrhal cough for years, must be regarded either as an admission that catarrh was not such a disease of the lungs or throat as was contemplated in the application, or as a waiver of the condition that the inaccurate answers of Ball should avoid the contract. Issuing the policy, with knowledge of the actual condition of the health of the insured, was a waiver of the condition making an inaccurate statement as to his health an avoidance of the policy. And by treating the contract of insurance as valid and subsisting, by making and receiving subsequent assessments upon it with full knowledge of all the facts, the defendant is estopped to avoid it for erroneous statements in the application. *Applenton v. Phoenix Mut. L. Ins. Co.* 59 N. H. 541; *Hadley v. N. H. F. Ins. Co.* 55 N. H. 110; *Barnes v. Union Mut. F. Ins. Co.* 45 N. H. 21; *Horn v. Cole*, 51 N. H. 287; *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 326 (Bk. 24, L. ed. 387); *Van Schoick v. Niagara F. Ins. Co.* 68 N. Y. 424, 436; *Morrison v. Wisconsin Odd Fellows Mut. L. Ins. Co.* 59 Wis. 163, 168; *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 665, 666.

The case finds that there was no evidence tending to show the amount received from one death assessment; and, subject to exception, the jury were instructed to return a verdict for \$5,000, with interest after sixty days from the

proof of Ball's death, in case they found for the plaintiff. This was error. The plaintiff was entitled to a sum equal to the amount received from one death assessment. If there was no evidence to show what that sum was, he could recover only nominal damages. The condition in the policy that the sum recovered should not exceed \$5,000, was no evidence that the sum received from one death assessment would amount to \$5,000.

New trial.

Carpenter, J., did not sit; the others concurred.

JONES *et al.*

v.

SURPRISE.*

1. The sale of intoxicating wines is prohibited by Gen. Laws, chap. 109, § 13.
2. A person who solicits or takes orders for spirituous liquors in this State, to be delivered at a place without this State, **knowing**, or having reasonable cause to believe, that, if so delivered, the same will be transported to this State and sold in violation of the laws thereof, **cannot recover** the price of such liquors in the courts of this State, **although the sale may be lawful in the State where it takes place.**
3. The rule of comity does not require a people to enforce in their courts of justice any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates public law.
4. Comity will not extend the remedy afforded by the laws of this State to enforce a contract valid in the State or country where it is made, when it is tainted by the illegal conduct, within this State, of the party seeking to enforce it.

(Merrimack—Decided March 11, 1887.)

CASE reserved. *Judgment for defendant.*

Assumpsit to recover a balance due for the sale of wines and spirituous liquors. Plea, the general issue, with a brief statement that the contract was void under Gen. Laws, chap. 109, § 13.

Facts found by the court: The plaintiffs were liquor-dealers in Boston, and the defendant a saloon-keeper in Suncook, at the time of the sale of the liquors in suit. The plaintiffs' agent solicited orders for the liquors, in the defendant's saloon, and forwarded the orders to the plaintiffs in Boston, having no authority to make a contract for their sale. He informed the defendant that the liquors would be delivered to him at the plaintiffs' storerooms in Boston. When he solicited the orders he had no knowledge of the provisions of Gen. Laws, chap. 109, § 13, and

did not intend the violation of any law of this State. He knew at the time of the sale that the defendant bought for the purpose of selling in violation of law. The liquors were delivered to carriers in Boston, for the defendant, and he paid the cost of transportation from Boston to Suncook, where he received them. Their sale was authorized by the law of Massachusetts.

The plaintiffs claimed that the sale being valid by the law of Massachusetts, the law of this State prohibiting the taking, or soliciting, of orders did not invalidate it. They further claimed that, as the statute prohibits the taking of orders for spirituous or distilled liquors only, they can recover for the wines. There was evidence tending to show that the wines were intoxicating.

Messrs. Bingham & Mitchell, and E. F. Jones, for plaintiffs:

"This statute does not repeal or abolish the common law existing and recognized here at the time of its passage, by virtue of which contracts of this kind are enforced. The omission of the Legislature to declare such contracts nonenforceable is a recognition of the continuance of the common-law rule of *Hill v. Spear*, 50 N. H. 253, and similar cases."

This is a Massachusetts contract. The goods were there delivered by the plaintiffs, and accepted by the defendant;—the delivery to and acceptance by the common carrier being, in law, a delivery to and acceptance by the defendant.

Corning v. Abbott, 54 N. H. 469; *Boothby v. Plaisted*, 51 N. H. 436; *Butler v. Northumberland*, 50 N. H. 33; *Garland v. Lane*, 46 N. H. 248; *Bancher v. Warren*, 33 N. H. 183; *Smith v. Smith*, 27 N. H. 244; *Woolsey v. Bailey*, 27 N. H. 219.

"The law of the contract travels with it wherever the parties thereto are to be found, and into whatever forum resort is had for its enforcement."

Green v. Collins, 3 Cliff. 494-507; *Story*, Conf. L. § 242; *Hill v. Spear*, 50 N. H. 262, and cases cited; *Corning v. Abbott*, 54 N. H. 469.

The whole system of agencies, of purchases and sales, of mutual credits, and of transfers of negotiable instruments, rests on this foundation; and in sustaining the principle there seems to be a unanimous consent of all courts and jurists, foreign and domestic.

Smith v. Godfrey, 28 N. H. 381.

"If an order for intoxicating liquors is given by a person in A to an agent of a dealer who has a license to sell such liquors in B, and received by the agent subject to his principal's approval, and the liquors which were sold on credit are put up by the seller, marked with the buyer's name, directed to him at A, and delivered to the carrier in B, it is a sale of liquors in B."

Frank v. Hoey, 128 Mass. 263; *Sortwell v. Hughes*, 1 Curtis, 244.

"These statutes, being all penal in their character, are to be construed strictly. The fair and obvious meaning of the words is undoubtedly to be given to them, and the intention of the Legislature, as expressed, is to be carried into effect; but they are not to be strained to embrace by implication subjects not

* See *State v. O'Neill* (Vt.), 1 New Eng. Rep. 775; *Re Liquors of Young & Lion* (R. I.), 1 New Eng. Rep. 813; *Well v. Golden* (Mass.), 2 New Eng. Rep. 235; *Fisher v. Lord* (N. H.), 2 New Eng. Rep. 285; *State v. Basserman* (Conn.), 2 New Eng. Rep. 827.

clearly within the obvious meaning of the words employed."

Jones v. Berry, 33 N. H. 211.

To convey their intention and accomplish such purpose, the Legislature of Massachusetts employed the following language: "No action of any kind shall be had or maintained in any court for the price of any liquor sold in any other State for the purpose of being brought into this Commonwealth, to be here kept or sold in violation of law."

Gen. Stat. Mass. chap. 86, § 61.

Even under the clear and comprehensive terms of this statute, the court of Massachusetts held that "the purchaser of intoxicating liquors sold contrary to Stat. 1852, chap. 822, may maintain an action for a wrongful taking of them from his possession, notwithstanding § 19 of that statute."

Breck v. Adams, 3 Gray, 589; *Fisher v. McGirr*, 1 Gray, 46; *Orcutt v. Nelson*, 1 Gray, 541.

In *Orcutt v. Nelson*, *supra*, Shaw, Ch. J. after stating the limits of this statute, says: "It cannot be presumed that the Legislature intended to extend their prohibition beyond this, and give the enactment an extraterritorial operation, to prohibit and vacate sales made out of its territorial jurisdiction."

It was a matter of well-understood judicial history at that time, that such contracts were recognized by and enforceable in our courts.

Corning v. Abbott, 54 N. H. 469; *Boothby v. Plaisted*, 51 N. H. 436; *Hill v. Spear*, 50 N. H. 253; *Butler v. Northumberland*, 50 N. H. 88; *Banker v. Warren*, 33 N. H. 183; *Smith v. Smith*, 27 N. H. 244; *Woolsey v. Bailey*, 27 N. H. 219; *Gassett v. Godfrey*, 26 N. H. 415.

It was also then well settled that "the fact that the plaintiffs were informed or believed that the defendants were intending to sell the liquors in violation of the laws of New Hampshire, at the time of the sale," would not avoid the sale.

Corning v. Abbott, 54 N. H. 471; *Hill v. Spear*, 50 N. H. 253, and cases there cited.

Even Vermont, notwithstanding the extremes to which the people and courts of the State have sometimes gone on the liquor question, has adhered to this principle.

McConihe v. McMann, 27 Vt. 95; *Gaylor v. Soragen*, 32 Vt. 110; *Tuttle v. Holland*, 48 Vt. 542. See also *Webber v. Donnelly*, 33 Mich. 469; *Green v. Collins*, 3 Cliff. 494.

The general words of an Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched.

Wilberf. Stat. L. p. 20.

In *Jones v. Berry*, 33 N. H. 209, it was held that "the statute which subjects to a penalty every peddler or other person going from place to place, carrying to sell, or exposing for sale, any goods without license, does not render illegal a sale made by such peddler or other person without license; and the price of goods thus sold may be recovered by suit."

To the same effect is the holding of the court in *Brackett v. Hoyt*, 29 N. H. 264, where it was held that a statute which punished an

"offer" to sell hay not branded did not render illegal a sale of unbranded hay.

In *Williams v. Tappan*, 23 N. H. 385, it was held that a statute of Massachusetts which declared that "all shingles offered for sale without being surveyed and marked * * * shall be forfeited to the use of the town where they shall be so offered for sale" did not invalidate an actual sale of shingles which were not so "surveyed and marked."

In *Harris v. Runnels*, 12 How. 79 (53 U. S. bk. 13, L. ed. 901), the court held that the price of a slave who was brought into the State of Mississippi in violation of law, and there sold, could be recovered; that it was the importation which was prohibited and illegal, and not the sale.

"Statutes required of sellers of commercial manures the observance of certain conditions, under penalty, but did not declare contracts for sale void for nonobservance. Held, that a seller might recover on such contract, although he had failed to conform to the statutory requirements."

Niemeyer v. Wright, 75 Va. 239; *S. C.* 40 Am. Rep. 720. See also *Larned v. Andrews*, 106 Mass. 435; *Smith v. Marshood*, 14 Mees. & W. 452.

In conclusion, we submit that this is a valid sale; and the remedy for its enforcement has not been abolished by Gen. Laws, chap. 109, § 18, and the decision rendered should be reversed, and judgment ordered for the plaintiffs.

Messrs. Albin & Martin, for defendant:

The fact that the agent did not know of the existence of Gen. Laws, chap. 109, §§ 18, 19, does not make his offense any the less criminal, or exonerate the plaintiffs from fault in directing their agent to do that which said §§ 18, 19, say he shall not do. They do not come into court with clean hands, and are not entitled to aid in the maintenance of this action.

Dunbar v. Lock, 62 N. H.—.

The plaintiffs claim that there can be no objection to the items of July 7, 1893, and May 7, 1894, because they were not spirituous liquors. We think these items are open to the same objections as are all the others in the account. The case finds that these wines were intoxicating, and the expression "spirituous," as used in the General Laws, comprehends intoxicating liquors.

Gen. Laws, chap. 1, § 81.

The mere knowledge of the unlawful intent of the defendant by the plaintiffs would not bar them from enforcing their contract to recover in our courts; yet, if they in any way aid the defendant in his unlawful design to violate our laws, such participation will prevent them from maintaining an action.

Fisher v. Lord, 63 N. H. 514.

Smith, J., delivered the opinion of the court:

It is made a criminal offense for any person not an agent to sell or keep for sale spirituous liquors, or for any person within this State to solicit or take an order for spirituous liquor to be delivered to any place without this State, knowing, or having reasonable cause to believe, that, if so delivered, the same will be trans-

ported to this State and sold in violation of our laws. Gen. Laws, chap. 109, §§ 18, 19. One question in this case is whether intoxicating wines are included within the terms of this statute. The Legislature has defined intoxicating liquor as follows: "By the words 'spirit,' 'spirituous,' or 'intoxicating liquor' shall be intended all spirituous or intoxicating liquor, and all mixed liquor, any part of which is spirituous or intoxicating, unless otherwise expressly declared." Gen. Laws, chap. 1, §§ 1, 31. As intoxicating wines and other intoxicating fermented liquors are not expressly excluded from the operation of Gen. Laws, chap. 109, §§ 18, 19, the only conclusion is that they come within the prohibition of its terms. No reason appears why the Legislature should prohibit the solicitation of orders for one class of intoxicating liquors, and permit it as to others. The construction of statutes is governed by legislative definitions; that of indictments by the ordinary use of language. *State v. Adams*, 51 N. H. 568; *State v. Canterbury*, 28 N. H. 195.

The remaining question is whether the plaintiffs can maintain an action in our courts for the price of liquors sold and delivered in a State where the sale is lawful, they having solicited and taken orders for the liquors in this State, in violation of our laws. That their authorized agent who solicited and took the orders did not know the solicitation or taking of orders was prohibited, and did not intend the violation of any law, is immaterial. A person is presumed to know and understand, not only the laws of the country where he dwells, but also those in which he transacts business. In *Hill v. Spear*, 50 N. H. 253, it was held by a majority of the court that mere solicitation, by a dealer in liquors, of orders in the future for spirituous liquors, even though he may have had reason to believe, and did believe, that the liquors would be resold by the purchaser in violation of the law of this State, is not such a circumstance as will affect the validity of a subsequent sale of such liquors in a State where the sale is not prohibited. Numerous decisions in England and in this country upon the subject were cited and discussed in that case; and an extended review of most of the same authorities may be found in *Tracy v. Talmage*, 14 N. Y. 162. Further discussion of the authorities is not called for at the present time. When *Hill v. Spear* was decided, the soliciting of orders for spirituous liquors to be delivered without the State was not prohibited. The present statute (Gen. Laws, chap. 109, §§ 18, 19), first enacted in 1876 (Laws 1876, chap. 38), makes the mere soliciting or taking of such orders, or the going from place to place soliciting or taking such orders, with knowledge or reasonable cause to believe that the liquors will be transported to this State and sold in violation of law, without any other act in furtherance of the vendee's design, a criminal offense punishable by fine or imprisonment. The plaintiffs' authorized agent, who solicited and took these orders from the defendant, knew the liquors were to be kept and sold by the defendant in this State, in violation of law. His knowledge is, in law, the knowledge of the plaintiffs.

The plaintiffs contend that, inasmuch as the

soliciting of orders constituted no part of the contract when the soliciting was not prohibited, the act of soliciting, now that it is made illegal, cannot vitiate a contract of which it forms no part. The case is not affected by the plaintiffs' ability to prove a sale without proof of the solicitation. No people are bound to enforce or hold valid in their courts of justice any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates public law. And every independent community will judge for itself how far the rule of comity between States is to be permitted to interfere with its domestic interests and policy. 2 Kent, Com. 457, 458; *Hill v. Spear*, 50 N. H. 253, 262; *Bliss v. Brainard*, 41 N. H. 256, 258. The object of the statute of 1876 (Gen. Laws, chap. 109, §§ 18, 19) was to discourage the sale of liquor in other States, to be transported to this State and sold in violation of its statutes. New Hampshire cannot prohibit the sale of liquor in other States, but it can punish, as it does by this statute, acts done in this State with the purpose of facilitating sales of intoxicating liquors in other States, to be transported to this State, and to be illegally sold here, in contravention of our policy and to the injury of our citizens. The statute was intended to make such sales and transportation difficult, if not impossible, by subjecting those who violate its provisions to the penalty of fine or imprisonment. Where a statute provides a penalty for an act, this is a prohibition of the act. In *Barlett v. Vinor*, Carth. 252; *S. C. Skin. 322*, Holt, Ch. J., said: "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute." Accordingly, it is everywhere held that where an indictment can be sustained for the illegal sale of liquors or other goods, where the price cannot be recovered (*Bliss v. Brainard*, 41 N. H. 256, 268; *Smith v. Godfrey*, 28 N. H. 384; *Caldwell v. Wentworth*, 14 N. H. 431; *Lewis v. Welch*, 14 N. H. 294; *Pray v. Busbank*, 10 N. H. 377); and if this was a New Hampshire contract, the plaintiffs could not recover. The law does not help the seller to recover the price of goods, the sale of which is interdicted. The reason of this rule applies in this case. Although this is a Massachusetts contract, it had its inception in this State in direct violation of our laws. Orders for the liquors were solicited and taken here by the plaintiffs' agent sent here for that purpose were transmitted by him to the plaintiffs, were accepted by them, and became the basis of the contract which they seek to enforce in this State. The orders are evidence for the plaintiffs as to price, quantity, and kinds of liquor purchased, as well as of an offer by the defendant to purchase, if, indeed, it is not true that the plaintiffs cannot prove their case without founding it upon the orders. Both the soliciting and taking of the orders was an indictable offense in which the agent was principal.

The inciting, encouraging, and aiding another to commit a misdemeanor is itself a mi

demeanor. Russ. Cr. 46, 47. The plaintiffs stand precisely as they would if they, instead of their agent, had solicited and taken the orders. Gen. Laws, chap. 284, § 7. Having aided, abetted, procured, and hired their agent to violate our laws by soliciting and taking orders for the very liquors embraced in this contract, they cannot with any grace invoke the remedy afforded by our laws to recover the price. No rule of comity requires us to enforce, in favor of a nonresident, a contract which had its origin in the open violation of law, and which would not be enforced in favor of our own citizens, especially when it is offensive to our morals, opposed to our policy, and injurious to our citizens. Its enforcement would tend to nullify the statute which the plaintiffs have caused to be violated. The law which prohibits an end will not lend its aid in promoting the means designed to carry it into effect. It does not promote in one form that which it prohibits in another. *White v. Buss*, 3 Cush. 448, 450. The opinion in *Hill v. Spear* (50 N. H. 264), concedes that there could be no recovery if the plaintiffs had actively participated in an illegal act in effecting the sale, and is put upon the ground that Stewart, their agent, did not advise, request, or encourage any violation of the laws of this State.

In *Biss v. Brainard*, 41 N. H. 256, 268, we said: "Where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. So, if the contract be in part only connected with the illegal consideration, but growing immediately out of it,—though it be in fact a new and separate contract,—it is equally tainted by it." In that case the plaintiff sought to recover for the value of the casks in which the liquors were contained, and for the freight and cartage of the liquors, the sale of the liquors being unlawful. Fowler, J., said: "Aside, therefore, from the positive provisions of the Massachusetts statute, withdrawing all protection from vessels and casks when employed as the instruments for perpetrating a violation of positive law, we think the sale of the casks was so tainted with the illegality of the sale of the liquors, so much a part of the *res gesta* of the main illegal and criminal transaction, and so much the mere instrument whereby it was accomplished, that no action can be maintained to recover their price." For analogous reasons the plaintiffs in this case cannot recover. Although this is a Massachusetts contract, valid in that State, it is so tainted by the plaintiffs' illegal conduct in soliciting, taking, and transmitting orders in violation of the statute, that comity will not extend to them the remedy afforded by our laws. The taking of such orders tends directly to encourage the illegal sale of liquors in this State, and being prohibited, it follows that an action to recover the price of liquors sold and delivered pursuant to orders so solicited cannot be maintained in this State, although the sale of intoxicating liquors in the State or country where they are sold and delivered is not illegal. *Dunbar v. Locke*, 62 N. H.—.

Judgment for the defendant.

Carpenter, J., did not sit; the others concurred.

N. H.

LITTLE v. UPHAM.

Whether a verdict is against the evidence, is a question of fact to be decided at the trial term.

(Hillsborough—Decided March 11, 1887.)

ON plaintiff's exceptions. *Overruled.*

Trespass for assault and battery. Plea, the general issue, with a brief statement that the defendant acted in self-defense. Verdict for the defendant, which the plaintiff moved to set aside, and for a new trial, "because, upon the uncontradicted evidence, the defendant made the first assault, and assaulted the plaintiff anew after the plaintiff had ceased to inflict or threaten violence to him and had retreated." Motion denied, and the plaintiff excepted.

Messrs. Taggart & Sullo way and Topliff & O'Conner, for plaintiff.

Messrs. Burnham & Brown, for defendant.

Clark, J., delivered the opinion of the court:

The objection that a verdict is against the evidence presents no question of law. It is a question of fact to be determined at the trial term. *Fuller v. Bailey*, 58 N. H. 71; *Le-favor v. Smith*, Id. 125; *Kelley v. Woodward*, Id. 158; *Hovey v. Brown*, 59 N. H. 114.

Exceptions overruled.

Smith, J., did not sit; the others concurred.

CONCORD & PORTSMOUTH R. R. and
CONCORD R. R. CORP.

v.
PORTSMOUTH.

Gen. Laws, chap. 161, § 8, which relates to securing railroad crossings of highways, is not repealed by Laws 1883, chap. 101, § 7.

(Rockingham—Decided March 11, 1887.)

CASE reserved. *Discharged.*

Petition for the examination of a railroad and highway crossing. March 25, 1886, the city councils of Portsmouth voted that the plaintiffs be required forthwith to protect, guard, and secure said crossing by gates. April 26 an attested copy of the vote was served on the plaintiffs, and May 22 they filed this petition. At the October Term, 1886, the city moved that the petition be referred to the county commissioners, the railroads claiming it should be referred to the railroad commissioners. The question so raised was reserved for the opinion of the court.

Mr. J. W. Fellows, for plaintiffs.

Mr. Samuel W. Emery, for defendant:

It seems to have been the intention of the Legislature in enacting Pamph. Laws 1883, chap. 101, to give to the board of railroad commissioners, not only control, to a very large extent, of the operations of railroad corporations within this State, but power to act

judicially as to many matters; and the means of enforcing decisions is provided by chap. 101, § 14.

By the repealing clause of the Act of 1888, all Acts and parts of Acts inconsistent with the provisions of the Act of 1888 are repealed.

We think that the Act of 1888 undertakes to wholly revise Gen. Laws, chap. 101, § 3, and that §§ 4-7, providing a course of procedure, are also entirely revised.

State v. Wilson, 43 N. H. 419; *Hall v. Martin*, 46 N. H. 348.

The Act of 1888 provides for a different course of proceeding on the part of a municipal corporation in order to procure establishment of gates—such a course in fact as to avoid delay, and to allow the railroad commissioners, after proceeding as provided in the Act of 1888, § 7, to give a decision upon the matter of the establishment of the gates.

If Gen. Laws, chap. 161, § 3, is repealed, the procedure dependent thereon is swept away, and the petition of the plaintiffs to the court no longer lies, and ought not to be entertained by the court, inasmuch as no law of the State authorizes or warrants its being brought.

Bingham, J., delivered the opinion of the court:

The question raised is whether Gen. Laws, chap. 161, § 3, providing that a town, by vote, may require a railroad to secure the crossing of a highway by gates, on both sides, is by implication repealed by Laws 1888, chap. 101, § 7, authorizing the selectmen of a town to apply to the board of railroad commissioners to examine the condition and operation of any railroad, a part of which is in their town. Such an implied repeal may be found: (1) where the provisions of the later statute are so inconsistent with and repugnant to those of the earlier one that both cannot be in force; (2) where the whole of the earlier law is revised by the new statute, and it is intended to prescribe the only rules to govern the subject. Neither of these exist in this case. *State v. Wilson*, 43 N. H. 415, 419. Petition referred to the county commissioners.

Case discharged.

Clark, J., did not sit; the others concurred.

WILLEY v. PORTSMOUTH.

An exception to the admissibility of evidence on one point does not ordinarily raise the question of nonsuit for want of evidence on another.

(Rockingham—Decided March 11, 1887.)

MOTION to set aside a verdict for plaintiff and for a new trial. *Judgment on the verdict.*

Case for obstructing and digging up the plaintiff's way by excavating and carrying away gravel. The city of Portsmouth owned the gravel and sand on the lot over which the plaintiff's way passed. Subject to exception,

the plaintiff was permitted to show acts of surveyors of highways, and of persons acting under their direction, in making excavations in the plaintiff's way, by taking and carrying away gravel for repairing highways. Verdict for the plaintiff, and motion to set aside, and for a new trial.

Mr. Samuel W. Emery, for defendant:

The rule of law that the master is liable to action by an injured party for the torts of his servant, arising from acts of commission or omission while engaged in the scope of his employment, is sound and just.

Anderson v. Brownlee, 1 Shaw (Sc.), 474; *Duncan v. Findlater*, 6 Cl. & F. 910; *Southern v. How*, Cro. Jac. 471; *Wood, Mast. & Serv.* 2d ed. 537, 920, *et seq.*; *Maximilian v. New York*, 62 N. Y. 165; *Clapp v. Kemp*, 122 Mass. 481; *Stables v. Eley*, 1 Car. & P. 614; *Laugher v. Pointer*, 5 B. & C. 547; *Lane v. Cotton*, 1 Salk. 17; *Martin v. Brooklyn*, 1 Hill (N. Y.), 545; *Kelly v. New York*, 11 N. Y. 432; *Walcott v. Swampscott*, 1 Allen, 101.

A liability may be imposed by statute, and the statute must be express (*Eastman v. Meredith*, 86 N. H. 284); but at common law there is absolutely no liability.

The rule of law which renders a master liable for torts of his servant, committed in the scope of the master's business, is the same rule which renders a municipal corporation liable for torts of its servants or officers.

2 Dill. Mun. Corp. 3d ed. § 968; *Wood, Mast. & Serv.* 2d ed. 917.

Towns may choose as many surveyors of highways as they think proper. If none are so chosen, the selectmen shall appoint such surveyors.

Gen. Laws, chap. 72, § 5.

The statute says they "shall" be appointed by the selectmen. Therefore it is not optional with a municipal corporation in New Hampshire to appoint or not to appoint a surveyor or surveyors of highways.

Ball v. Winchester, 32 N. H. 485.

One of the elements necessary to constitute a surveyor of highways a servant or agent of a municipal corporation, so that the corporation may be charged for his torts while acting within the scope of his duty, is totally eliminated. Here, then, is not the relation of master and servant, or principal and agent.

Wood, Mast. & Serv. 2d ed. 920 *et seq.*

In *Maximilian v. New York*, 62 N. Y. 165, *Folger, J.*, says, in rendering the opinion of the court of appeals: "A municipal corporation elects or appoints an officer in obedience to an Act of the Legislature. He is the authority selected by it as the authority empowered by law to make selections; but when selected and its power is exhausted, he is not its agent. He is the agent of the public for whom and for whose purposes he was selected. * * *

It is easily gathered from the case that he was not chosen immediately by the defendant, nor by any of its agents falling within the class of its executive officers; nor was he immediately controllable or removable by it or them."

83 Wis. 814; 81 Ala. 469; 9 La. Ann. 461; 17 Gratt. (Va.) 375; 21 Mich. 118; 45 Mo. 473; 18 Kans. 890; *Wood, Mast. & Serv.* 2d ed. 921; 41 Conn. 87; 53 Am. Dec. 318; *Hafford v. New Bedford*, 16 Gray, 802; *Ham v. Mayor of New*

York, 87 Super. Ct. 458; *Walcott v. Swampscott*, 1 Allen, 101; 70 N. Y. 459; 8 Abb. N. C. 279; *Ball v. Winchester*, 32 N. H. 445; 71 N. Y. 580; 49 How. Pr. 67; 81 Md. 462; *Grimes v. Keene*, 52 N. H. 385; 25 Me. 126; *Hardy v. Keene*, 52 N. H. 877; *Morse v. Weymouth*, 28 Vt. 824; 29 Ind. 187; *Palmer v. Carroll*, 24 N. H. 314; 21 Cal. 143; *Thompson v. Fellows*, 21 N. H. 425; 2 Dill. Mun. Corp. 3d ed. § 979; *Barney v. Lowell*, 98 Mass. 570; *Oliver v. Worcester*, 102 Mass. 489; *Alcorn v. Philadelphia*, 44 Pa. 348; *Erie v. Schwingle*, 23 Pa. 384; *Dean v. New Milford Township*, 5 Watts & Serg. 545; *Dayton v. Pease*, 4 Ohio St. 80, 100; *McCarty v. Bauer*, 8 Kans. 287; *Rose v. Addison*, 34 N. H. 318; *Judge v. Meriden*, 38 Conn. 90; *Makepeace v. Worden*, 1 N. H. 16; 1 Johns. 516; 15 Johns. 250; 17 Johns. 455; 7 How. 758 (48 U. S. bk. 12, L. ed. 902); 38 Conn. 368.

Under the laws of New Hampshire, the surveyor of highways is not under the control of the town by which he is chosen. Reference to the provisions of Gen. Laws, chap. 72, plainly discloses this.

Wells v. Goffstown, 16 N. H. 58; *Waldron v. Berry*, 51 N. H. 141; *Turnpike Road v. Champney*, 2 N. H. 199; *Palmer v. Carroll*, 24 N. H. 314; *Rowe v. Addison*, 34 N. H. 318.

We say that an officer acting under judicial discretion cannot be a servant or agent of any municipal corporation or person, so as to charge the corporation or person with liability for his tort committed while about the business his judicial discretion is to be exercised in. If acting with discretionary powers, the rule is the same.

Wood, Mast. & Serv. 2d ed. 924; *Ball v. Winchester*, 32 N. H. 435.

Full control of the acts of an alleged servant within the scope of the business he is about is essential to charge a master for the tort of his servant committed within the scope of his master's business.

58 Ill. 297; *Clapp v. Kemp*, 122 Mass. 481; *Stables v. Eley*, 1 Car. & P. 614; *Laughter v. Pointer*, 5 B. & C. 547; *Wood, Mast. & Serv.* 2d ed. 926.

"If this derrick and appurtenances were improperly and insecurely placed and fastened, through the carelessness or fault of the surveyor, he who placed them thus knew of the defect; and if he knew it, it would be evidence from which the jury might find that the town knew it."

See *Rowe v. Portsmouth*, 56 N. H. 295 (where notice to the city marshal was held to be notice to the city); 1 Allen, 172; Whart. Neg. § 191; *Gilman v. Laconia*, 55 N. H. 130; *Wood, Mast. & Serv.* 2d ed. 916, 917.

The doctrine of *Ball v. Winchester*, 32 N. H. 435, is adopted and declared in—*Oliver v. Worcester*, 102 Mass. 489; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570; *Denniston v. Clark*, 125 Mass. 216; *Johnson v. Dunn*, 134 Mass. 523.

Eaton v. B. C. & M. R. R. 51 N. H. 504, is wholly immaterial to this case; likewise *Gilman v. Laconia*, *supra*.

As to *New York v. Furze*, 3 Hill, 612, which is cited by Judge Ladd, this case was criticised in 1 Denio, 600; 82 N. Y. 499; 48 Am. Dec. N. H.

823, and has been virtually overruled by the court rendering it. Further, it has been overruled in 28 Am. Rep. 362, and 122 Mass. 375; disapproved in 5 Neb. 388; 17 Am. Rep. 652; 55 Mo. 127. The opinion of Cushing, *Ch. J.*, does not, we submit, go so far as to overrule *Ball v. Winchester*. Judge Smith seems to hold that *Ball v. Winchester* and *Groton v. Haynes* do not conflict (p. 137).

Messrs. Frink & Batchelder, for plaintiff:

The city of Portsmouth owned a gravel pit across which the plaintiff had a right of way. It may be assumed to have been purchased for the purpose of supplying material for the repair of highways within its limits. The city was authorized to hold a lot for that purpose (Gen. Laws, chap. 72, § 18); and was bound to keep the highways within its territory in repair (Id. § 1). This duty may be performed through surveyors chosen by the town or appointed by the selectmen (Id. § 5); or the town may, by vote, contract for keeping its highways in repair (Id. § 25).

This defendant performed this duty through the surveyors. In its performance, without any implication of ill faith on their part, they destroyed the plaintiff's right of way. Is the town liable in damages?

To employ the language of Judge Ladd in *Gilman v. Laconia*, 55 N. H. 132, to hold that a town was not liable under such circumstances would seem an anomaly of injustice and absurdity.

"One cannot be deprived of his property, personal liberty, or any legal right, to his substantial damage, without a legal remedy."

"It is a vain thing to imagine a right without a remedy."

Edes v. Boardman, 58 N. H. 590; *Walker v. Walker*, 63 N. H. 322.

The surveyor of highways might be liable for damages from neglect of duty under some circumstances, and for willful malfeasance, but no farther. This is not only a well-established, but a salutary, rule of law.

Denniston v. Clark, 125 Mass. 217; *Waldron v. Berry*, 51 N. H. 136.

The towns discharge their duties in the performance of the act, and the public assume the risk that it is well performed.

Eastman v. Meredith, 36 N. H. 284.

It is difficult to see upon what principle the town could be liable in either of the following New Hampshire cases, if they were not responsible for damages resulting from the commission or omission of some act by an officer having discretionary powers, which resulted in the injury complained of:

Hardy v. Keene, 52 N. H. 370; *Groton v. Haines*, 36 N. H. 392; *Parker v. Nashua*, 59 N. H. 402; *Vale Mills v. Nashua*, 63 N. H. 137; *Carpenter v. Nashua*, 58 N. H. 87.

The dicta of Judge Smith in *Wakefield v. Newport*, 60 N. H. 376, recognizes the position assumed by us.

In *Maximilian v. New York*, 62 N. Y. 160, Judge Folger instances the duty of keeping in repair streets, etc., as one with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act.

The weight of authority, as well as of rea-

son, throughout the United States, is in accord with—

Gilman v. Laconia, 55 N. H. 182; *Aldrich v. Tripp*, 11 R. I. 141.

The doctrine that towns cannot be liable for injuries inflicted by their officers is an unwholesome one, and not supported by reason or authority.

Hunt v. Boontville, 27 Am. Rep. 300; 65 Mo. 620. See *Eaton v. B. C. & M. R. R.* 51 N. H. 534, as to municipal liability.

"Municipal corporations, for the improper management and use of their own property, are liable to the same extent and in the same manner as private corporations and natural persons."

Dill. Mun. Corp. § 780; *Eastman v. Meredith*, 36 N. H. 284.

Bingham, J., delivered the opinion of the court:

The defendant owned the gravel over which the plaintiff's way passed, and, subject to exception, was permitted to show that the persons moving the gravel from his way were surveyors of highways and persons acting under them. The case is meagre in narrative; but it is understood that the gravel bank was outside the limits of any highway, and that the exception is to evidence showing for whom the persons digging the gravel claimed to be working. The manner in which the wrong was done, by whom, and under what claim, were things so closely connected with the main fact as to be admissible as a part of the *res gestæ*.

If it was the purpose of the defendant, in taking the exception, to raise the question of its liability for the acts of highway surveyors, the case fails to show it. For aught that appears, the ruling in that particular may have been satisfactory. An exception to the admissibility of evidence on one point does not ordinarily raise the question of nonsuit for want of evidence on another.

Judgment on the verdict.

Clark, J., did not sit; the others concurred.

Jean L. GAGNON, Admr.,

v.

Daniel CONNOR.

1. In a suit seasonably brought, the declaration may be amended after the time when a new action for the same cause would be barred by the Statute of Limitations.
2. The question of fact whether justice requires an amendment of a declaration, and the question of fact raised by a motion to set aside a verdict on the ground of excessive damages, are determinable at the trial term.

(Hillsborough—Decided March 11, 1887.)

ON defendant's exceptions. *Judgment on the verdict.*

Case for personal injuries, brought within two years of the intestate's death. *Laws*, 1879, chap. 85. Plea, the general issue. At the trial, 304

after the expiration of the two years, the plaintiff was allowed, subject to exception, to amend his declaration. Verdict for the plaintiff, which the defendant moved to set aside on the ground of excessive damages. The motion was denied, and the defendant excepted.

Messrs. Sulloway, Topliff, & O'Connor, for defendant:

In the case of *Wiley v. Yale*, 1 Met. 553, a motion was made for leave to amend after the two years had elapsed,—the time within which the statute limited the bringing of suits. The court denied the motion and arrested judgment.

Amendments are not allowed when the facts show that justice does not require it. "Amendments are allowed solely for the prevention of injustice."

Hardy v. Nye, 63 N. H. 612, 1 New Eng. Rep. 858.

Amendments are not allowed when injustice will be done thereby. *Redding v. Dodge*, 54 N. H. 98.

In *Burnham v. Plant*, 57 N. H. 41, *Cushing Ch. J.*, said: "It is clear that the plaintiff cannot, under cover of an amendment in general terms, introduce into his writ a new and different cause of action."

In *Mt. Washington Hotel Co. v. Redington*, 55 N. H. 388, *Smith, J.*, said: Amendment may be allowed "whenever the form of action is not changed, and the identity of the cause of action is preserved." Here there is no form to change, no cause of action stated, no identity to preserve, no suit pending, nothing to amend.

Messrs. Burnham & Brown, for plaintiff

Section 9. "Amendments in matters of substance may be permitted in any action, in any stage of the proceedings, upon such terms as the court shall deem just and reasonable; but the rights of third persons shall not be affected thereby."

Gen. Laws, chap. 226, §§ 8, 9; Gen. Stat. chap. 207, §§ 8, 9; Com. Stat. chap. 198, §§ 11; Rev. Stat. chap. 186, §§ 10, 11.

The language of § 8 is mandatory. It imposes a duty upon the court; it leaves no room for discretion, whenever "the case may be rightly understood." It has been so held since—

Berry v. Osborn, 28 N. H. 279, 286.

Yet, until the June Law Term in 1879, the section was restricted in its application, by judicial interpretation, to matters of form merely.

Brown v. Leavitt, 52 N. H. 619.

But at that term a decision was handed down in which all the authorities were reviewed, expressly overruled, and the doctrine established that the statute means what it says.

The court below was overruled, and the form of action changed from assumpsit to covenant.

Stebbins v. Lancashire Ins. Co. 59 N. H. 144, 148.

This case has since been followed, and now law. At the same term it was held that any objection to the form of action may be obviated by amendment of the declaration (*Rider v. Chick*, 59 N. H. 50, 52), and that declaration in assumpsit may be amended to

adding a count upon a note (*Buckminster v. Wright*, 59 N. H. 153, 154).

Trover and assumpsit may be joined by amendment,—contract joined with tort.

Welcome v. Labontee, 63 N. H. 124, 125; *Peaslee v. Dudley*, 63 N. H. 220, 221.

Case may be amended, even after verdict, by "adding a new count in trespass."

Merrill v. Perkins, 59 N. H. 843, 844.

And so may trespass, by "adding a common count in assumpsit."

Elsher v. Hughes, 60 N. H. 469.

Such an amendment does not "change the cause of action."

Chase v. Dodge, 59 N. H. 350.

Even the forum may be changed by amendment. A declaration at law may be amended by adding a bill in equity (*Brooks v. Howison*, 63 N. H. 882, 889, 1 New Eng. Rep. 243; *Metcalf v. Gilmore*, 59 N. H. 417, 431); or a bill in equity, by adding a declaration at law (*Walker v. Walker*, 63 N. H. 321, 326, 327, 1 New Eng. Rep. 250).

"After the entry of the action, the declaration could be made what it might originally have been."

Rutherford v. Whitcher, 60 N. H. 110, 111.

"Under the circumstances the plaintiff was properly allowed to amend his declaration by adding a count in trover (*Rutherford v. Whitcher*, *supra*) alleging a conversion within six years." It will be noticed that this action was barred by the general Statute of Limitations before the amendment was allowed or filed.

Welcome v. Labontee, 63 N. H. 124, 125.

The early case of *Brigham v. Eate*, 2 Pick. 423, cited by the defendant, does not apply here, for the reason that the writ in that case contained, not a defective count, but no count at all. It had nothing in the nature of a count, and stated no cause or even form of action. Besides, it is expressly stated to be controlled by a foreign statute.

The statute of 1879 does not establish an original right or cause of action. Unlike *Lord Campbell's Act*, it does not enlarge the scope of a pre-existing right to embrace the injury resulting from the death; and the jury in this case were so charged. It merely extends a common-law right of action by extending the remedy. It simply continues for a period of two years the remedy which before ceased at death. It removes one bar and establishes another.

Cooley, Torts, 264.

The limitation of this statute, then, in no respect differs from the general or other statutes of limitation, and must be specially pleaded, or set up in a brief statement. No rule is better established.

Amoskeag Mfg. Co. v. Barnes, 48 N. H. 25, 29; 7 Wait, Act. & Def. 308, and cases cited.

It is not admissible in evidence under the defendant's plea of "not guilty,"—the widest of the general issues.

Brickatt v. Davis, 31 Pick. 404, 410; Heard, Civ. Pl. 129; 1 Tidd, 8th ed. 702; 1 Chitty, Pl. 1st ed. 487.

Was the motion to set aside the verdict properly denied? This branch of the case the court will not consider. It raises a question of fact which was conclusively determined by the justice presiding at the trial.

N. H.

Fuller v. Bailey, 58 N. H. 71; *Lefavor v. Smith*, 58 N. H. 125.

Such questions will not be considered at the law term.

Welcome v. Labontee, 63 N. H. 124, 125.

DOE, Ch. J., delivered the opinion of the court:

In *Brigham v. Eate*, 2 Pick. 420, the writ was abated because it contained no declaration. The law allows an insufficient declaration to be amended for the purpose of curing a defective statement of the cause of action. In a suit seasonably brought, the declaration may be amended after the time when a new action for the same cause would be barred by the Statute of Limitations. *Merchants Bank v. Stevenson*, 7 Allen, 489, 490. In that case, and in *Wiley v. Yale*, 1 Met. 558, 555, an amendment was denied on the ground that, as a matter of fact, justice did not require it. In this case the question of fact whether justice required the amendment, and the question of fact raised by the motion to set aside the verdict on the ground of excessive damages, were determinable at the trial term; and no error of law appears. *Merrill v. Perkins*, 61 N. H. 262.

Judgment on the verdict.

SMITH, J., did not sit; the others concurred.

MARY R. ODIORNE

v.

Susan J. MOULTON *et al.*

An agreement made by four legatees named in a will, in equal parts to aid, comfort, and take care of the testatrix, and defray the expenses of her sickness and funeral, entitles one who, with the knowledge and acquiescence of the others, has furnished more than an equal part of care, nursing, etc., to a ratable contribution from the others.

(Rockingham—Decided March 11, 1887.)

PILL in equity. *Decree for plaintiff.*

In 1875, Mary Bladell, of Portsmouth, made her will bequeathing her property in equal shares to the plaintiff, Mrs. Odiorne, and the defendants, Mrs. Moulton, Mrs. Henderson, and Mrs. Gerrish. At the same time the legatees executed an agreement in writing whereby, in consideration of the will, they mutually undertook, "in equal parts, to aid, comfort, and take care of (the testatrix) in her sickness, and in like portions to defray the expenses incident to her sickness and the expenses of her funeral." From that time to the time of her death, which occurred in 1884, Miss Bladell, by reason of her age and infirmities, was in need of more or less care and nursing, which was provided by the plaintiff and Mrs. Moulton during the first year, and mainly by the plaintiff afterwards. Mrs. Henderson and Mrs. Gerrish furnished no special care or attention to Miss Bladell, and were never requested to furnish any, either by Miss Bladell or the plaintiff. The value of all the services rendered in caring for Miss Bladell was \$1,000, of which \$50 was furnished

by Mrs. Moulton and \$950 by Mrs. Odiorne. The plaintiff asks for contribution from the defendants; and if the bill can be maintained she is entitled to a decree for \$700.—\$200 to be paid by Mrs. Moulton, and \$250 each by Mrs. Henderson and Mrs. Gerrish. The defendants moved to dismiss the bill.

Messrs. Frink & Batchelder, for plaintiff:

Valuable services having been rendered under the agreement, our only complete remedy is by a bill for contribution from the defendants.

Pom. Eq. Jur. §§ 139, 1416, 1418.

The services were not to be rendered "upon request," or "when notified," but "in her sickness," whenever that might happen. It was the duty of the parties to this agreement to find out when Miss Blasdell was sick, and to tender their services.

Watson v. Walker, 28 N. H. 471.

The services of Mrs. Odiorne having been rendered under a legal obligation, by the terms of which these defendants were bound to contribute equal shares, there is implied, on their parts, a request to this plaintiff to perform whatever necessary service she rendered the deceased.

Hall v. Smith, 5 How. 96 (46 U. S. bk. 12, L. ed. 66).

The place where the services were to be rendered was equally known to the plaintiff and the defendants; and the latter could in no way be relieved from the performance of their agreement, except by a tender of their labor to the deceased.

Clement v. Clement, 8 N. H. 210.

Mr. Calvin Page, for defendants Henderson and Gerrish:

As between themselves, the parties were partners in this transaction. It was a joint undertaking for their joint benefit, and the partnership terminated when the purpose for which it was formed was accomplished,—at the date of Miss Blasdell's death.

Pars. Partn. chap. 12, p. 384, § 2.

If there is no agreement, the law makes none, and infers none from the greater industry or greater ability of one partner.

Philips v. Turner, 2 Dev. & B. Eq. 128; *Caldwell v. Leiber*, 7 Paige, 483, 495.

In *Caldwell v. Leiber*, *supra*, the court says: "Partners are not entitled to charge each other for their services in the management of the concern; and the law never undertakes to settle between them their various and unequal services in the transaction of their private affairs."

The same rule applies after the dissolution of the firm. Partners who wind up the concern are not entitled to any extra compensation for their time and labor.

Beatty v. Wray, 19 Pa. 516, 519; *Burden v. Burden*, 1 Ves. & B. 170; *Stocken v. Dawson*, 6 Beav. 371, 376; *Lyman v. Lyman*, 2 Paine, C. C. 11, 52.

When the plaintiff, through ten long years of silence, without a word of caution or complaint to any of the parties, caused them to omit any service that they would otherwise have gladly rendered, and led them to suppose that the agreement was being satisfactorily kept by all parties, though one word from her

would have disclosed her intentions, and put them upon their guard, and secured from them what she required,—when she did all this to obtain their share of the estate, she so acted that equity should not now allow her to take advantage of her acts.

Horn v. Cole, 51 N. H. 287; *Manning v. Cogan*, 49 N. H. 331, 339; *Davis v. Handy*, 37 N. H. 65.

Doe, Ch. J., delivered the opinion of the court:

Services which Miss Blasdell needed, and which were to be rendered or paid for by the four signers of the contract, were performed by two of them. There was no express or implied agreement that she was to demand of each of the four a quarter of everything she needed; or that each of the four was to furnish a quarter part of every item of necessities; or that each, before doing anything in fulfillment of the contract, was to call upon the other three for contribution in advance. It is agreed in argument that the four knew, when they made the contract, that their abilities and opportunities for rendering personal services were not equal, and never would be. It was necessarily understood that unequal services properly rendered in performance of the contract would be equalized by contribution. There is no evidence of fraud, concealment, or unfairness. All the parties were apparently aware of the fact that the plaintiff was doing more than her share, and no one had any reason to suppose she was gratuitously performing a contract which the four agreed to perform "in equal parts." Her rendition of services does not appear to have been a fact peculiarly within her own knowledge, and there are no facts that required notice. *Watson v. Walker*, 28 N. H. 471.

Decree for the plaintiff.

Clark, J., did not sit; the others concurred.

SCHOOL DISTRICT NO. 16

v.

City of CONCORD.

A balance of a fund of an abolished school district, remaining after the assessment and remission of the equalizing tax authorized by Laws 1885, chap. 43, § 2, is applied by law, as nearly as may be, to the use of those who would have been entitled to the benefit of it if the district had not been abolished; and the school board of the town district may be appointed trustees for the disposition of the money.

(Merrimack—Decided March 11, 1887.)

CASE reserved. Case discharged.

Bill in equity by a district abolished by Laws 1885, chap. 43, for the disposition of \$1,652.79 held by the defendant, belonging to the plaintiff, and not included by the tax assessors in the equalization of the property of abolished districts. Facts agreed.

The case is stated in the opinion.

Mr. David Cross, for plaintiff:

The money was originally collected and held by the city, or its officers, in trust, to be applied for the benefit of the inhabitants of the plaintiff district, in educating their children under the common-school system as then existing.

School Dist. No. 1 v. Sanborn, 25 N. H. 88; *Fuller v. Heath*, 89 Ill. 296; Gen. Laws, chap. 85; Gen. Stat. chap. 77.

If the money, though not wanted or needed by the district, had been applied to schooling purposes in other districts having a scanty appropriation, it could not be seriously denied that the diversion would be a gross breach of trust, and that the district or its taxpayers (and perhaps both) would be entitled to some remedy.

School Dist. No. 7 v. Morrill, 59 N. H. 367, 369; *School Dist. v. Sherburne*, 48 N. H. 52.

The district could not use it to pay the expense of building a schoolhouse, or for liquidating its debts. It would belong to it in a qualified sense only, and for special purposes.

Barrett v. School Dist. No. 2, 37 N. H. 445, 448.

To allow money paid and apportioned for the exclusive benefit of one district to be applied for the benefit of another would be as unjust, inequitable, and unconstitutional as to authorize taxes raised in one town to be appropriated in another, or to make A liable for B's debts.

Hitchcock v. St. Louis, 49 Mo. 484, 488; *Edes v. Boardman*, 58 N. H. 580, 589; Dill. Mun. Corp. § 650 (512).

As a corporation may exist for some purposes after its dissolution (Gen. Laws, chap. 147, § 17; chap. 86, § 28), the plaintiff district, being technically entitled to the money by its prudential committee, may be held to exist, and may receive the money, if it is reasonably necessary and convenient for the final disposition of the fund; but if the fund can be legally, equitably, and conveniently disposed of without extending or continuing the powers of the defunct corporation, such a method should be adopted.

School Dist. v. Greenfield, 64 N. H. 84, 2 New Eng. Rep. 908.

As the district has ceased "to exist for general purposes" (*Sargent v. Union School Dist.*, 68 N. H. 528, 2 New Eng. Rep. 290), it could legally do nothing with the money, except to hold it as trustee on a trust that has terminated. If its inhabitants should form themselves into a private-school corporation to afford greater facilities for the education of their children, the body corporate thus brought into existence would not be entitled to use this money in paying for teachers, fuel, and incidental expenses (Gen. Laws, chap. 85, § 8), as the original district might have used it; for the appropriation was made and the taxes were paid, not for a private, but for a public, school, and the diversion of the money in such a way would be as illegal as its use by the town district. Taxes cannot be raised or appropriated for merely private objects.

Cooley, Tax, 105; *Jenkins v. Andover*, 103 Mass. 94, 101; *Curtis v. Whipple*, 24 Wis. 350, 353; Dill. Mun. Corp. § 786 (587).

If, then, the officers of the city and of the district, having money in their hands raised by taxation for school purposes, as this fund

was raised, hold it as trustees; and if the object of the trust cannot legally be accomplished because the *cestui que trust* no longer exists, or is no longer capable of receiving the benefit in any legal and practicable way,—the fund must revert, by way of a resulting trust, to the taxpayers of the district by whose money it was established.

Story, Eq. Jur. §§ 1156, 1196; *Perry, Tr.* § 160; *Easterbrooks v. Tillinghast*, 5 Gray, 17.

Towns and school districts are merely parts of the machinery established by the Legislature for the convenient accomplishment of a public purpose; and they may be deemed no longer needful, and be dispensed with or abolished, at the will of the Legislature, as far, at least, as the use and enjoyment of the public fund is concerned.

Child v. Colburn, 54 N. H. 71; *Farnum's Petition*, 51 N. H. 376; *Chicago v. People*, 80 Ill. 384; *Cooley, Const. Lim.* 240.

A school district, as such, has no vested rights of property in its schoolhouse; and, when abolished, its corporate powers are at an end, unless its continued existence is necessary for some purpose of the trust.

School Dist. v. Greenfield, 64 N. H. 84, 2 New Eng. Rep. 908.

Though the title to the property might pass to the town or to the town district without an express statutory provision to that effect (*School Dist. No. 1 v. Richardson*, 23 Pick. 62; *School Dist. No. 6 v. Tapley*, 1 Allen, 49), it would pass charged with the trust for educational purposes imposed upon it by the Legislature and guaranteed to the taxpayers whose money created it. "The money was raised by an assessment on all the polls and taxable estate of the town; and the statute contemplates that each district may receive back, as nearly as practicable, the amount it has contributed to the school fund."

School Dist. No. 7 v. Morrill, 59 N. H. 367, 369.

"The general rule of equalization applied to abolished school districts by Laws 1885, chap. 43, § 2, is an affirmation of the rights of all parties concerned."

School Dist. v. Greenfield, 64 N. H. 84, 85, 2 New Eng. Rep. 908.

The tax was raised, not for general municipal purposes, or for general school purposes, but for the support of schools. Gen. Laws, chap. 85, § 8. It could not be used in the purchase of real estate for the district, or for the purpose of building schoolhouses.

Lee v. School Dist. No. 1, 86 N. J. Eq. 581.

When taxes are legally assessed and paid for a special purpose which is afterwards abandoned or judicially declared to be illegal, the taxpayers are entitled to a remission or refunding of the taxes they were obliged to pay, although they paid them voluntarily. The municipality cannot retain the money, and omit to apply it to the purpose for which it was raised. Such a holding would legalize extortion and robbery.

Dill. Mun. Corp. § 945, note; *Bradford v. Chicago*, 25 Ill. 411, 415; *Greedup v. Franklin County*, 80 Ark. 101; *Worthen v. Budgett*, 82 Ark. 496, 523; *Jersey City v. O'Callaghan*, 41 N. J. L. 349; *Peyser v. Mayor*, 70 N. Y. 497.

Evidently the taxpayers' rights could not

thus be devested; and a denial of their right to their just and equitable shares in the property would be an unauthorized exercise of judicial power. *Grim v. Weissenberg*, 57 Pa. 433, 437.

"Numerous cases might be named where the return of taxes collected would be the only just proceeding to be taken. Money raised for a special emergency may not be required by the emergency ceasing."

Tippecanoe County v. Lucas, 98 U. S. 108, 115 (Bk. 23, L. ed. 822); *Virden v. Needles*, 98 Ill. 366, 372; *Bass v. Pontleroy*, 11 Tex. 698.

Messrs. Leach & Stevens, and *H. G. Sargent*, for defendant.

Doe, Ch. J., delivered the opinion of the court:

District No. 16 having been abolished by the Act of 1885, chap. 43, the defendant, holding the district's money, properly refused to pay it to anyone until the payee was judicially ascertained. The bill is properly brought by the plaintiff, and could have been brought by the defendant, for an adjudication of the proper disposition of the money which is applied by law, as nearly as may be, to the use of those who would have been entitled to the benefit of it if the district had not been abolished. The fund has been accumulating in the city treasury fifteen years, during a part of which time the district had no school because it had no scholars. It was one of the increasing number of districts whose childless condition called for the Act of 1885, or some other provision against the evil of an annual tax that could not be used for the purpose for which it was raised.

In the reserved case no reason appears why the equalizing school-property tax of 1886, assessed on persons and property within the limits of the abolished districts, should not be paid out of this fund. But a maintenance of the district organization for the management and disposition of the money would be an inconvenient and unnecessary mode of administration. *School Dist. v. Greenfield*, 64 N. H. 84, 2 New Eng. Rep. 908. By virtue of their official duties, the school board of the town district seem to be proper persons to be appointed trustees. If cause is not shown for a different course, they will be appointed at the trial term, with instructions to pay the plaintiff's share of the equalizing tax, and the plaintiff's reasonable costs and expenses of this suit (to be determined by the court), and to apply the balance for the plaintiff's use and benefit. If doubts arise as to any matter of detail, the trustees can apply at the trial term for further instructions, which the facts stated in the case do not enable us to give at this time.

Case discharged.

Carpenter and Bingham, JJ., did not sit; the others concurred.

WESTERN UNION TELEGRAPH CO.

STATE of New Hampshire.

A telegraph company is liable for interest, at 10 per cent, on the amount of the tax finally levied upon it, from December 1 of the year in which it is as-

sessed, although the amount of the original assessment has been reduced on appeal.

(Merrimack—Decided March 11, 1887.)

MOTION by the Attorney-General that interest at the rate of 10 per cent from December 1, 1884, on the plaintiff's tax of 1884, and from December 1, 1885, on the plaintiff's tax of 1885, be added to such taxes as finally fixed by the court at the June Term, 1886, on appeals by plaintiff from the assessments for the years 1884 and 1885. *Case discharged.*

The case is stated in the opinion.

Mr. Attorney-General Bradford, for the State, for the motion.

Messrs. Chase & Streeter, for plaintiff:

Taxes do not bear interest except when expressly so provided by statute.

1 Desty, Tax. 9.

A tax is not a debt or contract, and does not bear interest.

Perry v. Washburn, 20 Cal. 318-350; *Haskell v. Bartlett*, 34 Cal. 281; *Lane County v. Oregon*, 7 Wall. 80 (74 U. S. bk. 19, L. ed. 101).

The State cannot recover interest on taxes, payment of which has been deferred, unless the statute authorizes interest on such taxes.

Western U. Tel. Co. v. State, 55 Tex. 814.

Where an action is given for taxes, interest is not recoverable unless the statute gives it.

Danforth v. Williams, 9 Mass. 324.

"A debt universally bears interest from the time it is due. A tax never carries interest. No instance, it is believed, can be found, since the formation of the government, where a claim for interest on taxes has been made or enforced."

Green, Ch. J., in *Camden v. Allen*, 26 N. J. L. 398. See *Shaw v. Peckett*, 26 Vt. 485.

Taxes are not debts so as to bear interest as liquidated demands.

State v. Southwestern R. R. Co. 70 Ga. 11.

In an action against a corporation for a failure to pay taxes, no interest should be allowed as damages; the statute prescribes the penalty for default in payment, and no other may be required.

People v. Gold & Stock Tel. Co. 98 N. Y. 67.

What the State omitted to demand the court cannot require.

See Hill. Tax. 444.

"The uniform custom in this State, so far as our information extends, has been not to demand interest, as interest, on taxes in default, and we will not disturb that custom." *Counties v. R. R. Co.* 65 Ala. 391.

A judgment for taxes cannot include interest, in the absence of statute or ordinance.

Edmonson v. Galveston, 53 Tex. 157; *People v. Thatcher*, 95 Ill. 109.

Statutes imposing interest on delinquent taxpayers (as our Gen. Laws, chap. 57, § 9, chap. 62, § 6, chap. 66, § 8, which impose a 10 per cent penalty) are sustained on the ground that the interest imposed is in the nature of a penalty for nonpayment of the tax within the time directed by statute.

2 Desty, Tax. 764, and cases cited.

The penalty of interest cannot be considered a part of the tax (*Ibid.*); and an Act which provides that a penalty of 10 per cent interest shall

attach to and become a part of a delinquent tax is void (*Ryan v. State*, 5 Neb. 276).

Unless express authority to do so be granted by the Legislature, a municipal corporation has no power to enforce the payment of taxes due it by affixing a penalty of an additional per cent for failing to pay promptly when due.

Augusta v. Dunbar, 50 Ga. 387.

It would seem that the court has no power to add interest, as interest, to the tax. The doctrine announced in our case of *Hibbard v. Clark*, 56 N. H. 155, logically leads to the same result, though this question was not there directly decided.

"Penalties are imposed as a punishment, and are supposed to bear some relation to the wrongful act done or omitted, and the circumstances attending the same."

Silbes v. Stockle, 44 Mich. 576.

This case is to be distinguished from *Boston & M. R. R. v. State*, 63 N. H. 571, 2 New Eng. Rep. 544. There the corporation was compelled by the statute (Laws 1881, chap. 58, § 1) to pay, and did pay, into the treasury about \$2,500 more than its legal proportion of the tax for that year.

If we had paid the original assessment, the money would be buried in the treasury until the Legislature should conclude, by a special Act, to authorize the treasury to pay it back.

Cooley, Tax. 580.

If the opinion that chap. 57, § 9, is applicable to all taxes is well grounded, and all taxes of every kind unpaid on the 1st day of December bear 10 per cent interest from that date, why did not the court, in *Boston & M. R. R. v. State*, 63 N. H. 571, 2 New Eng. Rep. 544, allow the plaintiff 10 per cent interest on the amount overpaid?

Bingham, J., delivered the opinion of the court:

Gen. Laws, chap. 62, § 14, as amended by Laws 1881, chap. 58, § 2, requires that every telegraph corporation shall pay an annual tax on the valuation of its property as near as may be in proportion to the taxation of other property throughout the State; and it is made the duty of the State board of equalization to assess the same at the average rate of taxation of other property. Section 8 of the last-named Act requires the assessment to be made and certified to the State treasurer by the 30th day of September, and that the tax shall be paid on or before the 30th day of October, and that all property of the corporation on the 1st day of April preceding shall be liable for its payment. The effect of these provisions is to subject telegraph corporations to the same taxation that other owners of property are required to pay.

Gen. Laws, chap. 57, § 9, provides that "interest at 10 per cent shall be charged upon all taxes not paid on or before the 1st day of December after their assessment, from that date, which shall be collected with said taxes as incident thereto." The plaintiff's taxes for the years 1884 and 1885 were seasonably assessed and duly certified to the State treasurer. Under the provisions of Gen. Laws, chap. 61, § 9, the plaintiff appealed from the assessment to this court, whose duty it is to make such orders as justice requires. On the appeal, it has been adjudicated that the assessment and tax in each

of the years was too large by two fifths, and the same was reduced to three fifths at the June Term, 1886. The plaintiff has not paid, or offered to pay, any part of either tax; and the question is whether it should be required to pay interest under Gen. Laws, chap. 57, § 9, which requires that interest shall be charged and collected on all taxes not paid on or before the 1st day of December after their assessment, as an incident to said taxes. This statute makes the interest a part of the tax to be collected. It would be unjust to require the plaintiff to pay interest on the two fifths that are abated, and that is disallowed. But the plaintiff claims that it should not be required to pay any interest, as the final determination of the assessment was not made until June, 1886, and none could accrue under the statute till the December after; but we think that when the State board of equalization made its assessment and certified it to the State treasurer, it made the assessment required by the statute; and that it was not the intention of the Legislature to give the plaintiff the use of the money justly due the State on or before December 1, 1884 and 1885,—one and two years' interest,—as a compensation for taking the appeal. All other taxpayers either paid their taxes on or before the 1st of December of these years, or became liable to pay interest thereafter, till they did pay them; and justice requires that the plaintiff should pay interest on its just and equal portion of the public burden due the State on or before the 1st of December in each of these years. Had the plaintiff tendered or offered to pay, when due, the sum afterwards found to be its proportional share, and the State had declined or neglected to take the same, a different case would be presented. *Haywood v. Hartshorn*, 55 N. H. 476, 483; *Thompson v. Boston & M. R. R.* 58 N. H. 524. A taxpayer appealing from an excessive assessment may be unable to determine the exact amount which will be found by the appellate court to be his share of the public expense. He may be unable to protect himself against the interest that will accrue after the 1st of December, by paying the exact amount of his tax debt before it is ascertained. But this is not a reason for giving him an exception that is not enjoyed by his neighbors who do not appeal. In an action of contract or tort, the defendant is frequently unable to protect himself against interest and costs, by paying into court the exact amount of damages before they are assessed. The amount he will pay for the purpose of protection is left to his judgment. The appealing taxpayer can protect himself against interest by paying enough of the amount assessed, and afterwards recovering any excess that may be abated.

It is said, however, that if the plaintiff had paid the taxes as first certified, it would have been remediless as to the two fifths abated on the appeal. It is true that the State cannot be sued without its consent; but in the proceedings for abatement provided for in Gen. Laws, chap. 61, § 9, under which the plaintiff takes this appeal, the State voluntarily makes itself the party defendant, subject, like other parties, "to all such orders as to costs and security for costs, and upon all other matters, as justice may require." This gave authority for any

order that justice might require for the satisfaction of any judgment of abatement that the plaintiff should recover in the case. *Edes v. Boardman*, 58 N. H. 580, 585, 586.

The plaintiff is charged with interest on the sum found due, on the appeal of each year, from the December after the assessment was made by the board of equalization, at the rate of 10 per cent.

Case discharged.

All concur.

STATE of New Hampshire

v.
Jacob P. CORBETT.

An indictment charging the prudential committee of a school district with willfully neglecting to give the district clerk the warrant for a district meeting with the affidavit of posting indorsed thereon, as required by Gen. Laws, chap. 87, § 5, is bad if it does not allege that the warrant was duly issued and a copy or copies seasonably posted.

(Coos—Decided March 11, 1887.)

ON demurrer to an indictment. *Demurrer sustained.*

Indictment, under Gen. Laws, chap. 262, § 18, found at the October Term, 1883. The indictment (matters of surplusage being omitted) charges that the respondent, on the 12th day of March, 1883, at Errol, etc., "was prudential committee of school district No. 1, in said Errol, duly qualified to act as such, and, as such committee, it was the duty of said Jacob P. Corbett to call the annual meeting of said school district by issuing his warrant for the same, and posting a copy thereof at the door of the schoolhouse, fourteen days at least prior to the date of the meeting, and to give to the clerk of the district, at or before the time of the meeting, the warrant, with a certificate thereon, verified by oath, that a copy was posted, and at what time and place; * * * yet the said Jacob P. Corbett, prudential committee as aforesaid, willfully neglected to give to the clerk of said district, at or before the time of said meeting, the warrant with the certificate thereon verified by oath that a copy thereof was posted, and at what time and place; * * * contrary to the form of the statute," etc. The respondent demurred.

Messrs. Drew & Jordan for respondent.

Mr. J. H. Dudley, Solicitor for the State.

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Smith, J., delivered the opinion of the court:

It is the duty of the prudential committee to issue his warrant for the annual meeting of his school district, and to post a copy of the same, attested by himself as such committee, upon the door of the schoolhouse, if there be any, otherwise at one or more public places in the district, fourteen days at least prior to the day of the meeting, at any time subsequent to the first Tuesday of January, and prior to the second Tuesday of March. Gen. Laws, chap. 87, §§ 1-3. The warrant, with a certificate thereon verified by oath that a copy was posted, and at what time and place, is required to be given to the clerk of the district at or before the time of the meeting, and he is required to record it in the records of the district. Gen. Laws, chap. 87, § 5. A public officer who willfully neglects any duty of his office forfeits a sum not exceeding \$30, if no other penalty is prescribed by statute for such neglect. Gen. Laws, chap. 262, § 18.

The duty of giving to the clerk of the district, at or before the time of the meeting, the warrant, with the certificate and affidavit indorsed upon it, required by statute, is not in terms imposed upon the prudential committee. But as no other officer is charged with this duty, a reasonable construction of the statute is that the duty is imposed upon the committee. And it is a duty which may be performed by him in person, or he may cause it to be done, as he may post, or cause to be posted, a copy of his warrant.

The indictment does not allege that a warrant was issued, or that a copy was posted. It would be impossible for the committee to certify to the posting of a copy of which there never was an original, or to give to the clerk a warrant that never was issued. An offense is committed if the committee willfully neglects seasonably to issue the warrant and post a copy; or, if that duty has been performed, by his willful neglect seasonably to return "the warrant," with the proper affidavit, to the clerk. The latter offense cannot be committed if the warrant does not exist; hence the necessity for alleging that the warrant was issued. Whether it is necessary to allege the date when the warrant was issued, or the time and place when and where the copy was posted, or the time and place when and where the meeting was called to be held, are questions we need not consider.

Demurrer sustained.

Allen, J., did not sit; the others concurred.

MASSACHUSETTS.

SUPREME JUDICIAL COURT.

John SHEPARD *et al.*

v.

George F. RICHARDSON *et al.*

1. A power of sale and the intervention of trustees do not necessarily take from the court the power to decree a strict foreclosure of a mortgage. Such a security will be presumed to carry with it the usual remedies, unless, by the terms of the instrument, they are excluded or qualified, either expressly or by fair implication.

2. The right to foreclose means, in strictness, the power to cut off a right to redeem given by equity, when, under the condition of the mortgage, the mortgagee's estate has become absolute at law. If the mortgagee's estate never becomes absolute, there never can be a foreclosure. It is not essential that a limit to the time for redemption be expressly fixed, though in some cases it has been held that this omission has left the mortgagee without a foundation for foreclosure.

3. Where certain holders of bonds made by the Boston Water Power Company, brought a bill against the company, and trustees in possession under a deed of trust, claiming that the entry by trustees and their possession for three years had been, in effect, a foreclosure, as provided by statute in case of mortgages, asking either for a decree thus declaring, or that a short day be appointed for the payment of the bonds and coupons, and, in default of such payment, that a foreclosure be then decreed,—*Held*, that, as the indenture fixes no limit, while the land remains unsold, to the mortgagor's right to redeem; and the instrument (which exhibits careful preparation) declares, "It is mutually agreed that, upon the payment of the principal and interest of said bonds, the conveyance herein made, and the estate and interest hereby granted to the party of the second part, shall be void," thus importing a right to avoid the conveyance by payment at any time; and this interpretation is confirmed by a provision that the trustees may "enter upon and take possession of all and singular the granted premises," and "so manage and dispose of the same as shall best enable them to carry out and fulfill the purposes of their trust," and "for the best interests of all parties concerned in the trust hereby created," under which the entry of the trustees is as agents of the mortgagors,—such entry not defeating the scheme for creating new-made land for building purposes and the extension of the city in that direction, but simply transferring the management from the mortgagors to the trustees; the latter being empowered to sell, with the largest discretion as to

quantity, time, notice, and mode of selling, as they might deem reasonable, and "for the best interest of all parties concerned in the trust;" and, although the power of the trustees possibly extends to selling the whole property at once, yet this power to sell is not conferred as a common mortgage power, but stands upon the same footing as their power to complete the filling, as one of the ways in which, as agents of the grantor so long as the default continues, they are to manage and dispose of the property for the best interest of all the parties,—these provisions being followed by the direction that the trustees, after applying surplus proceeds of sales, etc., to the payment of the bonds, "shall restore the residue thereof, and all land, securities, and other properties remaining in their possession after such payment is completed, to the party of the first part; and thereupon this trust shall terminate,"—the whole tenor of the deed is inconsistent with a right on the part of the trustees to foreclose by entry and lapse of time.

(Suffolk—Filed May 9, 1887.)

ON report. *Bill dismissed.*

Bill in equity, brought by John Shepard, the Home National Bank of Brockton, Samuel Knight, Peter W. French, and others, certain bondholders of the Boston Water Power Company, against the company and its present trustees, to have an indenture securing such bonds, treating it as a mortgage, declared to have been foreclosed by an entry and continued possession for three years thereunder.

The instrument declared on is set forth in the opinion of the court in *Foster v. Boston*, 133 Mass. 143, an action by Foster and others, as trustees, to enforce a contract to purchase, as follows:

"The deed is in the form of an indenture between the Boston Water Power Company, a corporation, of the first part, and a party of the second part as trustees, whose successors in the trust the plaintiffs are. It recites that the party of the first part, being possessed of large tracts of land in the Back Bay, so called, in Boston, and being in need of money for the purpose of improving the lands and making them available for sale, and for paying its indebtedness and discharging liens existing upon the lands, proposes to borrow money on the security of the lands, and for that purpose to issue bonds to the amount of \$2,800,000 to be authenticated by a certificate signed by the party of the second part as being secured by the indenture. It next recites the disposition to be made of the bonds; the larger part of which are to be delivered by the corporation to the trustees, to apply, so far as needed, upon certain specified liabilities, and all not used for that purpose to be returned to the corporation; the remainder of the bonds to be applied to the payment of other debts of the corporation, and the discharge of liens on its property, and then to improving, managing, and disposing of the lands, to the expenses of the trust, and the general wants of the corporation. After the recitals, the indenture, 'to the end

that the punctual payment of the bonds so issued, and of the interest thereon, as and when the same shall become due, may be secured, and in consideration of one dollar paid by the party of the second part,' conveys the land to them in fee simple, to hold 'in trust for the intents and purposes, and upon the trusts following.'

The indenture sets forth the trusts as follows:

"1. To permit said party of the first part to remain in the possession and enjoyment of the granted premises, and to improve the same by filling said land and flats, and by laying out streets and avenues thereon, and otherwise making the same available for sale, and to sell and convey the same, and to dispose of the current net revenues and avails thereof in such manner as it shall elect, until and unless default shall be made in the payment of said bonds, or the interest thereon, or any part thereof.

"2. To release, from time to time, from the lien created by this instrument, so that the same may be sold and conveyed free from incumbrance, such portions of said lands as, in the unanimous opinion of said trustees and of the president of said Boston Water Power Company for the time being, may be safely released without impairing the security for the payment of said bonds, either by reason of the receipt of the proceeds of sales by said trustees, or by reason of the increased value of the lands of said corporation by reason of the advance in value, or by reason of the increased value given to the remaining lands by the improvements made thereon by said corporation. And the deed of the said corporation, and the release of the said trustees, both duly executed, shall be conclusive evidence of the unanimous opinion of said trustees, and of said president. And in case said trustees and said president shall not agree, then, upon the application of either, the question of the lands so to be released shall be submitted to and determined by the treasurer of the Commonwealth of Massachusetts for the time being, whose written decision shall be final, and shall direct the action of the trustees thereon.

"3. To receive and invest all sums of money that may be paid them by said party of the first part from the proceeds of sales of said land; and to pay therefrom, from time to time, all interest due, or that may become due, on said bonds, and the expenses of the trust created by this instrument, including the reasonable compensation of the trustees; and to apply the residue to the purchase and cancellation of the bonds secured by this instrument; said purchase to be made at the market value of said bonds, but in no case at a price exceeding the par value thereof and accrued interest.

"4. In case default shall be made in the payment of the bonds issued under this instrument, or any of them, or of any of the interest coupons attached thereto, at any time when and where the same may become due and payable according to the tenor and effect thereof, and for six months thereafter,—then and in that case all of said bonds shall thereupon immediately become due and payable; and the said trustees, and the survivor or survivors of them, and their successors or successor in said

trust, and the survivor or survivors of them, may, and, upon the written request of the holders of at least one-third part of the bonds then outstanding and unpaid, shall enter upon and take possession of all and singular the granted premises, or so much thereof as shall then remain unsold, and all rights of the party of the first part therein, and all obligations and securities which may have been received for any lands conveyed by this instrument that may have been sold; and, as the attorneys in fact, or agents of the party of the first part, shall thereafter, and so long as said default shall continue, so manage and dispose of the same as shall best enable them to carry out and fulfill the purposes of their trust, either by sale or sales thereof in its then existing condition, or by completing the filling said lands and flats, or of such portion thereof as they shall deem expedient, and otherwise improving the same, and thereafter selling the same by public or private sale, upon such notice, in such parcels, at such prices, and upon such terms of payment and security, at such time or times, and in such manner, as they shall deem just and reasonable and for the best interests of all parties concerned in the trust hereby created, with full power to give good and sufficient deeds of conveyance in fee simple for any lands so sold; and, after paying all expenses connected with and incident to the management and care of said property, including the compensation of the trustees and the cost of any improvements that may have been made thereon by them or their agents, shall apply any remaining surplus of the proceeds of any sale or sales made by them, and all other moneys that may have come into their hands as such trustees, or so much thereof as may be needed, to the payment *pro rata* of the principal and interest of all of said bonds then remaining unpaid; and shall restore the residue thereof, and all lands, securities, and other property remaining in their possession after such payment is completed, to the party of the first part; and thereupon this trust shall terminate. And it is further declared that no purchaser under any or either of the foregoing trusts shall be under any obligation to inquire into the necessity or regularity of any sale thereunder, nor see to the application of any of the purchase moneys thereof; but that the receipt of the trustees or trustee for the time being to such purchaser or purchasers, for such purchase moneys, shall be his or their full and effectual acquittance and discharge thereof."

Further facts appear from the opinion.

Messrs. Sidney Bartlett, Robert D. Smith, and N. Matthews, Jr., for complainants:

The complainants contend:

1. That the indenture of June 1, 1874, is a mortgage which may be foreclosed by entry and three years' possession, under Pub. Stat. chap. 181, §§ 1, 2.

2. The lands included in the Francis and Rollins mortgages, by the assignment thereof to the trustees, fell, as between the Water Power Company and the trustees, within the provisions of the indenture of June 1, 1874, and were thereafter subject to precisely the same right of foreclosure.

3. The entry was in two places, in either of which it was proper to make an entry for the purpose of foreclosing the mortgage.

4. The entry made by the trustees upon default, on November 9, 1882, and the certificate thereof, were valid in form and substance to commence a foreclosure under the statute; the entry was not rendered invalid by the declaration of an intention to enter also for all the other purposes for which an entry could be made under the deed.

5. The entry was not rendered vain, or the foreclosure opened, by the acts or words of the trustees or of some of them.

The deed of June 1, 1874, is a conveyance of portions of the grantor's real estate to secure specified sums, not yet due, which the grantor promises to pay with interest at specified times; the grantor has the right of possession until default; and there is a condition of defeasance in the usual form; namely, that the deed shall be void on payment of the debt. The deed therefore falls within the well-recognized definition of a mortgage, and can be foreclosed.

Parks v. Hall, 2 Pick. 211; *Eaton v. Whiting*, 3 Pick. 491; *Shaw v. Norfolk Co. R. R.* 5 Gray, 162; *Haven v. Adams*, 4 Allen, 86; *Haven v. Grand Junction R. R. & D. Co.* 12 Allen, 337; *First Nat. F. Ins. Co. v. Salisbury*, 130 Mass. 308; *Hall v. Sullivan R. R.* 2 Redf. Am. R. R. Cas. 621; *Alexander v. Central R. R.* 3 Dill. 487; *Central Trust Co. v. New York & N. R. R. Co.* 83 Hun, 518; *Cary v. Whiting*, 118 Mass. 364.

This right of foreclosure, never expressed in the deed, is so important that it is held to exist although other machinery for realizing his debt be secured to the mortgagee. All other methods are cumulative merely.

If the deed is a mortgage, the right to foreclose is given by statute, and cannot be taken from the mortgagee, except by express words.

Messrs. John Lowell and Henry D. Hyde, for the Boston Water Power Co., defendant:

The power in the trust deed does not constitute it a power-of-sale mortgage, and subject it to all the statutory incidents of a power-of-sale mortgage.

Is it reasonable to suppose for a moment that the trustees, in order to make a valid sale of the smallest part of said trust property, would be obliged to comply with the specific and carefully drawn provisions of the Public Statutes, and "previous to such sale" cause "notice thereof" to be "published once a week, for three successive weeks, in some newspaper, if there is any, published in the city or town wherein the mortgaged premises are situated, the first publication of such notice to be not less than twenty-one days before the day of sale?"

Pub. Stat. chap. 181, § 17.

Again, if this is to be construed as a power-of-sale mortgage, a single sale would in all legal probability exhaust the power.

Fryer v. Baker, 138 Mass. 459.

If, however, the trust deed is capable of being viewed as a mortgage, it is submitted that it is competent for parties to make any provision enlarging the right of redemption in the mortgagor, and limiting the right of foreclosure, and which shall operate to give the mort-

gagor further time to redeem or avail himself of the equity or surplus in the property.

There are many cases in equity which protect an improvident mortgagor, but none of an opposite character.

In Welsh mortgages, for instance, which, though common in Great Britain, are not so here, but are recognized here as lawful, there is right of redemption, but no right of foreclosure.

Yates v. Hamblly, 2 Atk. 360; *Tenlon v. Curtis*, Younge, 610; *Curtis v. Holcombe*, 6 L. J. N. S. Ch. 156; *Marks v. Pell*, 1 Johns. Ch. 594.

The single course to pursue to avoid all difficulties, and to effectuate and carry out the intention of the trust deed, as declared already by this court, and to do substantial justice to all parties, is to hold that the instrument is a trust deed incapable of a strict foreclosure, or of a foreclosure in any sense, and ordering the trust to be wound up according to its terms.

See *Koch v. Briggs*, 14 Cal. 257; *Sampson v. Pattison*, 1 Hare, 533; *Marvin v. Titworth*, 10 Wis. 320.

The prayer for foreclosure cannot be granted when the mortgage is in the form of a trust, like the one at bar; the decree is always for a sale or sales.

Sweitzer v. Mayhew, 81 Beav. 37, and cases in note; *Jenkin v. Row*, 5 De G. & Sm. 197; *Sampson v. Pattison*, 1 Hare, 533; *Ex parte Pettit*, 2 Glyn & J. 47; *Kirkwood v. Thompson*, 2 Hem. & M. 392, 402, per Wood, V. C.; *Locking v. Parker*, L. R. 8 Ch. 80, 89, per James, L. J.; *Seton*, Decrees, Hunt's ed. 468.

Holmes, J., delivered the opinion of the court:

This is a bill in equity brought by some of the bondholders secured by an indenture sufficiently set forth in *Foster v. Boston*, 133 Mass. 143, against the grantor and trustees, treating the instrument as a mortgage, and praying that it may be declared to have been foreclosed by an entry of the trustees, made more than three years before the filing of the bill, and that the trustees may be ordered to distribute the property among the bondholders; or, if the mortgage is not foreclosed, that a short day of foreclosure may be fixed. The defendant company, among other things, denies that the indenture contemplates or permits a short foreclosure; and, as we are of opinion with it upon this point, it will not be necessary to discuss the other questions which have been raised.

We readily admit that neither the giving of a power of sale, nor the intervention of trustees, nor both together, in a mortgage, necessarily take from the court the power to decree a strict foreclosure (*Shaw v. Norfolk Co. R. R.* 5 Gray, 162; *Hall v. Sullivan R.* 11 L. R. N. S. 188; *S. C.* 2 Redf. Am. R. R. Cas. 621); and that the security will be presumed to give the usual remedies, unless the terms of the instrument exclude them. *Baile v. Lord*, 2 Drury & W. 480, 489. But those remedies may be excluded or qualified by express words or by fair implication, as when it appears that such alone is contemplated. *Locking v. Parker*, L. R. 8 Ch. 80, 89; *Jenkins v. Row*, 5 De G. & Sm. 107; *Sweitzer v. Mayhew*, 81 Beav. 37. There is no danger that mortgagees will be oppressed by mortgagors; and there is no reason for courts undertaking to force rights upon them,

or to do more than to construe the security which they have been content to accept.

Properly speaking, the right to foreclose means the right to cut off a right to redeem given by equity, when, by the condition of the mortgage, the mortgagee's estate has become absolute at law. *Sampson v. Pattison*, 1 Hare, 533, 536; *Koch v. Briggs*, 14 Cal. 256, 262. Where, by the letter of the deed, the mortgagor still has the right to redeem, the mortgagee cannot maintain a bill to foreclose. *Bonham v. Newcomb*, 1 Vern. 232; *S. C.* 2 Vent. 364. If, as in Welsh mortgages, the mortgagee's estate never becomes absolute, there never can be a foreclosure. *Yates v. Hambly*, 2 Atk. 360; *Adams, Eq.* 125, 126. And although the failure expressly to fix a limit to the time for redemption does not necessarily take away the usual remedies (*Baile v. Lord, ubi supra*), in some cases, where no time was fixed by the deed beyond which the mortgagor could not defeat the mortgagee's estate by payment, the foundation for foreclosure has been thought to be wanting. *Tenlon v. Curtis*, Younge, 610.

The indenture before us fixes no limit to the mortgagor's right to redeem while the land remains unsold. It is not a carelessly drawn or imperfect instrument, as in *Baile v. Lord, ubi supra*; and the fact therefore is important. The language is: "It is mutually agreed that, upon payment of the principal and interest of said bonds, the conveyance herein made, and the estate and interest hereby granted, to the party of the second part, shall be void," etc.; not upon payment of the principal and interest of the bonds "according to their tenor," as in 5 Gray, 164. The words used, taken by themselves, import a right to avoid the conveyance by payment at any time; and this interpretation is confirmed by the provision in the fourth article of the trusts (printed in 133 Mass. 145, 146) for the trustees managing the property "so long as said defaults shall continue." These words contemplate the trustees' management as lasting for whatever time may be necessary, however long, until the bonds are paid; not that it shall come to an end in three years by mere lapse of time, if the default continues for that time.

This is the first step. And the whole of the fourth article first mentioned tends the same way. The trust is very like the trusts for sale in the English cases which we have cited, where a foreclosure was held to be excluded. In the next place, the trustees, upon entry, are to manage and dispose of the property as agents of the party of the first part; that is, of the company giving the security. This provision, again, of itself, hardly can be made consistent with an entry to foreclose by lapse of time. For such an entry, as well as the entry provided for in common mortgages, is adverse to the mortgagor. The next thing to be noticed is the peculiar character of the trustees' duties, after they have entered—a peculiarity which was made necessary by the peculiar nature of the property. This was a great tract of land in Boston, mostly covered by water, which was to be filled and made suitable for building purposes and the extension of the city in that direction. If the trustees entered, the scheme was not to be defeated, but simply the management was to be changed. They were to go

on and fill as the company had been doing, and to sell, with the largest discretion as to quantity, time, notice, and mode of sale, as they might deem reasonable and "for the best interest of all parties concerned in the trust."

It is true that the trustees were not bound to complete the filling, and that their power possibly extended to selling the whole property at once; and it may be asked how, when such a power as that was given, any implication can be found against the less stringent power to foreclose by lapse of time. But it will be seen, upon reading the fourth article, that their powers to sell are not the common mortgage powers, but stand alongside of and upon the same footing as does their power to complete the filling, as one of the ways in which, as attorneys and agents of the grantor so long as the default shall continue, they are to manage and dispose of the property for the best interest of all parties. The exercise of a common power of sale may be determined upon without regard to the interests of the mortgagor. A mortgagee's decision to sell or to foreclose is governed by his own interest alone, although in the conduct of it, when decided upon, the mortgagor's interests must be considered also. See *Kirkwood v. Thompson*, 2 Hem. & M. 392, 400.

The effect of the words, "so long as said default shall continue," has been considered already. Finally, it is provided that the trustees, after applying surplus proceeds of sales, etc., to payment of the bonds, "shall restore the residue thereof, and all lands, securities, and other properties remaining in their possession after such payment is completed, to the party of the first part; and thereupon this trust shall terminate." So that the whole plan from beginning to end is the possibly gradual satisfaction of the debt as the new-made land should be gradually sold off for building lots and the plan was to remain the same, whether the company or the trustees carried it out. See *Foster v. Boston, ubi supra*.

Without saying that any one of the considerations which we have mentioned should be conclusive if it stood alone, we are of opinion that the whole tenor of the deed is inconsistent with a right on the part of the trustees to foreclose by entry and lapse of time.

Bill dismissed.

Chester SNOW

v.

John B. ALLEY.

1 The defendant induced the plaintiff to transfer to him 150 bonds of the face value of \$1,000 each, upon his promise to procure the incorporation of the Hattinonic Telegraph System with the Postal Telegraph Company, in which latter plaintiff held large interests; and he had promised to furnish the necessary funds to complete the purchase of the American Wire Factory, and to build a line, according to the Postal Telegraph System from New York to Chicago; and, as a special inducement to the plaintiff to

enter into the contract and deliver the bonds, **he fraudulently promised**, in addition to his undertakings on behalf of the Postal Telegraph Company, that he would purchase from the plaintiff 82 bonds at not less than 50 per cent of their face value, and would lend plaintiff \$20,000 upon other bonds, having no intention of making such purchase or such loan. **In a suit by the plaintiff to rescind on the ground of defendant's refusal to purchase the bonds or make the loan, and after the defendant had fully performed his other undertakings, which had proved of great value to the Postal Telegraph Company,—Held, that the plaintiff could not maintain the suit without placing the defendant in the situation he occupied before the making of the contract.**

2. **When the consideration of the contract is entire, but the promises of the defendant are several, and all of them except one have been performed, even if the promise unperformed was made, wrongfully intending not to perform it, such contract cannot be repudiated and rescinded by the aggrieved party, and all that he conveyed in consideration thereof recovered back, where, from the nature of the things done and contracted to be done by the defendant, restitution, by the plaintiff, of the benefits which he and other parties associated with him have enjoyed, is practically impossible.**

(Barnstable—Filed May 21, 1887.)

ON defendant's exceptions. *Sustained.*

Action of tort to recover the value of certain shares of corporate stock alleged to have been obtained by fraud and converted by defendant.

The facts fully appear from the opinion.

Measrs. James M. Morton and Hosea M. Knowlton, for defendant:

All the familiar badges of fraud are wanting. There were no misrepresentations or lies. There were no confessions by the defendant of wrongdoing. If the facts, all taken together, have any tendency to prove fraud, then any man can go to the jury with such a charge whenever a promise has been made, its performance postponed, and the fact of it finally denied by the maker.

Attwood v. Small, 6 Cl. & F. 282; *Baird v. Mayor*, 96 N. Y. 598.

Even if there is some evidence of fraud, the plaintiff is not entitled, upon the facts, to maintain this action. Trover, in a case like the present, proceeds upon the right of the defrauded party to rescind. By rescinding he becomes entitled to the possession of the property which he has been induced to part with by means of the fraud. But whether the fraud be more or less, in order to rescind the parties must be restored to the position in which they were before the contract was made, so far as any change has been caused by anything done pursuant to the contract. The party rescinding cannot retain any of the property, advantages, or benefits which he has received through

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the contract, and, at the same time, rescind it. The restitution must be entire; and if the situation of the parties has been so far changed, in good faith, that restitution cannot be made, then relief must be sought in some other form of action. The rescission must take place before the action is brought. All this is true whether the action be trover, assumpsit, replevin, ejectment, or any other form which involves the rescission of a contract.

Kerr, Fr. 327, note; Benj. Sales, § 888, note a; *Kimball v. Cunningham*, 4 Mass. 502; *Miner v. Bradley*, 22 Pick. 457; *Thayer v. Turner*, 8 Met. 550; *Morse v. Brackett*, 98 Mass. 205; *Bassett v. Brown*, 105 Mass. 551; *Coolidge v. Brigham*, 1 Met. 547; *Estabrook v. Suttell*, 116 Mass. 808; *Brown v. Hartford F. Ins. Co.* 117 Mass. 479; *Cook v. Gilman*, 84 N. H. 556; *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75; *Cobb v. Hatfield*, 46 N. Y. 583; *Pearson v. Chapin*, 44 Pa. 9; *Poor v. Woodburn*, 25 Va. 284; *McCrillis v. Carlton*, 87 Vt. 139; *Worley v. Moore*, 97 Ind. 15; *Smith v. Brittenham*, 109 Ill. 540; *Herman v. Haffenegger*, 54 Cal. 161; *Potter v. Taggart*, 54 Wis. 395; *Campbell v. Fleming*, 1 Ad. & E. 40; *Hunt v. Silk*, 5 East, 449; *Clarke v. Dickson*, El. B. & E. 148; *Clough v. London & N. W. R. Co.* L. R. 7 Ex. 87; *Cargill v. Bower*, L. R. 10 Ch. D. 503; *West. Bank of Scotland v. Addie*, L. R. 1 Scotch App. 145; *Sheffield Nickel Co. v. Unwin*, L. R. 2 Q. B. 214; *Bisbee v. Ham*, 47 Me. 543.

Whenever a contract is made between parties, it is binding upon them, except in case of fraud practiced by one of them. When such fraud exists, it does not avoid the contract *ab initio*; for the defrauded party may deem it more for his interest to proceed to enforce his contract, notwithstanding the fraud, or at least to go on with the contract, and bring his suit for damages for the fraud. The election is his. But it is one which he must promptly make; and, having once elected in any positive manner, he is bound thereby; and if he affirms the contract, he cannot afterwards avoid it. The justice of this doctrine is apparent. To allow the plaintiff to go on and get all the benefits of the contract, and then annul it and recover back his consideration, would be monstrous.

Clough v. London & N. W. R. Co. L. R. 7 Exch. 29, 35, 36; *Attwood v. Small*, 6 Cl. & F. 282-505; *Metropolitan El. R. Co. v. Manhattan R. Co.* 11 Daly, 873-447.

His election not to rescind may be manifested in various ways. Mere lapse of time, after knowledge of all the facts, may of itself amount to election to affirm.

It is well settled that the election must be made within a reasonable time after the plaintiff acquires knowledge of the alleged fraud, or some fact comes to his knowledge tending to raise a reasonable suspicion of fraud.

Whitcomb v. Denio, 52 Vt. 382; *Hunt v. Hardwick*, 68 Ga. 100; *Leaming v. Wise*, 73 Pa. 173; *Grymes v. Sanders*, 93 U. S. 55 (Bk. 28, L. ed. 798); *Jennings v. Broughton*, 5 De G. M. & G. 125.

Whether the rescission has taken place within a reasonable time is, when the facts are disputed, a question of fact for the jury.

Whitcomb v. Denio, *supra*.

This being an action to recover for the fraud of the defendant, the plaintiff has two burdens

to sustain to maintain his case: (1) he must overcome the presumption of honesty, to which every man is entitled; and (2) he must sustain the ordinary burden of proof upon the evidence, such as is required in every action of contract where no questions of honesty are involved.

Hatch v. Bayley, 12 Cush. 27.

Messrs. George O. Shattuck and H. P. Harriman, for plaintiff:

The ruling of the court that, if several considerations furnished the influence under which the bonds were surrendered, and that, if the jury could not find that any one was material apart from the rest, they must find that all were fraudulently made; but that, if any one of the considerations had a material influence in inducing the plaintiff to part with his bonds, and if, without it, he could not have parted with them, and the jury found this consideration was fraudulent, the plaintiff could recover,—was correct.

Matthews v. Bliss, 22 Pick. 48, 58; *Safford v. Grout*, 120 Mass. 20; *Nicol's Case*, 8 De G. & J. 387, 423, 489.

The contention of the defendant may be that a fraud of this nature will be a sufficient ground for an action on the case for deceit, but not for a rescission of the contract and an action of trover.

The true doctrine is stated in *Olermont v. Tasburgh*, 1 Jac. & W. 112: The effect of partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the party who practices it.

In *Kennedy v. Panama, etc. Mail Co.* L. R. 2 Q. B. 579, 586, Blackburn, J., says: "There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be, and what was taken, so as to constitute a failure of consideration."

It will be found that in many of the cases of rescission a part of the consideration was *bona fide*.

Clough v. London & N. W. R. Co. L. R. 7 Exch. 26; *Stevens v. Austin*, 1 Met. 557.

In most cases of fraud by irresponsible parties, the only effective remedy is by rescission. A defrauded party cannot be deprived of this remedy simply because some true representations accompany those which are false.

Richards v. Todd, 127 Mass. 167; Benj. Sales, 4th Am. ed. § 429, note b, and cases cited.

In the eighth prayer, the defendant asked the court to rule, in substance, that the plaintiff cannot recover in trover for the bonds until all the money which the defendant invested in the construction company, or lent to the Postal Telegraph Company, or to Gray for its benefit, has been repaid.

In the ninth prayer, the defendant requested the court to rule, in substance, that the plaintiff cannot maintain this action until all the benefits which the Postal Telegraph Company has received, or which the plaintiff has received on the enhanced value of his stock and bonds by reason of the defendant's acts, have been restored to him.

The *in statu quo* doctrine for which the defendant contends in these prayers has no foundation in authority or reason, as applied to cases of fraud.

"Fraud renders all contracts voidable *ab initio*, both at law and in equity. No man is bound by a bargain into which he has been deceived by a fraud, because assent is necessary to a valid contract; and there is no real assent when fraud and deception have been used as instruments to control the will and influence the assent."

Benj. Sales, § 428.

The mere election to rescind avoids the contract.

"Rescission is the legal consequence of his [the defrauded party's] election to reject it." Id. § 443.

In *Clough v. London & N. W. R. Co.* L. R. 7 Exch. 26, it was held that the vendor's election to rescind might be first made in a plea claiming the goods on the ground of fraud, and that there was no necessity for any antecedent declaration or act *in passu*.

Thurston v. Blanchard, 22 Pick. 18.

In case the suit for the recovery of the property obtained by fraud is against a third party who has acquired the title with knowledge of the fraud, no restoration of anything is necessary before recovery.

Stevens v. Austin, 1 Met. 557; *Manning v. Albee*, 11 Allen, 520; *S. C.* 14 Allen, 7; *Clough v. London & N. W. R. Co.* L. R. 7 Exch. 26; Benj. Sales, § 442.

But in case the suit is between the original parties, to prevent circuity of action, restoration is required before a recovery can be had.

In *Thayer v. Turner*, 8 Met. 550, Shaw, Ch. J., said: "The reason of this rule is that the plaintiff shall, so far as it is in his power, put the defendant *in statu quo* by restoring and revesting his former property in him without putting him to an action to recover it, before he can exercise his own right to take back the property sold, or bring an action for it."

Kimball v. Cunningham, 4 Mass. 505, gives the reason for the rule: "For he shall not compel even the fraudulent seller to an action to recover back the property he has parted with in the exchange."

When property has passed, under a contract, to the defrauded party, the legal effect of rescission is to revest the title to it in the parties to whom it belonged before the making of the contract.

Evans v. Gale, 17 N. H. 573.

In *Richards v. Todd*, 127 Mass. 167, Morton, J., said: "The effect of Todd's election to avoid the contract of partnership for the fraud practiced on him is that, as between the parties, there has never existed any copartnership."

The doctrine of restoration in case of fraud, exactly stated, is that the party defrauded, having in his possession any property the title to which the act of rescission has revested in

the wrongdoer, shall restore it to him. The words "*in statu quo*" are not used by the best recent writers in this connection.

The right of the wrongdoer to a restoration is not founded on any equitable right to be made whole or indemnified against loss in consequence of his fraud, but upon a right to have restored to him what he delivered to the innocent party, which the act of rescission has re-vested in him. The right of rescission is not defeated if the thing to be restored has become depreciated or worthless.

Neblett v. Macfarland, 92 U. S. 101 (Bk. 23, L. ed. 471); *Guckenheimer v. Angevine*, 81 N. Y. 394.

Masson v. Bovet, 1 Denio, 69, 74; Kerr, Fr. 337, approving *Masson v. Bovet*; *Cohen v. Ellis*, 16 Abb. N. C. 320, 349; *Downer v. Smith*, 32 Vt. 1; *Whitcomb v. Denio*, 52 Vt. 883; *Hammond v. Pennock*, 61 N. Y. 145; *Holbrook v. Burt*, 23 Pick. 546; *Milliken v. Thorndike*, 103 Mass. 383; *Faulkner v. Klamp*, 20 N. W. Rep. 320; *Blake v. Movatt*, 21 Beav. 608, 613.

The defendant says he ought not to restore what he obtained by fraud, unless the plaintiff will indemnify him against loss in the common enterprise, and pay over to him, and cause the company to pay over to him, any increased value in their securities which his connection with the enterprise may have caused. This claim is so remarkable that it does not appear to have been made before, and has not been in terms passed upon. But there are numerous cases in which such claims have been ignored.

Richards v. Todd, 127 Mass. 167; *Ravolins v. Wickham*, 3 De G. & J. 321; *Garner v. Mangam*, 93 N. Y. 642; *Metropolitan El. R. Co. v. Manhattan R. Co.* 14 Abb. N. C. 231; *Cohen v. Ellis*, 16 Abb. N. C. 320, 349; *Blake v. Movatt*, 21 Beav. 608; *Yeoman v. Lasley*, 40 Ohio St. 190.

When this contract was made, it was voidable, because all contracts induced by fraud are voidable. As long as it remained executory on the part of the defendant, the *status quo* was unchanged. As soon as the defendant made his loans and advances for the benefit of the Postal Telegraph Company it became impossible for the plaintiff to restore the *status quo*. The defendant contends that that makes avoidance impossible. That is to say, the fraudulent party, with his eyes open, may, by his own acts, prevent avoidance, when the defrauded party has done nothing and is not in fault. The true rule is that, when a contract is induced by fraud, avoidance becomes impossible only when (1) the defrauded party, knowing of the fraud, affirms the contract; (2) the defrauded party disables himself from restoring what he has received; (3) the rights of innocent third parties intervene.

Clough v. London & N. W. R. Co. L. R. 7 Exch. 26; Kerr, Fr. 43, 336, 337; Benj. Sales, § 453.

It has sometimes been said that there can be no rescission unless the parties can be restored to their original position; but no decision can be found in support of a proposition as broad as that. The cases have gone no further than to hold that, if the innocent party, by his own act, has put it out of his power to restore what he received, he cannot rescind.

Cases cited *supra*; *Urquhart v. McPherson*, 2 Mass.

L. R. 3 App. Cas. 831; *Clarke v. Dickson*, 1 El. B. & E. 148.

The defendant, having obtained the 150 bonds by fraud, is estopped against alleging that he was induced by the receipt of them to make the loans and investments for the benefit of the Postal Telegraph Company.

Devens, J., delivered the opinion of the court:

This is an action of tort to recover in trover from the defendant the value of 150 Postal Telegraph bonds of the par value of \$1,000 each, alleged to have been converted by the defendant, on the ground that they were obtained by fraud. The declaration and answers are made part of these exceptions.

In the summer of 1881 the plaintiff, with certain persons named Roberts, Cummings, and others, organized in New York a corporation called the Postal Telegraph Company. The original capital was \$30,000. At the time of the organization of the company, the plaintiff was interested in, and owner of, certain patents appertaining to telegraphy, and was in possession of a bond for a deed of a certain factory, situated at Ansonia, Conn., belonging to Wallace & Sons, and used for the purpose of manufacturing a patent telegraphic wire formed by the deposit of copper around a steel core, to which the plaintiff's patents related. Ninety thousand dollars had been paid by the plaintiff's associates toward the purchase of this wire factory, in consideration of which the bond had been given. None of this sum had been contributed by the plaintiff. The Postal Telegraph Company was organized for the purpose of acquiring the factory and patents aforesaid; also a system of telegraphy, invented by Professor Gray, called the Harmonic, another system called the Leggo Automatic; and to build a line from Chicago to New York for the purpose of testing these inventions, which, it was believed, if successful, would revolutionize telegraphy, and furnish a much cheaper system than the one in use. At the time of the organization of the company, the plaintiff was one of the organizers, and a member of the company. For the purpose of acquiring these patents and properties, and raising the money to build the line to Chicago, and between all important cities in the United States, it was agreed between the parties in interest, including the plaintiff, but not the defendant, in the fall of 1881, that the capital stock should be increased to \$21,000,000, and that the property should be mortgaged to the Farmers' Loan & Trust Company of New York, to secure the payment of \$10,000,000 of bonds of the par value of \$1,000 each, to be issued by the Postal Telegraph Company. The vote to increase the capital stock and authorize the issue of the bonds was not actually passed until March 9, 1882, after the defendant had become interested in the corporation. The enterprise was substantially at a stand for want of means, when, on the 25th of February, 1882, Roberts, Cummings, and others, with the knowledge of the plaintiff, visited the defendant at Washington, to enlist him in the scheme, and get him to invest his money and use his influence in favor of the company,—the parties relied on to fur-

nish funds to carry on the Postal Telegraph enterprises having declined to go further. This was the first connection which the defendant had with the promoters of the Postal Telegraph Company, although he had previously become interested in the Harmonic System. The defendant, at this interview, agreed orally to come into the enterprise, and help carry out the arrangements previously made with Snow and others, if, on investigation, it appeared favorable, and satisfactory arrangements could be made. Subsequently, on the 7th and 8th of March, an interview was held at New York, between the plaintiff, defendant, Roberts, Cummings, and others, in which the defendant finally agreed to come in and use his efforts in behalf of the enterprise; and to subscribe \$100,000 to a construction company to be formed for the purpose of building a line to Chicago; and to lend the Postal Telegraph Company \$100,000, and more if necessary (Roberts subscribing and lending an equal amount); and to use his efforts to advance, equally with Roberts, the money necessary to complete the payment due from the Postal Telegraph Company for the wire factory, which was then supposed to be about \$280,000, but which, by agreement with Wallace & Sons, was afterward reduced to \$160,000 and interest; to advance to Elisha Gray, or for his account, what money was necessary to free the Harmonic from certain liens and pledges to which it was subject, and to put it into the Postal Telegraph Company free from such liens and pledges. There was testimony tending to show that the 150 bonds which are the subject of this suit were given defendant by plaintiff as a bonus to induce the defendant to come into the enterprise, and do the above things, and for all the advantages he was going to be to the Postal Telegraph Company, and for the risk which he was to incur; and that the agreement on the part of the defendant to do the above things was the consideration which induced the plaintiff to give the defendant the bonds. There was no evidence tending to show that the defendant lost any money, or made any money, by reason of his doing anything which he promised to do, or did, in connection with the Postal Telegraph Company, or by his connection with these enterprises. The plaintiff testified that he declined to give the bonds for the foregoing considerations solely, but that it was further agreed that no bonds should be sold till the line was completed to Chicago, and that he (defendant) would buy 32 bonds of him (plaintiff), and pay him fifty cents on the dollar for the same, and lend him \$20,000 on other bonds than the 32 or 150 aforesaid; and this agreement was part of the consideration for the 150 bonds. The making of this last agreement was denied by the defendant, who testified that he never intended to lend the plaintiff any money on bonds, or buy any of the plaintiff's bonds, as the plaintiff had testified, because he never promised to do so. The things which the defendant and those associated with him were to do were relied upon to enhance the value of the bonds and stock; and there was evidence offered by the defendant tending to show that what he did

enhanced the market value of the stock and bonds of the Postal Telegraph Company.

The defendant did not claim, and there was no evidence tending to show, that he had lent or otherwise given any money or other property directly to the plaintiff for the 150 bonds; but the defendant claimed that the consideration for the same was the advantage which the defendant was to be to the Postal Telegraph Company, the things he was to do for it, the advances and subscriptions he was to make, the risk incurred thereby, and the enhanced value of the bonds and stock which would result to the plaintiff. The success of the Postal Company, and the value of its bonds and stock, depended on its ability to purchase the wire factory at Ansonia and build the line to Chicago. There was no dispute but that the defendant had fully performed all the agreements made by him, and in consideration of which he had received the 150 bonds now in controversy, unless he had also agreed to lend the plaintiff the sum of \$20,000 and purchase of him the 32 bonds at not less than fifty cents on the dollar, fraudulently intending not to do so. As the agreement in regard to the loan and purchase of bonds was distinctly denied by defendant, it was a denial by necessary inference that he fraudulently intended not to keep such an agreement.

The defendant, by his eighth and ninth requests, asked the learned chief justice of the superior court, who presided at the trial, to instruct the jury: "If the parties entered into a contract by which the defendant agreed to advance money, by way of loan or otherwise, either to Professor Gray or to the Postal Telegraph Company, or for the construction of a telegraph line, or for the purchase of a factory at Ansonia, or for any other purpose, and the defendant did thereupon loan or advance any substantial part of the money he agreed to loan or advance, and said loans or advances have not, before the commencement of this suit, been repaid to the defendant, the contract is not rescinded, and this action for the bonds cannot be maintained. * * * The plaintiff cannot maintain this action while any part of the contract, so far as the same has been performed in whole or in part by the defendant, has not been rescinded. He cannot avail himself, for his own use or that of the company in whose behalf he was contracting, of the defendant's advances, or of the benefit of the defendant's acts, and, at the same time, recover back the consideration for these advances or acts, in this action."

Without now considering whether the jury was justified in so finding, we assume, for the purposes of the present discussion solely, that the defendant did promise as the plaintiff alleged, and that he fraudulently intended not to keep the promise, so far as the loan of \$20,000 and the purchase of the 32 bonds are concerned. The learned judge declined to give the instructions above stated, which had been requested by the defendant. He states the four considerations upon which the evidence tended to show that the plaintiff was induced to part with his bonds, namely: "That the defendant was to furnish or procure money as to cause the incorporation of the Harmonic

Telegraph Company with the Postal Telegraph Company;" "that the defendant should furnish or procure money for the Ansonia Factory;" that the defendant should build, or cause to be built, a line, according to the postal telegraph system, to Chicago." "Apparently," he adds, "there is no dispute that these three considerations enter into the arrangement by which these bonds passed from the plaintiff to the defendant." He then proceeds to the inquiry whether there was a fourth consideration in the proposed loan and purchase of bonds; and, after instructing the jury as to the rule which should govern in determining whether there was any such, continues: "If the fourth consideration is proved, and you are satisfied that it had a material influence in inducing this party to surrender his bonds; in other words, that, unless the defendant had promised to buy 32 bonds at \$500 a bond, and loan \$30,000, he would not have given him the bonds,—if you should be satisfied of that, and that there was a fraud in the promise,—then the plaintiff might recover, notwithstanding those other considerations combined with this to induce him to give up the bonds."

It is conceded by the plaintiff in his argument that "it must also, under the ruling of the court, for the purposes of this inquiry, be assumed that the promises for the benefit of the Postal Telegraph Company had some influence in inducing the plaintiff to part with his bonds; that those promises were made in good faith, and have, to some extent at least, been performed by the making of loans and advances, and that all of said loans and advances had not, before the commencement of this suit, been repaid to the defendant."

The right to rescind or avoid a contract proceeds upon the ground that a party has been fraudulently betrayed into making it, and, having thus been induced to part with his own property, may resume possession of it on returning that which he has himself received, and thus placing the other party in the same position that he was in before the contract was made. If that which he returns is diminished in value by natural causes, or in the ordinary and proper use of it, he may still return it, as in such case, the contract being rescinded, such diminution is the loss of the original owner. *Res perit domino*. But if it be injured by his own negligence, he cannot return it; and his right to rescind the contract is gone. Where property is entirely worthless, it need not indeed be returned; but so strictly has this rule been held that articles which are of the slightest value, or the loss of which may be a disadvantage in any way, must be returned, even if they have no intrinsic or no market value,—as the casks containing worthless lime, or the sacks which had been on rejected bales of cotton. *Bassett v. Brown*, 105 Mass. 551; *Conner v. Henderson*, 15 Mass. 319; *Morse v. Brackett*, 98 Mass. 205; *Estabrook v. Sweet*, 116 Mass. 308.

Where the note of a party against whom a rescission of a contract is claimed has been given to the rescinding party, it is sufficient, indeed, for the latter to tender a return of it at the trial, for, as between the parties to it, this is not property, but a promise only. *Thurston* 2 MASS.

v. Blanchard, 22 Pick. 18; *Bridge v. Batchelder*, 9 Allen, 394.

Where property also has passed into the possession of a party cognizant of the fraud, it may be reclaimed without proving that the defrauding party has been restored to his original position. In such case the party in possession of the property known by him to have been obtained by fraud is not in a position to raise the question whether restoration has been made or not. This is *res inter alios*, with which he has no concern, and irrelevant to the issue at the trial. *Stevens v. Austin*, 1 Met. 557; *Manning v. Albee*, 11 Allen, 520; *S. C.* 14 Allen, 7.

If a wrongdoer who has obtained property by fraud has made expenditures upon it, enhancing its value, he has no claim for these against one who, by reason of the fraud practiced upon him, is entitled to demand its restitution, and who himself restores all which he has received, or tenders the restoration of it, when he rescinds the contract. In such case the wrongdoer is in a situation analogous to that of a trespasser who wrongfully converts a chattel and increases its value by labor bestowed upon it. *Guckenheimer v. Angevine*, 81 N. Y. 394.

In the case at bar the parties to the original contract are before us. There was no attempt to place the defendant in the position in which he was before the contract; and the claim of the plaintiff is that he may avail himself of all the advances made by defendant in subscriptions and loans; of his efforts to interest others in the Postal Company; and of his services as its treasurer, the result of all which, as there was evidence tending to show, was largely to increase the value of the stock and bonds in which the plaintiff had an interest, so far as nominal values are concerned, of over \$3,000,000; and that he may recover from the defendant the full value of the 150 bonds which he gave him in consideration that the defendant would do these things,—upon the ground that the defendant also promised to loan \$20,000 and purchase, for \$16,000, 32 bonds, not performing, and fraudulently intending not to perform, this latter promise, it being one of the inducements to the contract. That if, in any particular, the defendant has failed to perform the contract which he made, intending not to perform it, the law will give the plaintiff a remedy by an action for deceit, in which the damages will be appropriate to the injury he has suffered, is readily conceded. It is quite a different proposition that the plaintiff may enjoy all the benefits he has received from the performance of a contract in its three most important particulars, and yet, retaining all these benefits, may abrogate it entirely on the failure of the other party to perform in a single particular, and may treat as his own, and thus recover, all the property which he has transferred in consideration of the contract.

While the loans and advances made by defendant were not repaid him,—which apparently might have been done,—it is obvious also that there was an impossibility in restoring him to his original position in other respects, even if, as to these, it was possible. The risks he had run by the loans and advances made by him; the exertions he had made; and the success of

those exertions in inducing others to make loans or subscriptions; the results he had achieved by which the immense block of Postal Telegraph Company stock and bonds belonging to plaintiff had been largely increased in market value,—could not have been adjusted and paid for by any satisfactory or practicable scheme of compensation.

It is not, in our view, important that the acts which the defendant was to do (with the exception of the alleged loan to plaintiff, and purchase of his bonds) were all to be done, and were in fact all done, immediately for the benefit of the Postal Company, and not for that of the plaintiff individually. The large interest which the plaintiff had in this company caused such acts, if successful in their results, to enure to the plaintiff's benefit; and this to the extent that he was interested therein. They were done also in carrying out the contract made with the plaintiff as he had seen fit to make it. Even if the considerations which an alleged defrauding party performs go to the benefit of an independent third party, they would not be the less, on that account, good and sufficient considerations to support the contract made by the alleged defrauded party, if they thus went in pursuance of the agreement and at his request. *Hubon v. Park*, 116 Mass. 541; *Turner v. Rogers*, 121 Mass. 12; *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528.

The contention of the plaintiff is that when the consideration of a contract is entire, but the promises by the defendant are several, and all of them except one have been honestly performed, if the promise unperformed was made wrongfully, intending not to perform it, such contract may be repudiated and rescinded by the aggrieved party, and all that he conveyed in consideration thereof recovered back without restitution, on his own part, of the benefits he, with the other parties associated with him, has enjoyed, if such restitution, from the nature of the things done and contracted to be done by defendant, is practically impossible. He urges that it is only when the injured party, by his own act, has put it out of his power to restore what he has received that he cannot rescind his contract.

The rule, as it has been repeatedly stated, is much narrower than this; nor have we found it anywhere judicially stated with the limitation which the plaintiff would place upon it. Indeed, the careful research of counsel on either side has not brought before us any case where the precise question now raised has been distinctly adjudicated, unless it be the case, *Metropolitan El. R. Co. v. Manhattan R. Co.*, which is to be found in 11 Daly, 488, also 14 Abb. N. C. 231. This is not a decision of the highest court of the State of New York, but it certainly does not favor the plaintiff's contention, as it is there held that where a party has, without any knowledge of any intention to rescind, and for no ulterior purpose, acted upon the faith of the agreement, and has lost rights thereby, and such rights cannot be restored, the injured parties can obtain no relief except through such reparation as an action at law to recover damages will afford.

There are a large number of cases in which it is not only said, but held, that, where resti-

tution cannot be made, the party injured must seek his remedy in some other way than by rescission of the contract; and that an action of damages for the deceit practiced upon him would afford an ample remedy to which he would unquestionably be entitled. These cases do not, however, appear to have contained this element,—that the benefit received by the party defrauded has been received in such form that, from its nature, it could not have been returned. *Bassett v. Brown*, *ubi supra*; *Estabrook v. Sweet*, 116 Mass. 308; *Cook v. Gilman*, 34 N. H. 556; *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75; *Worley v. Moore*, 97 Ind. 15; *Smith v. Brittenham*, 109 Ill. 540; *Potter v. Taggart*, 54 Wis. 895; *Biabe v. Ham*, 47 Me. 548.

The rule, as given by most eminent judges, certainly excludes the plaintiff in the case at bar from any right to rescind his contract, or to recover, in the form of action he has adopted, the value of the property he has parted with, and compels him to seek his remedy by an appropriate action for the injury he has sustained by the alleged failure of the defendant to make the loan and purchase contracted for. That in such action the rule of damages would be entirely different from that adopted in the case at bar is readily seen, as in such action he could recover damages only for the injury he had actually sustained; while he has been permitted to recover, as the case was submitted to the jury, for the full value of all the bonds he parted with, no regard being had to the benefits he had received from the performance of the contract so far as the defendant had actually performed it, or to the burden which the defendant had necessarily sustained in such performance. "Where a contract is to be rescinded at all, it must be rescinded *in toto*," says *Lord Ellenborough*, in *Hunt v. Silk*, 5 East, 449, "and the parties put *in statu quo*." That this was a correct statement of the principles upon which the right to rescind a contract must rest has never been questioned, and it has often been adopted *in verbis*.

"When it is once settled that a contract induced by fraud," says *Mr. Justice Crompton*, in *Clarke v. Dickson*, 1 El. B. & E. 148, "is not void, but voidable at the option of the party defrauded, it seems to me to follow that, when a party exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract." This expression is quoted, and its principle adopted, by *Lord Cranworth*, in *Urquhart v. McPherson*, L. R. 3 App. Cas. 831.

West. Bank of Scotland v. Addie, L. R. 1 Scotch App. 145, was a case where the shares which were the object of an alleged fraudulent sale had been changed into those of a differently constituted company. Originally they were shares in an unincorporated company, which had afterwards become an incorporated one, with the usual statutory incidents. It was held that there could be no rescission of the contract on account of the impossibility of returning that which the injured party had received, and that he must seek his remedy by action against those who had deceived him. If the shares had simply depreciated in value, they would still have been the same, and

might have been returned. The case also affirmed that of *Clarks v. Dickson*, *ubi supra*, and the language of *Mr. Justice Crompton* is again quoted.

In *Sheffield Nickel Co. v. Unwin*, L. R. 2 Q. B. 214, it is said by *Mr. Justice Lush* that "a contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*. For a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all, but the party complaining of the nonperformance must resort to an action for damages." Without quoting numerous other instances, both in England and in this country, in which the principle that contracts may be rescinded where fraud has been committed has been said by eminent judges to rest upon the fact that the parties can be restored to their original *status*, it is to be observed that the rule has always thus been stated in the decisions of this court. It is said by *Chief Justice Shaw*, in *Perley v. Balch*, 28 Pick. 286, where the controversy was as to certain goods alleged to have been sold under false and fraudulent representations: "The purchaser cannot derive any benefit from the purchase, and yet rescind the contract. It must be nullified *in toto*, or not at all. It cannot be enforced in part and rescinded in part. And if the property would be of any benefit to the seller, he is equally bound to return it. He who would rescind a contract must put the other party in as good a situation as he was before; otherwise he cannot do it." A similar statement is made by *Chief Justice Shaw*, in *Thayer v. Turner*, 8 Met. 550.

"A contract," says *Mr. Justice Wilde*, in *Coolidge v. Brigham*, 1 Met. 547, "cannot be rescinded as to one of the parties for the default of the other, unless both of them can be put in the same state as before the contract. It cannot be rescinded as to one of the parties, and remain in force as to the other. It must be rescinded *in toto*." In *Morse v. Brackett*, 98 Mass. 205, *Chief Justice Bigelow* remarked: "This case comes within the familiar principle that no contract can be rescinded unless both parties can be restored to the condition in which they were before the contract was made. The party cannot insist on the validity of the contract as to one portion of the subject-matter, and claim to set it aside or avoid it as to the residue." See also remarks of *Foster, J.*, in the same case, and *Wells, J.*, in *Bassett v. Brown*, *ubi supra*.

The plaintiff relies much on the case of *Mason v. Bovee*, 1 Denio, 74, and especially upon the language there used,—“that the law cares little what the fraudulent party's loss may be.” In that case the rescinding party had restored to the defrauding party all that he who had received; and the general rule that he would rescind a contract must return, or offer to return, all that he has received, is distinctly recognized. All that the case decides is that, if the effect of such restoration is not to extricate the defrauding party from the condition in which he finds himself by reason of his fraud, he has no ground of complaint. In *Hammond v. Pennock*, 61 N. Y. 145, where this case is quoted with approbation, it was decided that the defrauding party could not prevent a rescission

of the contract, because, after making it, he had himself done that which prevented his being restored to his original position. In that case he had sold and contracted to sell some of the land which was the subject of the contract; and it was held that, in a suit in equity, he might be compelled to transfer such of the land as had not been sold, the proceeds of such as had been sold, and to account for the proceeds so far as they could then be traced. In neither case was the defrauded party released from his obligation to restore all that he had received. The other party was thus placed in the same condition that he was in before the transaction, so far as the two parties were concerned. Even if the effect of this restoration had not been, by reason of difficulties which the fraudulent party had himself created, and which were not things done in pursuance of the contract, to extricate him from all the embarrassments in which he had involved himself, the other had still relinquished all the benefits which he, or others acting with him, had received by virtue of the contract; and the defrauding party had been restored to the position in which he was before the contract made, so far as any change had been caused by that which had been done pursuant to the contract.

We are of opinion that, independent of the authority upon the subject, the position that the avoidance of a contract becomes impossible only when the defrauded party has disabled himself from restoring what he has received,—as by conveyance thereof,—cannot be sustained upon grounds of reason and justice. We cannot hold that he may retain the benefits of such a contract, whether received by himself or those in behalf of whom he acts, if it becomes practically impossible to reinstate the defrauding party in his original position by restoring what has been received; and that, having annulled the contract without such restoration, he may recover back all that he parted with, if the other party to the contract has in any particular fraudulently failed in the performance of that which was an inducement to the contract. It is quite certain that the learned court which used the expression on which the plaintiff has much insisted,—“The law cares little what the fraudulent party's loss may be,”—could not have intended thereby to say that a party, however fraudulent his conduct may have been, was not to be dealt with fairly. No man, however wrongly he may have conducted, is without the pale of the law or beyond its protection; nor can fraud or wrong ever be righted by injustice. *Pearson v. Chapin*, 44 Pa. 9.

It is not through any action of the defendant that the plaintiff is unable to return the benefits he and the company in which he is so deeply interested have received from the moneys and the exertions of the defendant. The difficulty arises from the highly complicated series of transactions into which they mutually entered, and the magnitude of the enterprise in which they, by mutual agreement, embarked. The plaintiff was not brought into the Postal Company and other collateral schemes by the defendant, or induced by him to receive the loans, advances, subscriptions, etc., which the defendant agreed to make, and has made, as

the consideration (or part of the consideration) for which he was to receive the 150 bonds. It was the plaintiff and his associates who induced the defendant to come in and interest himself in their enterprise. If in any particular the defendant has fraudulently failed to perform his contract, it is altogether just that he should pay to the other party the damage he has occasioned by such failure; but there is no reason why he should be further liable than this. A civil proceeding is not intended to inflict punishment upon anyone; still less a punishment which shall enure to the advantage of another who has been sufficiently protected when he has received full indemnity for all the injury he has suffered. When such an one has been injured in but a single subordinate particular of his contract, he should not, for that reason, reap all the other benefits of it without any compensation. Nor could any punishment be more capricious than that which would thus be inflicted upon the wrongdoer. It would be the same whether his wrongful conduct related to a great or small amount. Indeed, the smaller his fault proportionately, the larger would be his punishment, as he would thus lose the benefit of more that had been honestly and faithfully done by him. No matter how small the fraudulent promise made and not performed (if it were still appreciable as an inducement to the contract), it would cause him to forfeit the whole value he had expended, even if it amounted to many thousands of dollars.

The case at bar itself affords a sufficient illustration of how harshly the rule would work which would permit an entire contract, involving many particulars, to be rescinded because, in some detail, it was fraudulently unperformed. The defendant was to furnish or raise money so as to procure the incorporation of the Harmonic Telegraph System with the Postal Telegraph Company; he was to furnish or procure the money for the purchase of the Ansonia Wire Factory; was to build, or cause to be built, a line, according to the Postal Telegraph System, to Chicago. All this involved large sums of money and great exertions. But he has failed to purchase the 82 bonds of plaintiff at 50 per cent, and to lend plaintiff \$20,000 according to the verdict of the jury, in fraudulent violation of his contract. For this failure, involving at its outside limit (if the loan was never repaid, and the bonds were utterly worthless) \$36,000, the rule for which the plaintiff contends requires that the defendant should forfeit, for the benefit of the plaintiff, the 150 bonds given in consideration of all defendant was to do; which bonds the jury have estimated in value at over \$100,000. According to this rule, the result would also be the same, and the defendant would alike forfeit the whole, if he had agreed to purchase a single bond for \$500, or any other substantial sum, if such agreement had been an inducement to the contract. This is to allow a defrauded party to recover far more than the amount of any injury that can possibly have been inflicted upon him, and is not consistent with justice.

We are of opinion, therefore, that the learned judge erred in instructing the jury that if they were satisfied that, "unless the defendant had

promised to buy the 82 bonds at \$500 a bond and loan him \$20,000, he would not have given him the bonds, this promise being made fraudulently, the defendant intending not to keep it, the plaintiff would be entitled to recover, notwithstanding the other considerations which had been fully and honestly performed combined with this to induce him to give the bonds." The defendant was entitled to an instruction, in substance, that, if several distinct considerations entered into the contract to induce the plaintiff to part with the bonds, and that three of these had been fully and honestly performed by the loans and advances made by the defendant, the plaintiff could not rescind the contract and maintain an action for the full value of the bonds, unless upon repayment of the sums which the defendant had lent or advanced; and, further, that if it was impossible, from the nature of the transactions, to restore the defendant to the condition in which he was before the contract, the plaintiff could not avail himself of the benefit of the loans, advances, services, and other acts rendered either to himself or to the company for whom he acted, and, at the same time, rescind the contract and recover back the consideration for these loans, advances, and services; but must seek his remedy in damages for the injury he had sustained by the wrongful and fraudulent failure of the defendant to perform the contract for the loan and purchase, which was the fourth consideration.

For the reasons already given, the exceptions to the rulings and refusals to rule in regard to this matter must be sustained.

The defendant has strongly urged that the finding of the jury that he ever made any promise to make the alleged loan or purchase of bonds was not justified by the evidence offered, and which has been reported. As we have assumed that the jury might rightfully have found that he did make such promise, and have further held that, even if this was the case, he was entitled substantially to the ruling requested by him, it is not necessary now to consider this inquiry.

Whatever form the litigation on this subject may hereafter take, it is more than probable that the evidence at a subsequent trial will vary in a greater or less degree from that which is now before us. It would not be profitable, therefore, to discuss it in its present aspect, and might embarrass any subsequent examination of the facts. The same remarks are applicable to the position taken by the defendant that the plaintiff, with full knowledge that the defendant entirely repudiated any agreement for a loan or a purchase of bonds, still went on with the contract, and continued to receive benefit from subsequent services and advances of the defendant; and the further position that the plaintiff has, for a sufficient consideration, released any claim for damages by reason thereof to the defendant.

Other exceptions were taken to the ruling of the learned judge. Some of them naturally grow out of the theory upon which the case was tried, which we have held to be erroneous. None of them require present discussion.

Exceptions sustained.

Frank E. DOWNER

v.

Daniel B. WHITTIER.

1. **Plaintiff held a note of defendant's, with certain shares of stock in a company of which defendant was treasurer as collateral.** After maturity and nonpayment of the note, plaintiff wrote defendant that she intended to sell the stock on a certain day, and did so sell it. Defendant made a transfer of the stock to plaintiff's vendee, and made out a certificate accordingly, and allowed six years or more to pass without making any objection to the sale, and was thereafter sued for the unpaid balance of the note. *Held*, that these facts justified the trial court in finding that defendant intended to waive, and had waived, any right he might have had to a more formal or longer notice.
2. *Held also*, on the facts, that the trial court was justified in finding that defendant had waived the right to further notice (if he had any such right) of the sale by plaintiff of an endowment life insurance policy also held by her as collateral to the said note.
3. *Held also*, that the trial court properly ruled that judgment should be entered for the plaintiff for the amount found by computing interest on the principal debt at 10 per cent (the rate provided in the note) to the time of first payment, which was less than the interest then due; then computing further interest on the principal to the time of the next payment; then subtracting both payments, which together were more than enough to reduce the principal debt below the original amount; and then computing interest on the balance of the original note as thus given to the date of judgment.

(Suffolk—Filed May 9, 1887.)

ON defendant's exceptions. *Overruled.*

This was an action by the payee against the maker of a promissory note for \$1,500, dated December 2, 1874, payable in three years after date, with 10 per cent annual interest. There was an indorsement on the note of \$68.30, received May 31, 1879, from the sale of 211 shares of stock pledged as collateral at the time the note was given. Trial was had in the superior court, before Hammond, J., without a jury. The defendant proved at the trial that, in addition to the shares of stock, he delivered to the payee of the note, as collateral security for its payment, an endowment policy of insurance upon his life for \$2,000, maturing November 1, 1886, and that the plaintiff had never returned said policy, or accounted therefor, except as hereinafter stated. The plaintiff admitted that this policy was sold by her in October, 1879, for the sum of \$1,494.56, and that this amount should be credited upon the note.

The facts and material evidence relating to the sale of the stock and policy, and the question of notice, and the rulings of the court thereon, appear from the opinion.

2 MASS.

In assessing damages, the defendant claimed that interest at the contract rate of 10 per cent should be computed on the principal debt from the date of the note to the time of judgment; that interest at the same rate should be computed on the several amounts received upon the sale of collateral, from the respective dates when the same were received down to the date of judgment; that the sum of said amounts, with the interest as thus computed, should be subtracted from the principal debt, with interest as above computed, and that the balance would be the amount for which judgment should be given. The defendant further claimed that if the method were adopted of computing interest on the principal debt to the time of the respective payments, and subtracting said payments from the total amount due at the times they were made, the sum of said payments amounting, as they did, to more than the face of the debt, the balance should be considered as interest, upon which no subsequent interest should be computed. But the court declined to adopt either of these methods of computation, and ruled that judgment should be entered for the amount found by computing interest on the principal debt at the contract rate of 10 per cent to the time of the first payment, which was less than the interest then due; then computing further interest on the principal to the time of the next payment; then subtracting both payments,—which together were more than enough to wipe out the interest due at that time, and enough to reduce the principal debt below the original amount,—and computing interest on the balance of the original note, as thus given, to the date of judgment. Judgment was accordingly entered for \$1,125; whereas the amount for which judgment would have been entered under either of the methods suggested by the defendant would have been \$610 or \$625, according as the first or second of the methods suggested by the defendant was adopted. To the refusal to adopt either of the methods suggested by the defendant, and to the adoption of the method employed, the defendant excepted.

Mr. E. W. Burdett, for defendant:

There was not sufficient evidence to warrant the finding of waiver in reference to the sale of the stock. The facts which appeared in evidence did not in themselves amount to a waiver. They establish nothing but silence on the part of the defendant. Silence alone (except in cases of concealment of facts unknown to one party, which the other party is under obligations to disclose) cannot constitute a waiver.

Gavtry v. Leland, 40 N. J. Eq. 323; *Allen v. Kellan*, 69 Ala. 442; *Stockman v. Riverside Land Co.* 64 Cal. 57; *Bigelow, Estop.* 639.

There was no reason for defendant to say or do anything prior to the sale of the stock. He had reason to believe that the plaintiff desired to be paid something on the note and interest, and that she might sell the stock if she was not paid; but he had no reason to suppose that she proposed, in case she should sell the stock, to violate his rights to notice, etc., in so doing. If, from the letter fixing a particular day for the sale, but without specifying the time, place, or manner of sale, he had reason to believe that she contemplated a violation of his rights in the matter, he was under no obliga-

tion to object or to warn the plaintiff, but was entitled to rely upon the redress which the law would furnish him.

Gantry v. Leland, and *Allen v. Kellan*, *supra*.

There was no reason for the defendant to do or say anything after the sale of the stock. What happened then was immaterial. The defendant could not, by any act or declaration of his own, repair the damage which had been done, or augment his rights founded thereon. It was too late for protest or objection. When he noted the transfer upon the books of the corporation, and issued a new certificate to the plaintiff's mother, he did not do so in confirmation of, or assent to, the violation of his rights in the matter; but *alto intuitu*,—in discharge of his duty as treasurer of the company. He had no right to disregard his duty in that capacity, and could have been compelled to make the transfer.

The strongest inference which can be legitimately drawn from the evidence is that the defendant knew, or had reason to believe, that the plaintiff intended to disregard his rights to notice in the sale of the stock. The further inference,—that he was willing that she should do so,—founded merely upon his silence, is not warranted in such a case.

Bigelow, Estop. 689, and cases *supra*.

But, admitting the propriety of both the inferences just mentioned, defendant's willingness did not constitute a waiver of his rights to notice, if his willingness was not communicated to the plaintiff; and the evidence lays no foundation for such a conclusion. Undisclosed mental willingness or acquiescence in the violation of one's rights by another is not a waiver of those rights. Silence does not give consent, except under circumstances which impose an obligation to speak. There was no such obligation in this case. Defendant was not bound to warn the plaintiff not to violate the rights which the law and defendant's own written agreement gave him, and which were therefore as well known to one party as the other. Like any trespasser, plaintiff acted at her peril.

Some clear and decisive statement, act, or conduct beyond silence is necessary to constitute a waiver.

Bigelow, Estop. 688; *Gantry v. Leland*, 40 N. J. Eq. 823, and other cases *supra*.

The judge's error undoubtedly arose from the mistaken opinion that mere willingness or acquiescence on the part of the defendant, indicated only by his silence, constituted a waiver of his rights. It is unlikely that he found from the evidence any communication of this willingness or acquiescence to the plaintiff,—any clear and decisive statement, act, or conduct beyond silence,—as the evidence did not warrant it. If he did so find, it was erroneous. Such a finding would be nothing better than a guess, and a violent guess at that, and would be set aside as against the evidence, if made by a jury. But without such a finding there could have been no waiver in this case. "Standing by" and seeing a thing done, though enough in a case of concealment, does not warrant a finding of waiver.

Marvell v. Bay City Bridge Co. 46 Mich. 278; *Stockman v. Riverside Land Co.* 64 Cal. 57, and other cases *supra*.

To constitute a waiver there must have

been an agreement or understanding between the parties.

Bay State Bank v. Kiley, 14 Gray, 492.

Cases of waiver do not rest upon silence alone, but upon something said or done between the parties.

Gerrish v. Norris, 9 Cush. 187; *Allen v. Kellan*, 69 Ala. 442, and other cases *supra*.

In cases where a waiver is alleged, there must be proof of an intent to waive. Declarations, acts, or a course of conduct having the appearance of a waiver, in order to have that effect, must have been accompanied with an intent to waive.

Gerrish v. Norris, *supra*; *Baker v. Copeland*, 140 Mass. 342, 1 New Eng. Rep. 491; *Carleton v. Akron Sewer Pipe Co.* 129 Mass. 40.

In order to establish a waiver, the party alleging it must also prove that he has been misled to his damage; and mere silence regarding the intended enforcement of rights as well known to one party as the other does not constitute such proof.

Marvell v. Bay City Bridge Co., and *Stockman v. Riverside Land Co.* *supra*.

If the act of the party claiming the waiver was voluntary, with full knowledge of the rights of the other, and no act, declaration, or conduct of the latter, beyond mere silence, induced the change in position of the former, there was no waiver.

Bigelow, Estop. 689; cases cited *supra*.

As to the method of computing interest adopted by the court below: *Dean v. Williams*, 17 Mass. 417, relied upon by the court, differs from the case at bar in this, that the partial payments were there indorsed upon the note; which fact may have an important bearing upon the question of intention of the creditor in appropriating the payments so made.

Dean v. Williams was followed by *Ray v. Bradley*, 1 Pick. 194, where partial payments of a judgment upon successive executions were computed according to the same rule. No reasons were then given by the court.

The question has never since been before this court, though the above cases were referred to in the cases of *Wilcox v. Howland*, 23 Pick. 187, and *Ferry v. Ferry*, 2 Cush. 92; in each of which cases, Shaw, Ch. J., remarked that the principle of the above cases "gives the creditor the benefit of compound interest."

The method suggested by the defendant has never been passed upon by this court; and it is submitted that if this method be more just, easier to apply, and less artificial than the rule of *Dean v. Williams*, this court should reconsider that early case, even if it be decisive of the question here involved.

The rule of *Dean v. Williams* rests upon the principle that a partial payment made upon an interest-bearing debt should first be applied to the payment of interest then due. The debtor has the right to direct the application of his payment to the extinguishment *pro tanto* of the principal, instead of the interest; and the creditor, if he receives it, is bound to apply it accordingly.

Pindall's Exr. v. Bank of Marietta, 10 Leigh, 484; *Miller v. Trevilian*, 2 Rob. (Va.) 1.

The creditor can appropriate only where the debtor has had an opportunity to do so and has neglected to avail himself of it.

If money be received by the creditor, without the knowledge of the debtor, the right of the debtor to appropriate it cannot be affected by the creditor's attempt to apply it as he chooses, before the debtor has an opportunity of exercising his election.

Waller v. Lacy, 1 M. & G. 54; Benj. Sales, 4th Am. ed. § 746.

In the case at bar, the debtor had no such opportunity to appropriate at the times when the payments were respectively made, as the evidence shows clearly that he had no knowledge of the payments at the times when made. The creditor, moreover, has not effectively appropriated the payment of \$1,494.56; for he gave no credit therefor until the trial of the case. Under such circumstances, the defendant should be allowed the opportunity to elect, at the trial, to apply his payment on account of the principal. And the second mode of computing interest, which was suggested at the trial by the defendant, is based upon this principle.

But if the conclusion be drawn, from the evidence, that neither the plaintiff nor the defendant has appropriated these payments in a particular way, then, upon the theory of *Dean v. Williams*, the question is, how the law will appropriate the payments. That case proceeds upon the theory that the law presumes that the partial payment is appropriated to the extinguishment of interest so long as interest is due. Such a presumption is unnecessary and unwarrantable, for interest is a debt of the same grade and nature as the principal itself. A separate action may be brought for each installment of interest as it falls due.

Greenleaf v. Kellogg, 2 Mass. 568.

Judgment for installments of interest will not bar a subsequent action for the principal.

Sparhawk v. Wills, 6 Gray, 168; *Andover Sav. Bank v. Adams*, 1 Allen, 28.

It is difficult to see why the law should presume that payments should first be applied to accrued interest. If it be answered that the law presumes that the debtor intends to pay first that part of his debt which bears no interest, there is no need of such a presumption in order to save the creditor's rights: because he can convert his interest, as soon as it becomes due, into an interest-bearing debt, by bringing a separate action for the interest then due.

The method of *Dean v. Williams* is contrary to the policy of the law, in that it encourages debtors to neglect to pay their debts until compelled to do so by judgment; because in every case, according to that method, debtors find it for their advantage to make no payments on account of their debts until judgment is obtained against them, for they lose the interest on some of the partial payments made by them. On the other hand, the first method suggested by the defendant is perfectly fair both to debtor and creditor. On the one side of the account, the creditor receives the exact amount for which he would have obtained judgment if no payments had ever been made; and on the other side, the debtor receives credit for the amounts paid by him, and interest upon each of such amounts from the time it is paid to the time of judgment. Upon this method there is no necessity of determining,

at the time of each payment, how much of it is principal and how much is interest, or how the payments should be appropriated. The case, upon the defendant's theory, is similar to a mutual account current, in which there are certain items on each side of the account, each item bearing simple interest from the time when paid or received.

Messrs. Perkins & Lyman, for plaintiff:

The method of computing interest on the note adopted by the court was correct.

Dean v. Williams, 17 Mass. 417; *Fay v. Bradley*, 1 Pick. 194; *Ferry v. Ferry*, 2 Cush. 98; *Wilcox v. Howland*, 23 Pick. 69.

Morton, Ch. J., delivered the opinion of the court:

This is a suit to recover the balance due upon a promissory note. It appeared at the trial that the defendant had assigned to the plaintiff, as collateral security for the note, 211 shares of the stock of the Magoon Heater Company, and also an endowment policy of insurance for \$2,000. After the maturity of the note, the plaintiff sold the collateral security, and applied the proceeds in part payment of the note. A question arose at the trial as to whether the plaintiff was required to give the defendant notice of her intention to sell. The court, who tried the case without a jury, did not rule upon this question, but found as a matter of fact that there had been a waiver, by the defendant, of any right of notice which he might have had. The defendant excepted to this finding, upon the ground that it was not warranted by the evidence.

The note became due in December, 1877. After its maturity the plaintiff frequently wrote to the defendant, stating that she must sell the stock unless he paid something on the note; finally, about May 24, 1879, she wrote him that she should sell the stock on May 31, 1879. He made no reply to this letter, and on the day she had named she sold it to her mother. The old certificate was sent to the defendant at Boston. He was the treasurer of the corporation, and in his capacity as treasurer he made the transfer on the books, and issued a new certificate to the plaintiff's mother. About two years afterwards the corporation sold out to another company, of which the defendant was treasurer; and he, as treasurer, issued new stock to the plaintiff's mother in exchange for the old stock. The defendant did not, at the time of these transactions, make any objections to the sale or to the notice given to him; nor at any time before this suit was brought. If he objected to the sale, good faith and fair dealing required that he should have notified the plaintiff of his objection. His failure to do so, his failure to answer her letter notifying him of her intention to sell, and the fact that he allowed six years or more to pass without making any objection to the sale, point strongly to the conclusion that he had no objection to the plaintiff's proceedings; and would justify a jury or the court in finding that he intended to waive, and had waived, any right he may have had to a more formal or longer notice.

Very much the same considerations apply to the sale of the endowment policy. She was pressing the defendant for the payment of his debt in whole or in part; and in March, 1879,

he wrote her that, by borrowing on the policy as collateral, and by paying something out of his own funds, he could pay her \$1,850 for the policy. To this letter she replied that she had been offered \$1,458 for the policy, and unless he could pay her that amount she should sell it. He made no reply to this, and in October, 1879, she sold it for \$1,444.56, which was its full value. She notified him of the sale, and he never made any objection or complaint until after this suit was brought. His conduct leads to the inference that he assented to the sale, and justified the court in finding that he had waived the right to further notice, if he had any such right.

The only other question is whether the court erred in assessing the damages. The court adopted the rule laid down in *Dean v. Williams*, 17 Mass. 417, and approved in *Ferry v. Ferry*, 2 Cush. 92, and which has since been uniformly acted upon in our courts. The plaintiff is therefore entitled to judgment for the sum found by the court.

Exceptions overruled.

Daniel HOLLAND, Admr.,
v.
LYNN & BOSTON R. R. CO.

Prior to Stat. 1886, chap. 140, a street railway company was not liable to an action of tort for the loss of the life of a person, whether a passenger or not a passenger.

(Suffolk—Filed May 9, 1887.)

APPEAL by plaintiff from a judgment of the Superior Court of Suffolk County in favor of defendant, sustaining a demurrer to a complaint in an action of tort. *Affirmed.*

This action was brought by Daniel Holland, as administrator, against the defendant, a street-railway horse-car company, to recover damages for the death of plaintiff's intestate, on or about August 31, 1885, through the alleged negligence of defendant in operating and managing one of its cars in which plaintiff's intestate was a passenger, and in suffering its railroad to be in such a defective and dangerous condition as to cause the injuries to plaintiff's intestate from which she died.

The case was heard in the court below on demurrer to the complaint, which the court sustained, and ordered judgment for defendant; whereupon plaintiff appealed to this court.

Messrs. Charles T. Gallagher and Jesse F. Wheeler, for plaintiff:

Pub. Stat. chap. 78, § 6, provides that if the life of a person, being a passenger, is lost by reason of negligence and carelessness of common carriers of passengers, or their servants or agents, such common carriers shall be liable in damages, to be recovered in an action of tort by the administrator of the deceased person to the use of the next of kin. The language of this section is the same found in § 8, chap. 199, of Acts 1881 of the Legislature of Massachusetts. What class of common carriers other than the above are intended to be included, if not the defendant?

Bent v. Hubbardston, 188 Mass. 100.

A common carrier of passengers is one who undertakes for hire to carry all persons indifferently that may apply for passage. Stages, ships, steamboats, ferries, omnibuses, tramways, and street cars are common carriers of passengers.

Thomp. Carr. 26, note, § 1, and cases cited; *Vinton v. Middlesex R. R. Co.* 11 Allen, 307; *Feist v. Middlesex R. R. Co.* 109 Mass. 405; *Wilton v. Middlesex R. R. Co.* 125 Mass. 133.

But it may be argued by the defendant that the Act of 1881, chap. 199, did not apply to a corporation like the defendant.

The manifest endeavor and intention of the Legislature, in that Act, was to grant a civil action at law against all corporations, so far as they could be enumerated, who were liable to cause the loss of human life; the Act providing, by § 1, for the liability of a railroad corporation; by § 2, for persons injured at railway crossings; by § 4, for loss of life on highways, town-ways, etc.; and by § 3, for loss of life of passengers on steamboats, stagecoaches or by common carriers of passengers. And the manifest intention of the Legislature was that by the use of the general term, "common carriers of passengers," tramways or railroads that did not come into § 1 of this Act would be covered by that term; and the Legislature of 1882 passed an Act for consolidating the General Statutes, re-enacting the provisions of the Act of 1881.

It cannot be said that the Legislature intended to relieve street railways from the provisions of an Act that applied to steamboats, stagecoaches, omnibuses, ships, ferries, tramways, and steam railroads.

But whatever may be the application of the Act of 1881 to street railways generally, it can be held to apply to the defendant corporation, because, by Acts of 1859, chap. 202, by which the defendant corporation was chartered, it is authorized to carry passengers for hire in public conveyances through Boston and adjoining cities; and by the powers given to defendant under that charter it came within the definition of "common carriers of passengers," in the general significance of that term.

And, further, whatever may be the application of the term "railroad corporation," in Act of 1881, § 1, as applied to street railways generally, in applying it to the defendant corporation,—which was chartered by the Act of 1859 aforesaid,—it appears by § 1 that the associates are made a corporation to construct, maintain, and use "a railroad." Section 3 provides that "said railroad" shall be constructed with suitable bridges to accommodate "said railroad." Section 5 speaks of it as "a railroad company," and provides for any loss or injury that any person may sustain by reason of the carelessness, negligence, or mismanagement of its agents or servants in the management and use of "said railroad." And in fact, from the title all through the charter of the corporation, the words "railroad" and "railroad corporation" are used, and in no place is it spoken of in any other terms; it being by § 14 deemed a railroad corporation, although it is exempted from the other general provisions of the law existing at that time (1859) in relation to steam railroads.

The Act of 1881, chap. 199, § 1, uses the

words "railroad corporation;" and there is nothing in that Act which would imply that the words "railroad corporation" should not apply to this corporation; and certainly, between §§ 1 and 3, the Statute of 1881 is broad enough in its terms to cover a railroad corporation like the defendant, as liable to a civil action for death. The Legislature must have intended that, if a corporation like the defendant was not a railroad corporation within the view of § 1, it must be at least a common carrier of passengers within the view of § 3.

The enactment of Acts 1886, chap. 140, can be no evidence of the intention of a previous Legislature, being a different body; that Act being as likely to have been procured to be enacted for the purpose of allowing street railways to claim that there was no right of civil action in existence as for the purpose of clearing up a doubt or creating a new form of action. It is as proper to regard such legislation as indicative of ignorance as it is to regard it as a declaration that no previous right existed. The ancient presumptions about legislative enactments have been pretty thoroughly dissipated in these later days, particularly so to the mind of one who has had active experience in or with the Legislature; it being a matter of common remark that our Legislature sits to correct the errors of previous Legislatures. Legislatures have been known to enact laws repugnant to the Constitution, even.

Had Stat. 1886, chap. 140, been passed at the same time as Pub. Stat. chap. 74, § 6, and had its other provisions been the same, it might have been claimed that the general words "common carriers," in Pub. Stat., did not include the class of common carriers like the defendant, on the ground that a particular description excluded the general description. But here it is conclusive upon this cause of action arising after the passage of the one, and before the passage of the other law, that while under the first only passengers might sue, under Stat. 1886, "a person being in the exercise of due diligence and not a passenger" might have remedy. It is sufficient to say that the manifest intention of the Legislature has been by its enactments to provide that a remedy shall be had by civil action, for the loss of life of a person, against any and all classes of persons and corporations liable to cause death by the negligence of themselves or their agents; and intent will always prevail.

Brown v. Pendergast, 7 Allen, 429.

But, aside from the charter of this defendant, plaintiff respectfully submits that Stat. 1881, chap. 199, § 1, applies as well to horse as steam railroads; and the enactment of chapter 199, not being an amendment of the street-railway law, and containing no restriction, must be taken to give the remedy by civil action in all cases where the remedy by indictment previously existed; the Legislature manifestly believing that the reasons were equally strong for providing a remedy for loss of life in civil courts in one case as in the other; and surely it intended to extend the right to a class of carriers more liable to cause loss of life than stagecoaches and other vehicles of a similar character.

Messrs. T. P. Proctor and E. Tappan, for defendant:

No action lies in behalf of the plaintiff against the defendant to recover damages for the death of the said Julia Holland. No such action for the death of a person can be brought at common law.

Carey v. Berkshire R. R. Co. 1 Cush. 475; *Moran v. Hollings*, 125 Mass. 98.

Against street railways there has been the common-law remedy for recovery of damages for injuries suffered in the lifetime of the plaintiff; and since Stat. 1864, chap. 229, § 87, there has been a statute remedy by indictment for death; but never until Stat. 1886, chap. 140, has there been a right of civil action against a street railway for death; and not until Stat. 1881, chap. 199, was there any such civil action against even steam railroads.

The public statutes as to railroads (see Pub. Stat. chap. 112, § 212) do not give any such right of action against street railways.

This view of the statute is confirmed by the opinion of the Legislature of 1886 (Stat. 1886, chap. 140), when the right of such action in tort for death is first given against a street railway.

Kelley v. Boston & Me. R. R. 135 Mass. 448.

There is no other statute in any way touching this subject, except that in relation to "common carriers and express companies" (Pub. Stat. chap. 73, § 6), which does not include actions against street railways.

The history of legislation on liability for loss of life shows that street railways are not included in the words "common carriers," as used in Pub. Stat. chap. 73, § 6.

If, nevertheless, street railways were subject to the Act of 1840, they would have been so subject by reason of the word "railroad" in that Act, that term being most nearly allied to street railways. Previous to the General Statutes of 1860, railroads were liable under said Act of 1840, for they were specially mentioned therein. But at the time of this revision, the Legislature were so impressed with the importance of railroads that they codified all statutes relating to them in one chapter of the General Statutes (chap. 63), including a section providing for their liability for loss of life of a passenger by indictment (§ 97).

Said Act of 1840, chap. 80, was at the same time placed in the chapter of the General Statutes on "Offenses against the person" (chap. 160, § 84), but with this marked change, that the word "railroad," with which the enumeration had formerly begun, and which had been the most important word therein, was omitted, thus making railroads no longer subject to its provisions.

It cannot for a moment be contended that railroads, subsequent to 1860, were liable in the same matter, both under the railroad chapter (Gen. Stat. chap. 63, § 97) and under the criminal chapter of offenses against the person (Gen. Stat. chap. 160, § 84), merely by force of the term "common carriers" retained in the latter section; because such a double liability would be superfluous, and therefore inconsistent with all legislation, and with the expressed design of the codification of the statutes; and also because said chapters 63 and 160 of the General Statutes would otherwise be inconsistent, as the former limits indictments to one year, and the latter is under the general limita-

tion of six years. Hence "common carriers," in Gen. Stat. chap. 160, § 84, cannot include "railroads."

This change in the General Statutes greatly circumscribed and limited the scope of the old Act of 1840; and it necessarily follows that if street railways were ever included in the word "railroad" in the Act of 1840, they passed from that statute in 1860.

"It is a well-settled rule that when any statute is revised, or one Act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled."

Ellis v. Paige, 1 Pick. 43, 45, per Wilde, J.

By Stat. 1864, chap. 229, § 37, street railways were first made indictable for loss of life. This Act was a codification of all laws relating to street railways, and made a general repeal of all Acts and parts of Acts inconsistent therewith. Now, if the term "common carriers," in the Act of 1840, contemplated street railways (though not then in existence), and the same were true of Gen. Stat. chap. 160, § 84, still, that term could no longer include street railways after the said Act of 1864; because all Acts and parts of Acts inconsistent with the Act of 1864 were by that Act expressly repealed (Stat. 1864, chap. 229, § 45). Hence the phrase "proprietor or proprietors of any steamboat stagecoach, or of common carriers of passengers" in any statute, cannot, after that date, include street railways.

The same term, "common carriers," limited as above stated, appears in Stat. 1881, chap. 199, § 3 (in which Act a civil action for loss of life is first authorized against any party). There is nothing in this Act to enlarge the meaning of said term so as to include street railways, and such enlargement is not to be presumed. Section 3 is substantially re-enacted in Pub. Stat. chap. 78, § 6, retaining the term "common carriers." If this term includes railroads (and it must include steam railroads as well as street railways, if it includes either), then said Act of 1881, chap. 199, contains redundant enactments; because § 1 of the Act imposes the same liability upon a railroad corporation as is imposed in § 3 upon "common carriers."

Stat. 1881, chap. 199, § 6, says the remedy provided by said Act (being a civil liability) shall be additional to the remedy provided by Stat. 1874, chap. 872, §§ 163, 164. This Statute of 1874 was a codification of the statutes relating to railroads, and said two sections relate exclusively to steam railroads, and impose a criminal liability. This provision of § 6 was necessary, because of the principle of law that, when a statute imposes a new penalty for an offense, it repeals by implication so much of a former statute as established a different penalty, unless expressly retained.

Nichols v. Squire, 5 Pick. 168, 169; *Commonwealth v. Kimball*, 21 Pick. 373, 377.

Morton, Ch. J., delivered the opinion of the court:

The question presented in this case is whether, prior to the Statute of 1886, chap. 140, a street-railway company was liable to an action of tort, if, by reason of its negligence, the life of a passenger was lost. That statute

was passed after the injury complained of in this case, and therefore has no application to the case. *Kelley v. Boston & Me. R. R.* 135 Mass. 448.

The Public Statutes provide that "if by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness, or gross negligence, or carelessness of its servants or agents while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger or in the employment of such corporation, is lost, the corporation shall be punished by fine of not less than \$500 nor more than \$5,000, to be recovered by indictment prosecuted within one year from the time of the injury causing the death, and paid to the executor or administrator for the use of the widow and children of the deceased. Pub. Stat. chap. 112, § 212. Under this provision a street-railway company is liable to an indictment if a life is lost by reason of its negligence or the gross negligence of its servants.

The same section further provides that "if the corporation is a railroad corporation, it shall also be liable in damages not exceeding \$5,000 nor less than \$500, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and to be recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the persons hereinbefore specified in the case of an indictment."

It is clear that this provision does not apply to street railway companies.

The first section of the chapter provides that in the construction of this and the following chapter, "the phrase 'street railway' shall mean a railroad or railway usually operated by animal power; 'railroad corporation' and 'railroad company' shall mean the corporation which lays out, constructs, maintains, or operates a railroad operated by steam power; 'street-railway company,' shall mean a corporation by which a street railway is constructed, maintained, or operated."

It is to be observed that the following chapter—which is the chapter concerning street-railway companies—makes no provision for an action of tort against such company if a life is lost by reason of its negligence or the gross negligence of its servants.

The plaintiff contends that street-railway companies are liable to an action of tort under Pub. Stat. chap. 78, § 6. This provides that "if the life of a passenger is lost by reason of the negligence or carelessness of the proprietor or proprietors of a steamboat or stagecoach, or of common carriers of passengers, or by the unfitness, or gross negligence, or carelessness of their servants or agents, such proprietor, or proprietors, and common carriers shall be liable in damages not exceeding \$5,000, nor less than \$500, to be assessed with reference to the degree of culpability of the proprietor, or proprietors, or common carriers liable, or of their servants or agents, and recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and

children of the deceased." This is a re-enactment, in substantially the same words, of the Statute of 1881, chap. 199, which was the first statute to give an action of tort for the loss of life against any common carriers of passengers.

It is true that the phrase "common carriers of passengers" is broad enough to include street-railway companies; but when we consider the history and course of legislation upon this subject, we are brought to the conclusion that this enactment was not intended to include and apply to such companies.

Railroads and other carriers of passengers were first made liable for damages for the loss of life caused by their negligence by the Statute of 1840, chap. 80, which provides that "if the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stagecoach, or of common carriers of passengers," such proprietors or common carriers shall be liable to a fine, to be recovered by indictment, for the use of the widow and children of the deceased. Under this statute, clearly railroads were liable to an indictment, which could be brought at any time within six years after the injury causing the death. *Commonwealth v. Boston & W. R. R. Co.* 11 Cush. 512.

By the Statute of 1853, chap. 414, railroad corporations were made liable to indictment for the loss of life of persons not passengers; and it was provided that all indictments against any railroad corporation for loss of life shall be prosecuted within one year from the injury causing the death. These provisions were re-enacted in the General Statutes as to railroad corporations in chap. 63, §§ 97, 98, and as to other carriers, in chap. 160, § 34, which significantly omits "railroad" from the enumeration of carriers liable under it.

Under the General Statutes it was held that, while indictments against railroad corporations must be brought within one year, indictments against other carriers to whom the statute applied might be brought at any time within six years. *Commonwealth v. East Boston Ferry Co.* 13 Allen, 589. It is thus seen that, after the passage of the general Act as to the liability of carriers, in 1840, the Legislature enacted special statutes applicable to railroad corporations, which were inconsistent with the general Act. The Legislature could not have intended that railroad corporations should be liable under two inconsistent statutes covering the same subject. The effect, therefore, of the later special legislation was to repeal so much of the Statute of 1840 as applied to railroad corporations; or, in other words, to take railroad corporations out of the operation of the earlier statute. The same reasoning applies in the case of street-railway companies.

By the Statute of 1864, street-railway companies were made liable to indictment for the loss of life of a passenger or of a person not a passenger; and it was provided that the indictment, as in the case of a steam-railroad company, must be brought within one year of the injury. Stat. 1864, chap. 229, §§ 87, 88. These provisions were re-enacted in the Statute of 1871, chap. 381, §§ 48-50. These provisions were inconsistent with the Statute of 1840, and the effect was to take street-railway companies

out of the operation of that statute. The Statute of 1874, chap. 872, has no bearing upon the case, as it does not repeal the Statute of 1871 (above cited), § 163, as to the liability for loss of life, being applicable only to railroad corporations operated by steam power, and, as to them, being a re-enactment of laws previously in force.

We come now to the Statute of 1881, chap. 199, which first gave an action of tort against carriers of passengers for the loss of life. It is clear that the first section does not apply to street-railway companies. But it is useless to discuss this, because the statute was repealed in a few months by the same Legislature which enacted it, and the provisions of the first section were embodied in Pub. Stat. chap. 112, § 212, in a form which, as we have seen in the first part of this opinion, includes only steam-railroad corporations.

The third section, re-enacted in Pub. Stat. chap. 73, § 6, in its description of the parties who are subject to the statute, follows exactly the words of Gen. Stat. chap. 160, § 34, and gives against such parties a new remedy. It was not intended to enlarge the scope of that provision of the General Statutes, by making different persons or corporations subject to liability, but to give an additional remedy against the same persons. Being in the same words as the previous statute, it should receive the same construction, unless a different intention is clearly shown. As we have seen, street-railway companies, as well as steam-railroad corporations, were not within the previous statute. Each had special provisions as to liability for loss of life, and if the Legislature had intended to include them, or either of them, in the third section of the statute, it would have been natural to specify them in the statute. Our construction is, in some degree, confirmed by the passage of the Statute of 1886, making street-railway companies liable in actions of tort,—a statute which was unnecessary if they were already so liable.

For these reasons, we are of opinion that, prior to the Statute of 1886, a street-railway company was not liable to an action of tort for the loss of the life of a person, whether a passenger or not a passenger.

Judgment affirmed.

W. D. GUNN

v.

CAMBRIDGE R. R. Co.

A street-railway company is not liable in an action of tort, for causing the death of a person, within the meaning of the statutes of this Commonwealth. So held in a case where the death occurred in the year 1885.

(Middlesex—Filed May 9, 1887.)

ON plaintiff's exceptions. *Overruled.*

Action of tort brought by W. D. Gunn, plaintiff, as administrator, against defendant, a street-railway horse-car company, to recover for the death of plaintiff's intestate, October 11, 1885, caused by alleged negligence of defendant and its servants and agents.

At the trial in the superior court before Thompson, J., at defendant's request the court ruled that there was no statute under which plaintiff's action could be sustained, and plaintiff excepted.

Messrs. Jesse F. Wheeler and Samuel J. Elder, for plaintiff:

The provisions of the last clause of Pub. Stat. chap. 112, § 212, are to be construed as a continuation of Stat. 1881, chap. 199, § 1—as a re-enactment thereof, and not as new enactments.

Pub. Stat. chap. 223, § 2; *Woodward v. Spurr*, 138 Mass. 593; *Drew v. Streeter*, 187 Mass. 460.

Pub. Stat. chap. 112, § 1, defines the word "railroad" to mean "steam railroad" "for the purposes of this and the following chapter, unless such meaning would be repugnant to the context, or to the manifest intention of the General Court." The manifest intention of the clause in question, and of Stat. 1881, chap. 199, was to give an action of tort where remedy by indictment had previously existed.

Gen. Stat. chap. 63, applies the word "railroad" to both steam and horse railroads.

Stat. 1874, chap. 372, § 2, says that "in the construction of this Act 'railroad' shall be construed to mean 'railroad or railway' operated by steam power."

Prior to enactment of Stat. 1881, chap. 199, remedy by indictment for loss of life of both passengers and those not passengers existed against horse railroads as well as steam railroads. Stat. 1881, chap. 199, does not purport to be an amendment of 1874, chap. 372, and contains no restriction in meaning of word "railroad," and must be taken to give the remedy by action of tort broadly in all cases where the remedy by indictment previously existed. The same reason which made it desirable to permit the remedy for loss of life to be transferred from the criminal courts to the civil courts, were equally strong in case of horse railroads as steam railroads, and there is nothing in the Act to indicate an opposite intention.

Stat. 1881, chap. 199, § 3, cannot have been intended to furnish the only remedy under that Act against horse railroads, or it would, in § 3, have specifically mentioned horse railroads as well as "stage-coaches;" surely the former are a much larger class of common carriers than the latter, and more worthy of special mention.

Stat. 1886, chap. 140, cannot be retroactive to interpret the intent of the Legislature of 1881, being the Act of a distinct body, and only indicates that some one saw that a question might arise under the Public Statutes, and thought to put the question beyond need of judicial construction.

Messrs. W. H. Martin and Samuel Hoar, for defendant:

The right to such an action as this was first given by Act of the Legislature passed April 12, 1886 (Stat. 1886, chap. 140). "There is nothing in" this Act "to show that the Legislature intended to give this new remedy for acts already past; and, in accordance with the well-settled and often declared rule, the statute must be construed as merely prospective in its operation."

Kelley v. Boston & M. R. R. 135 Mass. 448.

An examination of the statutes prior to the Act of 1886 only serves to strengthen the inference naturally drawn from the passage of that Act. The only legislation giving any color for such a right of action is that contained in Pub. Stat. chap. 112, § 212; but there, while a remedy by indictment is given against a "corporation operating a railroad or street railway," a remedy for civil action is confined expressly to a "railroad corporation;" and in the first section of that chapter the terms "railroad," "street railway," "railroad corporation," and "street railway company," as used in that and the following chapter, are defined so clearly as to leave no ground for confounding the terms.

But, furthermore, it is of no importance in this case what the Legislature intended by the term "railroad corporation," in the statute of 1881, for its meaning in Pub. Stat. chap. 112, being clearly governed by the definition in § 1 of that chapter, and therefore admitting of no doubt, this court "cannot look to the earlier statutes to see if an error has been made by the Legislature in its understanding of them, as there is then no room for the office of construction."

Bent v. Hubbardston, 138 Mass. 99.

Morton, Ch. J., delivered the opinion of the court:

This case is decided by *Holland v. Lynn & Boston R. R. Co.* ante, p. 320. Whether the plaintiff's intestate was a passenger or not, at the time of his injury, the defendant, being a street-railway company, is not liable in an action of tort.

Exceptions overruled.

Samuel E. SAWYER, *Petitioner*,

v.

City of BOSTON.

1. In a proceeding for the assessment of damages for the taking of petitioner's land by the city, defendant, for a park, evidence of sales of lots situated like the petitioner's was not incompetent merely because they were smaller lots than petitioner's.
2. Sales of lands which were compulsory are not evidence of the value of other lands.
3. An expert in real estate is no more competent than anyone else to determine just what effect, measured in money, the dislike of litigation may have had on a given person's mind.
4. Interest was properly allowed on the value of the land at the time it was taken.
5. If it does not appear affirmatively from the record that the petition was brought too late, a motion in arrest of judgment on that ground cannot prevail. The petitioner is not bound to allege that he is in time.
6. The Statute of Limitations must be pleaded, even when the cause of action

appears in the declaration to have accrued more than the statutory time before.

7. If the plaintiff sets forth facts sufficient, when they arose, to give him a cause of action and a right to proceed in the court in which he sues, it is for the defendant to show facts which have taken his right away.

(Suffolk—Filed May 9, 1887.)

ON defendant's exceptions. *Overruled.*

This is a petition for the assessment, by a jury, of the damages sustained by the petitioner by the taking of his land May 25, 1883, by the board of park commissioners of the city of Boston, under Acts 1875, chap. 185.

At the trial in the superior court before Brigham, *Ch. J.*, it was admitted that, in 1876, the board of park commissioners of the city of Boston made a report which contained a plan of the park marked "West Roxbury or Franklin Park," which they proposed to lay out, and that they recommended that steps be taken by the city to acquire the lands included within the location shown on this plan. Said plan was put in evidence. It showed lands on Sigourney Street; the lands of the petitioner, called "Newstead" and "Monteglades;" lands of F. O. Prince *et al.*, trustees; lands of Jacob Fottler, and other lands; the lands of said Prince *et al.*, trustees, and of Fottler, being large estates, each of about 15 acres, adjoining and similarly situated physically with the petitioner's land. It also appeared in evidence that, subsequent to the said report of the park commissioners, and before the taking of the petitioner's land, said commissioners had been authorized to bond for the city the lands referred to by them in their report of 1876, and had so bonded a part of them.

The petitioner offered in evidence the sale of, and price paid for, certain house lots on Sigourney Street, of from 9,000 to 12,000 square feet, similarly situated physically to some of the petitioner's land. The defendant objected to this evidence on the ground that a small lot of land—a house lot adapted for building—was not a fair guide for the jury to find the value of a large unbroken lot like that of the petitioner. The court admitted the evidence, and the defendant excepted thereto.

The defendant offered in evidence the sale of the said lands of Jacob Fottler to the city, to be used for the purposes of the park, and offered to show the price which the city paid for the land in February, 1883. The court excluded the evidence, and the defendant excepted thereto.

Experts produced by the defendant testified that they formed their opinions of the value of the petitioner's land from the price at which the said lands of Fottler were sold to the city for the park; and one of them having stated that he formed his opinion of the value of the petitioner's land partly from sales of other lands in the vicinity, at different times, was asked by the defendant to state fully the sales on which he based his opinion. The question was objected to by the petitioner, and, on the objection being overruled, the petitioner excepted.

The witness then testified: "The Dabney estate was sold, to the best of my recollection, for about 4½ cents per foot,—14 acres, more or less. The Prince estate, if I recollect right, was some 28 acres. To the best of my recollection that was sold for about 4 cents. The Fottler estate was, I think, some 43 acres. That I knew about; that was sold for some 3 to 3½ cents."

The court charged the jury: "The law allows such inquiries as you have been making to be assisted by the evidence of persons who are called experts. They are presumed to be persons who have acquired a knowledge of the very facts which, as I have said to you, are the appropriate facts to be considered in determining the value of land taken for the public use, and to be competent to give an opinion arising out of that knowledge. And they are presumed and expected to give opinions which have the same basis as those which would be formed by the kind and class of facts which I have said apply to an inquiry into the value of land. * * * The law allows him, after he has qualified himself to give an opinion to the jury, to give the reasons and facts upon which that opinion is founded. * * * If he bases his opinion upon a kind of facts which the law does not regard as the appropriate and pertinent facts to such an inquiry as you are making, and so far as his opinion is based upon what the jury would not have the right to consider, his opinion is, of course, impaired in value by that reason. * * * I have special reference, in these suggestions, to opinions expressed by witnesses here, founded upon prices which they believed or had heard had been paid by the city to persons whose lands had become a part of Franklin Park.

"Of course if the facts of those transactions would not have been competent for a jury to hear and consider on the question of value, they would not pertinently and properly enter into the opinion, or the basis of the opinion, of an expert. An expert, gentlemen, comes here having acquired the very knowledge which it is the purpose of this trial to give to you; and having acquired a great deal more of it than the course of the trial has enabled the parties to give you, and out of his experience to advise you as to the same matters which you are to determine, by his opinion to help you, and, so far as he recommends his opinion to you by the foundations which he states he has for it, so far as it is founded upon the same class of facts which you have a right to consider independently of him,—I say, so far as it is thus founded, it is of value." To which instruction the defendant excepted.

The court also charged the jury: "The prices which the city of Boston may have paid for any land in the park does not furnish appropriate or pertinent evidence of the value of the land of the petitioner taken. The law does not regard sales made to avoid the very proceeding which has been going on before you as current market sales. A sale by the owner of land for which there can be one purchaser only, when he has no option to refuse to sell, and can only elect between an acceptance of the price offered and the uncertainty, delay, and trouble of legal proceedings, is not

a reasonable or fair test of market value. It is in no sense a sale in the market." To which instruction the defendant excepted.

A witness for the defendant, Samuel Little, was asked by the defendant: "From 1888 up to the present time, what rate of interest has money commanded, as a safe investment?" and answered, "Not over 4 per cent. Occasionally a small mortgage pays a higher rate; but there has been no difficulty in the last two years in placing good loans at 4 per cent."

Q. I mean any large amount?

A. A large amount, 4 per cent.

The defendant asked the court to rule and instruct the jury: "After finding the fair market value of the land at the time of the taking, the jury shall add to that value such amount, not exceeding 6 per cent per annum, as they shall determine to be a fair compensation for the withholding of such value, and may consider, as bearing on such compensation, the testimony of Mr. Little as to the interest which money, on a safe investment, would command." The court refused so to rule, and instructed the jury: "You will determine the value of the land at the time of each of these takings, and compute interest upon that value at the rate of 6 per cent to this day." To which ruling and refusal to rule, and to said instruction, the defendant excepted.

The jury assessed damages to petitioner in the sum of \$265,091.97.

A motion in arrest of judgment was filed July 15, 1886, as follows:

"And now comes the defendant, after verdict and before judgment, and shows in arrest of judgment on the verdict on said petition that the first lot of land mentioned in the petition aforesaid, designated therein as lot 1, and described as the parcel numbered 17 on a plan of 'Proposed West Roxbury Park,' dated 1880, on file at the office of the board of park commissioners of the city of Boston, was taken by said board of park commissioners for a public park, on the 28th day of May, 1883, more than one year before the bringing of the said petition, which was during the January Term of the Superior Court for the County of Suffolk, in the year 1885.

"And the defendant further shows that, within the period of time between the taking of said land and the bringing of said petition, there was no suit instituted wherein the legal effect of the proceedings of said board of park commissioners in locating or laying out said park, or taking any land therefor, was drawn in question.

"Wherefore the defendant moves that judgment be arrested, and that said petition, so far as it relates to the lot of land above described, be dismissed."

Said motion having been overruled, the defendant excepted.

Mr. Andrew J. Bailey, for defendant:

I. All the circumstances and facts bearing upon the lots, the sales of which were offered in evidence, are set forth and reported in the bill of exceptions; and evidence of sales of land similarly situated is inadmissible where there are circumstances bearing on the values which would tend to mislead the jury.

Paine v. Boston, 4 Allen, 168-170; *Boston & W. R. R. Corp. v. Old Colony & F. R. R. R.*

Corp. 8 Allen, 142; *Presbrey v. Old Colony & N. R. R. Co.* 103 Mass. 9.

II. The sales to the respondent, offered in evidence, were in no way compulsory, and the evidence of them was improperly excluded; and the court erred in instructing the jury in that respect.

Wyman v. Lexington & W. C. R. R. Co. 13 Met. 326; *Walker v. Old Colony & N. R. R. Co.* 103 Mass. 10; *Whitman v. Boston & M. R. R. Co.* 7 Allen, 316.

III. The court had no jurisdiction to determine the value of the first lot of land described in the petition; and the want of jurisdiction might be taken advantage of at any time before judgment.

Riley v. Lowell, 117 Mass. 77; *Custy v. Lowell*, 117 Mass. 78; *Osborn v. Fall River*, 140 Mass. 508, 1 New Eng. Rep. 439.

And where the court has no jurisdiction in one count of a declaration, and the verdict is general, the verdict must be set aside.

Benon v. Swift, 2 Mass. 53; *Stevenson v. Hayden*, 2 Mass. 406; *Barnes v. Hurd*, 11 Mass. 60.

Measrs. Robert M. Morse, Jr., and Moorfield Storey, for petitioner:

I. Time, situation, and circumstances must be similar, to make sales of other land competent evidence in a case like that at bar. Any differences in the size of the parcels, their character, or their quality, are fair subjects for argument before the jury, but certainly such differences are not grounds for excluding sales altogether.

Wyman v. Lexington & W. C. R. R. Co. 13 Met. 316, 326; *Benham v. Dunbar*, 103 Mass. 365; *Gardner v. Brookline*, 127 Mass. 358.

The sale of Jacob Fottler's land to the city for park purposes, and the price paid by the city, were properly excluded. It was in fact a settlement, and not a sale, and not competent evidence.

Wyman v. Lexington & W. C. R. R. Co. supra; *Cobb v. Boston*, 112 Mass. 181.

Whether a particular sale will aid the jury, or whether the time of sale, the situation of the land, or the circumstances, are such as to make it likely to mislead them, are questions largely within the discretion of the presiding judge.

Shattuck v. Stoneham Branch R. R. 6 Allen, 115, 117; *Presbrey v. Old Colony & N. R. R. Co.* 103 Mass. 1, 9; *Green v. Fall River*, 113 Mass. 268; *Boston & W. R. R. Corp. v. Old Colony & F. R. R. Co.* 8 Allen, 142, 145; *Chandler v. Jamaica Pond Aqueduct Corp.* 132 Mass. 305.

II. The instruction in regard to interest was correct. It is perfectly well settled in this Commonwealth that damages bear interest; nor does the defendant in this case claim that this is not the rule, or that the date from which the jury were instructed to compute the interest was incorrect. It is admitted that the petitioner was entitled to interest on the value of his land, when fixed, from the date of the taking to the date of the verdict.

Parks v. Boston, 15 Pick. 198, 208; *Burt v. Merchants Ins. Co.* 115 Mass. 1, 14, 15; *Old Colony R. R. Co. v. Miller*, 125 Mass. 1, 3, 4; *Fraser v. Bigelow Carpet Co.* 141 Mass. 126, 1 New Eng. Rep. 525.

III. A motion in arrest lies only where the

whole record is not legally sufficient to support a judgment.

Gould, Pl. p. 459.

The Statute of Limitations must be pleaded; and if this is not done, the record does not show that such a bar exists.

1 Chitty, Pl. chap. 7, *471; *Emmons v. Hayward*, 11 Cush. 48; *Middlesex Co. v. Osgood*, 4 Gray, 447, 448; Pub. Stat. chap. 167, § 20, p. 967.

The respondent's petition cannot be stronger after failing to plead the statute than if the record showed such a plea.

If the record in this case had showed a plea of the statute and a verdict for the petitioner, the court must have presumed that facts avoiding the plea had been proved at the trial.

Smith v. Cleveland, 6 Met. 332, 334.

The fact existed before verdict, and no judgment can be arrested for a cause existing before verdict, unless such cause affects the jurisdiction of the court.

Pub. Stat. chap. 167, § 82.

But the respondent says in reply that the cause on which it relies affects the jurisdiction of the court, and cites—

Custy v. Lowell, 117 Mass. 78.

The report of this case is brief, but it is quite distinguishable from the case at bar. If a petition is brought too late, there are, of course, methods by which this defense can be taken; and in *Custy v. Lowell* it was set up in the answer, as the original papers show. The decision does not show that the defense could be taken by motion in arrest, which is the question here.

It will be argued, however, that the language of the opinion sustains the contention that, if the petition is not brought in time, the court has no jurisdiction, and that want of jurisdiction may be taken advantage of at any time before judgment. The statements to this effect are apparently *obiter*; but if the expressions were necessary to the decision in *Custy v. Lowell*, the same rule cannot apply in the case at bar.

In *Custy v. Lowell*, the petitioner proceeded under Gen. Stat. chap. 48, § 6, which authorizes the levying of sewer assessments, and provides that "a person aggrieved by such assessment may, at any time within three months from receiving notice thereof, apply for a jury." Nothing can extend this time.

The Park Act (Stat. 1875, chap. 185, § 5), provides that a person aggrieved by the determination of the park commissioners "may have his damages assessed by a jury of the superior court, in the same manner as is provided by law with respect to damages sustained by reason of the laying out of ways in the city of Boston." The provisions referred to are contained in Gen. Stat. chap. 48, §§ 79, and Stat. 1874, chap. 341, § 1, which were in force when the Park Act was passed, and are now found in Pub. Stat. chap. 49, §§ 86, 89.

By these provisions of law an injured party may file his petition within a year from the taking, or within a year from the determination, of any suit "wherein the legal effect of the proceedings of the street commissioners is drawn in question," or within six months after his land is actually entered upon, provided he did not have actual notice of the proceedings

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which entitled him to damage, at least sixty days before the expiration of a year from the taking. Is it possible for the court to say upon this record, as matter of law, that this suit is not brought within either of these periods of limitation? If so, the court can only proceed upon the ground that the petitioner must set out in his petition all the facts which show that it is brought in time, and that, if he fails to do so, his petition must be dismissed, although the objection is not taken till after verdict.

Certainly such a defect in the petition can be cured by amendment. If the petitioner now amends by setting up facts which show his petition seasonable, and the city does not admit them, is the verdict to be set aside, and the city given a second chance? If so, it can take advantage of a mere defect in pleading to secure a new trial, if the verdict is unsatisfactory.

Such a course would certainly be inconsistent with the rules of pleading, which require the defendant to plead the bars on which he relies; and would also be inconsistent with the salutary tendency of the courts to discourage laches and to treat defenses as waived which are not set up at the proper time.

Smith v. Cleveland, 6 Met. 332; *Brown v. Webber*, 6 Cush. 580; *Barry v. Page*, 10 Gray, 398; *Emery v. Osgood*, 1 Allen, 244; *McLaughlin v. Cowley*, 127 Mass. 316, 321.

The court cannot arrest judgment on one part of this petition.

The court cannot fix the number of feet in either of the parcels of land, and of course can neither compute the sum allowed for each parcel nor calculate the interest. These are matters within the exclusive province of the jury.

Lambert v. Craig, 12 Pick. 198; *Conn. River R. R. Co. v. Clapp*, 1 Cush. 559; *Roberts v. Rockbottom Co.* 7 Met. 46, 49.

Holmes, J., delivered the opinion of the court:

1. Evidence of sales of lots situated like the petitioner's land was not incompetent merely because those were small and the latter large. So far as appears, the petitioner's land could be cut up and used for house lots without trouble. We see no reason to doubt that the discretion of the court was exercised rightly. *Gardner v. Brookline*, 127 Mass. 358, 363; *Chandler v. Jamaica Pond Aqueduct Corp.* 122 Mass. 305.

2. Nor can we say that the exclusion of the price paid by the city for Fottler's lands was wrong. The settlement was made when it was apparent that if Fottler did not agree with the city, his land would be taken for the park; and, so far as appears, the case is like *Cobb v. Boston*, 112 Mass. 181.

3. An expert who had testified to value gave as one of his reasons the price paid for the Fottler land, and stated it. The court in its charge instructed the jury that, "so far as [an expert's] opinion is based upon what the jury would not have the right to consider, his opinion is, of course, impaired in value for that reason." It is argued that this is wrong, and that an expert, because he is an expert, can consider and give due weight to things which a jury would not be competent to weigh.

Without considering whether so refined a criticism would be ground for a new trial in any case, it certainly cannot be when, as here, the ground of excluding the sale is that it was practically compulsory, and therefore no criterion to anybody. An expert in real estate is no more competent than anyone else to determine just what effect, measured in money, the dislike of litigation may have had on a given person's mind.

4. Interest was properly allowed upon the value of the land at the time it was taken. *Old Colony R. R. Co. v. Miller*, 125 Mass. 1, 3.

5. A motion in arrest of judgment was made on the ground that the petition was filed more than one year after the taking of one of the parcels described in it, and that, in the meantime, no suit was brought wherein the legal effect of the proceedings was drawn in question. The date when the petition was filed is not before us, but as the petition is dated "January Term, 1885," and alleges the taking to have been on May 25, 1883, we infer that the suggestion that it was filed more than a year after the taking is true. But the other fact alleged in the motion (that no suit was brought) etc., does not appear affirmatively from the record, and therefore it does not appear affirmatively that the petition was not filed within the time provided by the statute as an alternative limitation to one year after the taking. The language of the statute is "or * * * within one year after the final determination of any suit wherein the legal effect of the proceedings * * * is drawn in question." Gen. Stat. chap. 43, § 79 (Pub. Stat. chap. 49, § 86); Stat. 1875, chap. 185, § 5. See also Stat. 1874, chap. 341, § 1 (Pub. Stat. chap. 49, § 89).

Of course it must appear from the record that the petition was brought too late, if this motion is to prevail. But as the fact does not appear affirmatively, the motion cannot prevail, unless it is held that the petitioner is bound to allege that he is in time, and that this petition would have been bad on general demurrer because of its failure to do so.

The rule as to the Statute of Limitations of personal actions is that it must be pleaded, even when the cause of action appears in the declaration to have accrued more than the statutory time before. *Stile v. Finch*, Cro. Car. 381; *Harokings v. Billhead*, Cro. Car. 404; 2 Wm. Saund. 63, note 6. The defense is matter of avoidance, because it admits a cause of action once to have existed. *Emmons v. Haywood*, 11 Cush. 48. The same thing is true here. We will assume that the limitation of time for bringing the petition goes to the jurisdiction of the court, within the meaning of Pub. Stat. chap. 167, § 82; so that if the record shows that the time has run, judgment may be arrested. *Custy v. Lowell*, 117 Mass. 78. But the mere fact that the time of bringing suit goes, in some sense, to the jurisdiction of the court, does not necessarily take the case out of the general rules of pleading; otherwise, pleas to the jurisdiction would never have been heard of.

As long as there was jurisdiction anywhere, it was in the superior court; and there would seem to be stronger reason for requiring the defendant to set up and prove a fact which took that jurisdiction away than for the same requirement as to facts which showed that the

court never had jurisdiction at all; as that the land is ancient demesne, or lies in certain counties palatine, or within the Cinque Ports, or that the defendant has privilege to be sued elsewhere. Com. Dig. *Abatement*, D. In cases like these before courts of general jurisdiction, we suppose that the order of pleading was settled, not by the legal effect of the facts when proved, but by a reference to the ordinary course of events. Most things and persons were within the jurisdiction; therefore, if the defendant's case was an exception, it was for him to show it. So, *a fortiori*, if the plaintiff sets forth facts sufficient, when they arose, to give him a cause of action and a right to proceed in the court in which he sues, it is for the defendant to show facts which have taken his right away. The argument is still stronger, if it be admitted that the advantage of the limitation, in whatever light regarded, could be renounced by the defendant, as in other cases.

To say that bringing suit in season is a condition precedent to the plaintiff's right is either to beg the question or to throw no light upon the matter. For if it means anything except that the plaintiff must allege that he has done so,—which is the question before us,—it is no more true than that competency of the parties to contract is a condition precedent to the contract's binding, when, nevertheless, infancy or coverture are matters to be pleaded in defense.

We believe that the practice has been in accordance with the views which we have expressed, and are of opinion that the motion in arrest of judgment was rightly overruled.

Exceptions overruled.

R. Carrie SIMPSON

v.

William L. MERCER.

Wright W. WILLIAMS.

v.

William L. MERCER.

1. Where plaintiff recovered a judgment against a constable for his wrongful act in allowing her goods to be taken and converted by the agent of defendant under a writ of replevin, which judgment was afterwards satisfied, the satisfaction of her judgment disentitled her to institute or maintain an action against the defendant for the same conversion, either for her own benefit or that of the constable.
2. Where the constable yielded to the representations of defendant's agent, and permitted the latter to enforce an asserted right to goods, and permitted him to remove the same from the storehouse, the constable may recover from defendant, upon the ground that, although so far a codefendant as to be in law liable to the owner of the goods, he was not in *pari delicto*.

(Suffolk—Filed May 7, 1887.)

A PPEALS by defendant from judgments of the Superior Court of Suffolk County in favor of plaintiffs on agreed facts. *Recovered in first action. Affirmed in second action.*

The nature of the cases, and the facts and questions raised, appear from the opinion.

Mr. A. J. McLeod, for defendant:

It is conceded that these two actions are for the same alleged injury, and that there can be but one satisfaction. They were tried together in the court below, and may be properly treated here as one action in different counts.

I. The action of *Simpson v. Mercer* cannot be maintained, for the reason that the plaintiff, R. Carrie Simpson, recovered judgment for the same cause of action in tort against Williams, and he has satisfied that judgment, thereby releasing the defendant, his joint wrongdoer, from any liability he might have been under to the plaintiff while the judgment remained unsatisfied.

Brown v. Cambridge, 8 Allen, 474; *Stone v. Dickinson*, 5 Allen, 29; *Same v. Same*, 7 Allen, 26; *James v. Worcester*, 141 Mass. 361, 2 New Eng. Rep. 354; *Simpson v. Poole*, 141 Mass. 502, 2 New Eng. Rep. 92; *Goss v. Ellison*, 136 Mass. 508.

II. In *Williams v. Mercer* the plaintiff cannot recover on the bond, because the damage and injury, if any, which he sustained, arose out of his own unauthorized act done subsequent to the execution of the replevin writ.

Williams v. Mercer, 139 Mass. 141; *Boynton v. Morrill*, 111 Mass. 4.

III. The plaintiff cannot recover upon his count in assumpsit. The implied promise, if any, could not be held to extend beyond indemnity against loss by reason of what he lawfully and properly did while executing his replevin writ.

Boynton v. Morrill, *supra*.

Such promise was merged in the bond which he took.

Andrews v. Callender, 18 Pick. 484; *Wheelock v. Freeman*, Id. 165.

But the law does not imply a promise where the parties have expressly stipulated.

1 Dane. Abr. pp. 22, 23.

In the case at bar, the bond is such stipulation.

Andrews v. Callender, and *Wheelock v. Freeman*, *supra*.

IV. If the plaintiff can recover at all, it must be upon the count in tort, which, if anything, is for deceit, and based on the statement by defendant's agent that the mortgage covered the property not named in the replevin writ, which the plaintiff permitted him to remove. But the plaintiff had no right to rely on this as an absolute statement of an existing fact susceptible of personal knowledge, and especially within the means of knowledge of the defendant's agent.

Tucker v. White, 125 Mass. 844; *Cole v. Cassidy*, 138 Mass. 437.

Whether the mortgage covered the property or not could be no more than a matter of judgment or opinion; and the statement that it did was the expression of an opinion only.

Page v. Bent, 2 Met. 371.

It was made in good faith, under the belief that it was the fact; and the making of such statement did not render the defendant liable to the plaintiff in this action.

Cowley v. Dobbins, 136 Mass. 401; *Page v. Bent*, 2 Met. 371; *Tucker v. White*, 125 Mass. 2 Mass.

844; *Stone v. Denny*, 4 Met. 151; *Cole v. Cassidy*, 138 Mass. 437.

The defendant's agent had the mortgage with him, and the goods were there. The plaintiff was bound to examine the mortgage, and determine for himself whether or not it covered the goods.

Cases *supra*.

V. The subject-matter of these suits is the taking from the storehouse, by defendant's agent, the property named in the declaration in the second suit. That taking has been conclusively determined to be wrongful by the judgment against the plaintiff Williams for the conversion of the same property at the time of the taking. The plaintiff and defendant each, by his conduct, contributed to cause the act adjudged to be wrongful. They are, therefore, joint tortfeasors *in pari delicto*; and neither can recover of the other indemnity or contribution.

Churchill v. Holt, 181 Mass. 67; *Baird v. Midvale Steel Works*, 12 Phila. 255, 84 Leg. Int. 12.

Messrs. Lund & Welch, for plaintiffs:

The plaintiff, in *Williams v. Mercer*, in all that he did under his writ, was strictly correct, and no fault was found with it by Simpson or anyone else. It was his duty as an officer to do what he did do, and he could not avoid it. He was bound to serve the writ. He served it properly. The defendant, taking advantage of the proper acts of the plaintiff, did an improper act, not intentionally, but believing that he owned the property his agent did take, and required the plaintiff to let him take it.

The defendant forced the plaintiff into this position; the plaintiff acted innocently, remaining passive; and the law will imply a promise or liability to indemnify the plaintiff against the damage he may suffer, caused by said act of the defendant. The act was wholly the defendant's; and, as between the plaintiff and the defendant, the plaintiff was not a joint trespasser; the defendant alone was guilty of wrong; and by reason of that wrong the plaintiff has been compelled to pay the damages.

Boynton v. Morrill, 111 Mass. 4, 7; Met. Cont. pp. 11, 12, and notes; *Marshall v. Homer*, 4 Mass. 68; *Betts v. Gibbins*, 2 Ad. & E. 57, 73 et seq.; *Humphrys v. Pratt*, 2 Dow & C. 288; *Kenyon v. Woodruff*, 38 Mich. 810; *Adamson v. Jarvis*, 4 Bing. 66; *Toplis v. Grane*, 7 Scott, 620, 642, 643; Chitty, Cont. 8th Am. ed. 440, 441, 585.

There was no illegal act in this case against which the defendant could not indemnify the plaintiff. It appeared legal, and as though the defendant had a right to take the property under the mortgage.

Cases *supra*.

There can be no question but what, if the defendant had given the plaintiff a bond to indemnify him against any liability or damage to him for this act of defendant's agent, it would have been valid, and the plaintiff could have recovered upon it. It is not a question of a bond in the usual form, but a bond to protect the plaintiff from any liability that he might incur by not acting at all, and permitting the defendant to take property which he claimed.

There being no bond given, the law will im-

ply a promise or liability as broad and effectual as the plaintiff would have had a right to demand.

Toplis v. Grane, 7 Scott, 620, 642, 643; *Betts v. Gibbins*, 2 Ad. & E. 57, 73, *et seq.*

In the case of *Simpson v. Mercer* there is no question as to the liability of the defendant to Simpson for the agreed value of the goods upon the agreed facts in this suit (*Williams v. Mercer*, 139 Mass. 141), unless the purchase by Williams of the judgment against him, and the plaintiff's right of action against the defendant, and the assignment of both to him, shall be treated as a discharge of her claim.

The case shows that he did not pay and satisfy the judgment or the claim; he purchased them both and took an assignment of them, with the right to sue the claim in her name. This claim against Mercer has not been satisfied by him, and he owes it; he has got the goods and has not paid for them; when he does he will own them. It could not be sued in Williams' name, as it was not negotiable; but he had the right to bring it in her name.

Poss v. Lowell F. C. Sav. Bk. 111 Mass. 285.

The claim was so taken and assigned in order that it should not be extinguished, but that whatever rights Simpson had should be secured to Williams, that he might protect himself from loss by the act of the defendant, when the defendant had received the goods.

Howard v. Smith, 12 Pick. 202.

C. Allen, J., delivered the opinion of the court:

In the case of *Simpson v. Mercer* the facts are as follows: A constable, Williams, having in his hands for service a writ of replevin in favor of Mercer (the present defendant) against one Bassett, opened a storehouse and took the goods described in the writ. An agent of Mercer, who was with the officer, also took away from the storehouse certain goods of the present plaintiff, Simpson, which were stored therein, claiming a right to do so; and the officer did not prevent him from doing so. Mrs. Simpson thereupon brought two actions of tort: one against the constable, for his wrongful act in allowing her goods to be taken; the other being the present action against Mercer for the wrongful act of his agent in taking the goods. In the action against the constable, she recovered judgment, which was satisfied; and she then executed a written instrument assigning to the constable her judgment against him, together with any and all claim and right of action she might have against Mercer for the goods, and authorized the constable to sue for and recover the same of Mercer, for his own use. By virtue of this assignment, the present action was brought in her name against Mercer, the declaration setting up said assignment, and averring that the suit was brought for the constable's benefit.

The answer to all this is that the plaintiff's claim was extinguished by the satisfaction of her judgment against the constable, and she is no longer entitled to institute or maintain an action against Mercer for the same conversion, either for her own benefit or for the benefit of the constable. *Stimpson v. Poole*, 141 Mass. 502, 505, 2 New Eng. Rep. 92, and cases there cited. 484

The judgment for the plaintiff must therefore be reversed, and judgment entered for the defendant.

In the case of *Williams v. Mercer* the constable seeks to recover from Mercer the sum paid by him to satisfy Mrs. Simpson's judgment against him. It was agreed that Mercer procured and paid counsel for defending that suit.

It appears that Mercer's agent, who was with the officer, had the mortgage under which Mercer claimed the goods which were to be replevied, and discovered that the description in it covered property not mentioned in the writ. He also found in the store, mingled with the goods to be replevied, numerous other articles which he believed to be the same covered by the mortgage, and he told the officer that they were the same. Upon his statement and representation that the mortgage covered all the goods in the store, the constable permitted him to remove said other property, as he claimed a right to do. Mercer received the property so removed, and ratified the acts and conduct of his agent in relation thereto. Under this state of things, the parties were not equally in fault; the constable yielded to representations of the defendant's agent; he permitted the latter to enforce an asserted right; he took no part in the act of removal, and derived no benefit therefrom, and may properly recover, on the ground that, although so far a codefendant as to be in law liable to the owner of the goods, he was not *in pari delicto*. *Churchill v. Holt*, 181 Mass. 67; *S. C.* 127 Mass. 165; *Gray v. Boston Gas Light Co.* 114 Mass. 149; *Lowell v. Boston & L. R. R.* 23 Pick. 32.

In this case, therefore, no question of pleading being open by the agreed facts, *the judgment for the plaintiff is to be affirmed.*

Judgments accordingly.

Patrick DOHERTY

v.

Sarah A. HILL.

1. A memorandum in writing signed by the agent of defendant, as follows: "Rec'd of Patrick Doherty \$100 to bind sale of estate on Congress Street, owned by Sarah A. Hill. \$350 cash, \$850 in mortgage at 6 per cent;" and dated at Stoneham, is sufficient to satisfy the Statute of Frauds, if there be only one "estate on Congress Street owned by Sarah A. Hill," in Stoneham; if there be more than one, then the memorandum does not satisfy the statute; and parol evidence cannot be given to identify the estate, and thereby make the memorandum sufficient.
2. A letter from the owner to the agent, authorizing him to offer the property, not exhibited to the buyer, is not admissible to identify the estate, so as to make the memorandum sufficient within the statute, and cannot be used to help it out.
3. Nor can the memorandum be helped out by evidence that the estate intend-

ed was the only one which the buyer knew of as belonging to the seller.

4. A draft of a deed of the premises is admissible in an action for breach of contract to convey, in connection with proof that it was offered to defendant for execution, to show a breach, but not to aid the memorandum.

(Middlesex—Filed May 9, 1887.)

ON defendant's exceptions. *Sustained.*

This was an action for breach of contract to convey real estate situated in Stoneham, in this Commonwealth. The defendant, in her answer, denied the signature and authority of the agent claiming to act for her, and also alleged that the contract declared upon was not a sufficient written contract to satisfy the Statute of Frauds. A demurrer was filed by defendant, which was overruled by the court, and defendant excepted. The case was tried in the superior court before Blodgett, J., who allowed the following bill of exceptions:

J. Horace Green, who claimed to act as agent for the defendant, and who executed the contract "A" declared on in the plaintiff's declaration, testified, as witness for the plaintiff, that the estate referred to in said contract was placed in his hands by the defendant in May, 1884, at which time the defendant instructed him to sell it for the sum of \$1,300; that on May 28, 1885, in reply to a telegram from him inquiring at what price she would sell, the defendant sent witness the following telegram:

"J. Horace Green, Stoneham. Eleven hundred and fifty cash; if possible, try for more. Sarah A. Hill."

That on May 30, 1885, the defendant wrote witness a letter, which letter was given in evidence, and was as follows:

"Newport, May 30, 1885.

Dear Horace,

I rec'd your tell" all right, and when I see you will pay you for the one I sent you in reply. We are two miles from the city, and it costs one Doll to deliver a tell" to me. As I tell" you, I will sell the house in Lincolnville for 1150 Doll, will pay last year's taxes and throw in insurance, which lasts until 1887. The water is taken about half way down the street. The water Co" will take it to the house if wanted, that is to the St. line, free of expense. I think my price is low enough for the house. It was well built for a Mr. Bean, he paying 2527 dollars for it. I will make terms easy for the party purchasing it, say three or four hundred down, and the other payments satisfactory secured by mortgage. I have the deeds of the property with me, and will come up if you make the sale. You can send a letter to me any time up to Sat. at this place; after that time I will send you word where to direct. Please follow it up and make the trade. Remember me to your mother. With kind regards to yourself and wife,

Affectionately,

Aunt Sarah."

That on June 1, 1885, at 9 A. M., and after receiving this letter, the witness received from the plaintiff \$100 in cash, and executed and gave to the plaintiff the following paper, "A,"

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being the same set forth in the plaintiff's declaration:

[A]

"\$100. Stoneham, June 1st, 1885.
Recd of Patrick Doherty one hundred dollars to bind sale of estate on Congress Street, owned by Sarah A. Hill.

J. Horace Green,
\$350 cash. Agent for Sarah A. Hill.
\$850 in mortgage at 6 per cent."

The witness further testified that he had never paid back to the plaintiff the \$100 received, and that he told the plaintiff he would pay interest on it, and that plaintiff could have the money whenever he called for it. The plaintiff offered the contract of sale in evidence, to which the defendant objected, but the court admitted it, and the defendant excepted.

The defendant offered evidence tending to show a revocation by the defendant to Green of authority to sell; that such revocation was written May 30, 1885, and mailed May 31, and not received by Green until after the delivery of paper "A" to plaintiff. Upon the matter of revocation the court gave appropriate instructions, to which the defendant did not except.

There was also evidence tending to show that the defendant, by her agent, Kimball, sold said estate on June 11, 1885, to one Almy, and delivered to said Almy a deed thereof.

The defendant testified—and upon this point her testimony was not controverted—that, in addition to the estate claimed to have been sold to the plaintiff, and which consisted of a lot of land with a dwelling-house on it, she owned, on the 1st day of June, 1885, several lots, containing two or three acres in all, and all in one piece, of other land on said Congress Street, upon the other side of the street, and nearly opposite to the land in question, and that this piece of land had no buildings upon it.

The plaintiff offered to show that the estate named in paper "A" was the lot with the dwelling-house on it, and the defendant requested the court to rule that it could not be shown, by extrinsic evidence, to which of the defendant's estates on Congress Street the written memorandum referred; but the court declined so to rule, and the defendant excepted.

The plaintiff offered in evidence a draft of a deed from the defendant to him of the estate the plaintiff claimed to have purchased, which draft was made by said Green, and sent by him to the defendant to be executed, and which the defendant refused to execute. To the admission of this draft in evidence the defendant objected, but the court admitted it, and the defendant excepted.

The defendant, for the purpose of showing the value of the estate as affecting the question of damages, offered to prove that said estate, since it was sold to one Almy in June, 1885, had been, since December, 1885, in the hands of a real-estate agent in Stoneham, with authority to sell for \$1,200, but no purchaser had been found. The court excluded the evidence so offered, and the defendant excepted.

The jury brought in a verdict for the plaintiff in the sum of \$200.

Mr. A. V. Lynde, for defendant:

The memorandum signed by the defendant's

agent was not sufficient, as claimed under the demurrer, and at the trial on the merits, to satisfy the requirements of Pub. Stat. chap. 78, § 1.

The authority of the agent was limited by the terms of the telegram of May 28 and the letter of May 30, and these fairly imply that, if the estate was not sold for cash, the terms were to be adjusted and agreed to by the defendant before there could be a binding contract to convey the estate.

Dresel v. Jordan, 104 Mass. 412; *Jarrett v. Hunter*, L. R. 34, Ch. D. 182; *Hastings v. Weber*, 142 Mass. 232, 2 New Eng. Rep. 691.

Besides, the description of estate in the memorandum given by the agent is such that, without the aid of extraneous parol evidence, the plaintiff could not identify which one of the several lots of land owned by the defendant he claimed to have purchased of the defendant.

Sherer v. Troughbridge, 135 Mass. 500; *Clark v. Chamberlin*, 112 Mass. 19; *Sherburne v. Shaw*, 1 N. H. 157; *Welsh v. Bayaud*, 21 N. J. Eq. 186.

The drafting and sending by the agent of a deed of the estate to the defendant, before obtaining her assent to the terms of the credit to be granted by her, and after a revocation, sent by the defendant by the next mail to the agent, of his authority to complete the sale, was not competent evidence to establish the validity of the contract or memorandum made by defendant's agent.

Messrs. Powers & Powers, and **J. C. Kennedy**, for plaintiff:

I. The written agreement signed by the agent of the defendant was a sufficient memorandum to satisfy the Statute of Frauds.

Hurley v. Brown, 98 Mass. 545; *Mead v. Parker*, 115 Mass. 413; *Slater v. Smith*, 117 Mass. 96; *Gowen v. Klous*, 101 Mass. 449; 1 Greenl. Ev. ¶¶ 286, 288; *Todd v. Taft*, 7 Allen, 371.

That resort may be had to parol evidence to furnish the means of interpreting and applying written agreements to the subject-matter of the contract is settled by the uniform current of authorities.

Stoops v. Smith, 100 Mass. 63; *Baker v. Hathaway*, 5 Allen, 103; 1 Greenl. Ev. ¶¶ 286, 288; *Farnell v. Mather*, 10 Allen, 322; *Putnam v. Bond*, 100 Mass. 58.

There was no patent ambiguity in the contract. The defendant's letter of May 30, 1885, shows that the estate to be sold had a house upon it, and her testimony proves that this house was the only building that the defendant owned at that time upon Congress Street.

There was an attempt upon the part of the defendant to create a latent ambiguity in the written contract by parol testimony, and such ambiguity may be removed by the same kind of testimony.

Hurley v. Brown, 98 Mass. 545, 548.

II. The draft of the deed made by the defendant's agent was admissible to show what estate was the subject of this written agreement, especially after the parol testimony introduced by the defendant. The subject-matter of the contract may be identified by proof of what was before the parties.

Bradford v. Manley, 13 Mass. 139; *Hogins v. Plympton*, 11 Pick. 97; *Clark v. Houghton*, 12 Gray, 38.

III. The evidence offered by the defendant was too indefinite and immaterial to be admissible upon the question of the value of the estate. Evidence of an unaccepted offer is incompetent for the purpose of showing the value of an estate (*Dunkley v. Middlesex Comrs.* 6 Allen, 92); much more, evidence of the absence of an offer.

Holmes, J., delivered the opinion of the court:

The memorandum would have satisfied the Statute of Frauds if the evidence had shown that there was only one "estate on Congress Street, owned by Sarah A. Hill," in Stoneham, where the memorandum is dated. *Mead v. Parker*, 115 Mass. 413; *Hurley v. Brown*, 98 Mass. 545; *Scanlan v. Geddes*, 112 Mass. 15. But the evidence showed that there was more than one. The plaintiff argues that this is an ambiguity introduced by parol, and that therefore it may be removed by parol. *Hurley v. Brown*, *supra*. But the statement seems to us misleading. The words show on their face that they may be applicable to one estate only, or to more than one. If, on the existing facts, they apply only to one, then the document identifies the land; if not, it fails to do so. In every case the words used might be translated into things and facts by parol evidence. But if, when so translated, they do not "identify the estate intended as the only one which would satisfy the description," they do not satisfy the statute. See *Slater v. Smith*, 117 Mass. 96, 98; *Potter v. Duffield*, L. R. 18 Eq. 4.

The letter from the defendant to her agent did identify the estate, we will assume, as the only one owned by her which had a house upon it. But of course this letter was not of itself a sufficient memorandum. It has been held that an offer in writing afterwards accepted orally satisfies the statute. *Sanborn v. Flagler*, 9 Allen, 474; *Browne*, Fr. § 845, a, 4th ed. But this letter was only an authority to offer. It does not appear to have been exhibited to the plaintiff, as in *Hastings v. Weber*, 142 Mass. 232, 2 New Eng. Rep. 691, and plainly was not intended to be. We express no opinion whether it would have been sufficient if it had been shown and its terms had been accepted.

Again, the letter cannot be used to help out the memorandum, on the ground that the latter impliedly incorporates it. The memorandum, it is true, purports to be signed by an agent, and therefore may be said to refer by implication to some previous authority. But this implied reference is, at most, rather an implied assertion that authority exists, which may be oral, than a reference to documents containing the authority. *Jefts v. York*, 10 Cush. 392, 395; *Boston & A. R. R. Co. v. Richardson*, 135 Mass. 478, 475. It hardly could be argued, as a defense to an action of deceit against a person who had assumed to act as agent without authority, that the memorandum signed by him impliedly referred to and incorporated the written communications from his alleged principal, and that therefore the plaintiff must be taken to have known them, and that they did not confer the authority assumed. In this case the agent had authority by telegram, before he received the letter.

The argument therefore would have to go the length of saying that all documents of authority were tacitly incorporated.

In *Hurley v. Brown*, *ubi supra*, it was held that a memorandum of an agreement to sell "a" house on a certain street should be presumed to mean a house belonging, at the time, to the contractor. It may be asked whether there is not at least as strong a presumption that a memorandum signed by an agent refers to property which he is authorized to sell. But unless the document of authority is specifically incorporated, then the memorandum is only of a sale of a house which the agent is authorized in some way to sell; and, so far as the memorandum goes, his authority may as well be oral as written. The difference may be one of degree, but the distinction is none the less plain between an identification by extrinsic proof of the usually manifest, external, and continuing fact that the party did not own but one house on a certain street, and that by similar proof of possibly oral communications between principal and agent, which is precisely the kind of identification the statute seeks to avoid. See *Whelan v. Sullivan*, 102 Mass. 204, 206; *Rossiter v. Miller*, 3 App. Cas. 1124, 1141; *Potter v. Duffield*, L. R. 18 Eq. 4; *Jarrett v. Hunter*, L. R. 34 Ch. D. 182.

The same considerations would apply to an attempt to help out the memorandum by evidence that the estate intended was the only one which the plaintiff knew of as belonging to the defendant.

The remaining exceptions become immaterial. The draft of a deed of the premises was admissible, in connection with proof that it was offered to the defendant for execution, to show a breach, but not to aid the memorandum. The deed was not referred to by the previously-executed memorandum, nor were its contents governed by the signature of the latter.

Evidence that a real-estate agent had not sold the land for \$1,200 was not evidence of its value.

Exceptions sustained.

Pauline T. GALE *et al.*

v.

Soth NICKERSON *et al.*

1. Although our statutes make no "provisions for a new trial or review in case of a decree allowing a will, there is an inherent power in probate courts, in cases where justice clearly requires it, to revise such a decree. If, after a will is proved, a later will or codicil is discovered, or if there is newly-discovered evidence proving that the will is forged, the court may reopen the case and reverse the decree.
2. **Decrees allowing wills and appointing executors** are in the nature of judgments *in rem*. The policy of the law looks to the speedy settlement of estates; and applications for new trial cannot be entertained unless the applicant makes a strong case, both of error

and injustice in the decree, and of diligence on his part.

3. **The supreme court has no original jurisdiction of probate matters.** An appeal from the probate court does not bring the case to the supreme court; that remains within the jurisdiction of the probate court. It does more than to bring here questions of law ruled on by the probate court; it brings the whole question, including both law and fact, whether the decree appealed from is invalid for any of the reasons of appeal assigned by the appellant. It is more in harmony with our system, and more convenient in practice, that a motion for a new trial or rehearing of a decree of the probate court affirmed by the supreme court should be heard, in the first instance, in the probate court. By entertaining a motion for a new trial the probate court does not overrule a decision of this court; it decides that, by reason of newly-discovered evidence, a new case is made out which this court has never passed upon; but any decree granting a new trial may be brought to this court for revision, by an appeal, which will suspend the operation of the decree until the determination of this court is had. The whole question is tried here *de novo*. If, for any reason, the petition ought to be dismissed, the decree of the probate court dismissing it must be affirmed, although the judge may have assigned unsound reasons for his ruling.

4. **Where a will was duly presented for probate and allowed**, in July, 1869, and an appeal taken, and in November, 1869, by consent of all parties, the decree of the probate court was affirmed and the case remitted to the probate court for further proceedings, a petition to the probate court, filed sixteen years later, to revise and reverse the decree allowing the will, which assigns, as the only reason for a new trial or rehearing, that the petitioners are informed and believe that the will of the supposed testator "was not in law his last will and testament, and that he never, in his own clear and unclouded mind and sound judgment, executed a will in writing of the kind filed in the said probate office; * * * that the said alleged will was and is a false and fraudulent one, and the signature thereto is not the signature of the said, * * * but is a forgery, as will appear on inspection of the paper itself, and on comparison with the genuine signature of the deceased; that there are several alterations in the said alleged will, made at times subsequent to the alleged date thereof, which, upon the face of the will itself, show material and substantial alterations sufficient of themselves to render the said will invalid;" and which petition nowhere specifies any fraud practiced upon the court or the parties interested, or alleges that there is any

newly-discovered evidence upon the issues which it seeks to retry,—is **insufficient, and was properly dismissed.**

(Barnstable—Filed May 9, 1887.)

APPEAL from a decree of a single justice of the Supreme Judicial Court affirming a decree of the Probate Court of Barnstable County dismissing a petition to vacate and set aside all proceedings relating to the probate of a will, and the appointment of an administrator, etc.* *Petition dismissed.*

The case is stated in the opinion.

Mr. Harvey D. Hadlock, for appellants:

The material allegation of fact contained in the petition is in these words: "That the said alleged will was and is a false and fraudulent one, and the signature thereto is not the signature of the said John Nickerson, but is a forgery, as will appear on inspection of the paper itself, and on comparison with the genuine signature of the said John Nickerson, deceased." This allegation, as all others contained in the petition, must, for the purposes of this hearing, be taken as true, and the motion upon which the court based its decree be treated as admitting all the facts stated in the petition.

By the appeal of August 28, 1869, the question of forgery was not before the court, and has never been passed upon; and the authorities limiting the time for taking an appeal have no application to the question presented by the petition.

Kent v. Dunham, 14 Gray, 279, and *Dunham v. Dunham*, 16 Gray, 577, have no application to the case at bar, at this stage of the proceedings. None of the questions raised by the appeal were passed upon by the court; the affirmance was based upon an agreement, and not upon a hearing. The order of the court simply remanded the case to the probate court for further proceedings in that court. This order was predicated upon the assumption that the instrument which purported to be the will of John Nickerson was a valid will. And it

will not be contended that even a decree of court can convert a forgery into a valid instrument.

The decree of a court never extends beyond the questions presented for its adjudication. The only questions before the court were contained in the reasons of appeal.

If the will was forged, as alleged in the petition, then no decree of court can make it valid; for, as *Lord Coke* says, "fraud avoids all judicial acts, ecclesiastical or temporal." And while it is true that public policy demands that all judicial acts be treated as valid until vacated by the proper tribunal, yet that is not sufficient to make valid that which was void.

Now, assuming the allegations in the petition to be true, and that the instrument offered and approved in the probate court as the will of John Nickerson was not his will, but a forged instrument, can the decree of approval be vacated? and if it can be vacated, what court has original jurisdiction? I shall unhesitatingly contend that it is well-settled law that, when a decree of a court has been obtained by fraud, the court in which such decree has been so obtained has full power to vacate it. *Holmes v. Holmes*, 63 Me. 422; *Adams v. Adams*, 51 N. H. 388; *Edison v. Edison*, 108 Mass 590; *Allen v. Maclellan*, 12 Pa. 328; *Meadows v. Duchess of Kingston*, 2 Amb. 763; *Prudham v. Phillips*, 2 Amb. 763.

The power, both of courts of equity and law, over their own processes, to prevent abuse, oppression, and injustice, is inherent and equally extensive and efficient; as is also the power to protect their own jurisdiction.

Kroppendorf v. Hyde, 110 U. S. 276 (Bk. 28, L. ed. 145); *Johnson v. Waters*, 111 U. S. 640 (Bk. 28, L. ed. 547).

The probate courts of the Commonwealth in their jurisdiction include wills of real estate as well as personal property.

Laughton v. Atkins, 1 Pick. 549.

Now, with this extended jurisdiction, can it be urged that probate courts are powerless to vacate decrees obtained by imposition and fraud, and that, if a forged will be admitted to

***HOLMES, J.:** This was an application to the probate court to set aside a decree made some fifteen or more years ago establishing a will.

The decree was made in the first instance in the probate court. The case was taken by appeal to this court, where, in accordance with the agreement of the parties, it was ordered that the decree of the probate court be affirmed and the case remitted for further proceedings. The ground on which it is now sought to set aside the decree is that the will was forged. There is also an imperfect and hardly sufficient allegation that the decree of the probate court was obtained by fraud, but no allegation that the decree of this court was obtained by fraud. I speak of the allegations in the petition to the probate court to vacate the proceedings, which was dismissed by the probate court, and is now before me on appeal. If more has been alleged in the reasons for the present appeal, that cannot help the petition, even if the additional allegations would make any difference in the result, which I am far from intimating. The judge of the probate court rejected the petition for want of jurisdiction, and in my opinion he was right. At the end of the argument the other day I suggested it was like the case of an attempt to file a bill of review in a court of first instance, when the decree sought to be reviewed had been affirmed by an appellate court. It is settled that this cannot be done; and I find that the cases establishing that it cannot be done are cited by *Chief Justice Gray*, as supporting his intimation, in *Cleveland v. Quilty*, 128 Mass. 578. He

says that it is at least doubtful whether a probate court can set aside a decree which has been affirmed by the supreme court. I now say that it cannot. I need not speculate whether it would have made any difference if the petition which I am considering had set forth a specific case of fraud in obtaining the decree of this court, although I think it would have made no difference as to a subsequent proceeding in the same cause. If there is any ground for setting aside a decree of this court, the application should be made here. And at this length of time, the allegations would have to be specific and the proof very clear, to induce the court to disturb what had stood so long. It was suggested that the reasons of appeal from the decree establishing the will, on which the decree of this court was passed, did not open the question of forgery; that the decree shows that it was passed by agreement of parties, and only amounted to dismissing the appeal. But the appeal, being properly taken, brought the case into this court; and the decree necessarily established or disallowed the will.

The will was established in this court as the supreme court of probate, and whatever the reasons of appeal, or the language of the decree, and whether the decree was made by agreement or after a contest, the decree which established the will established it for all purposes, and against all.

Decree of Probate Court dismissing petition affirmed.

probate and allowed, the decree that allowed that forged will cannot be vacated? And yet this must be the result, if the courts cannot vacate decrees obtained by imposition and fraud; as the decrees of probate courts, in matters of probate, within the authority conferred upon them by law, are conclusive upon the courts of common law, and cannot be reversed by writ of error or *certiorari*.

Dublin v. Chadbourn, 16 Mass. 441; *Peters v. Peters*, 8 Cush. 529.

Nor can equity grant relief even in cases of fraud.

Gaines v. Chew, 2 How. 641-646 (43 U. S. bk. 11, L. ed. 411, 412, 413); *Sever v. Russell*, 4 Cush. 513.

It appears that in colonial days the power to vacate decrees was recognized in the probate courts. The ecclesiastical courts of England had jurisdiction over matters now within the jurisdiction of the probate courts of this Commonwealth; and the custom and right of the ecclesiastical court to revoke any of its decrees obtained by fraud or imposition are recognized in *Harrison v. Mitchell*, Fitzg. 308, and in *Nicol v. Askeno*, 2 Moore, P. C. 92.

All the text-books relied on as guides in matters of practice of this kind state that probate of a will, either in common or solemn form, may be revoked on evidence of fraud in the proof, or of a later will.

Wentw. Off. Exrs. 48; *Toller*, 73, 74; 1 Wms. Exrs. 299-508.

The authority of courts of probate to correct errors in their decrees on administrators' accounts, even when in terms final, upon clear proof of fraud or mistake in a point not once actually presented and passed upon, has been repeatedly sustained in this court, and by the highest courts of Vermont and New York, and is now affirmed in this State by statute.

Field v. Hitchcock, 14 Pick. 405; *Boynnton v. Dyer*, 18 Pick. 5; *Adams v. Adams*, 21 Vt. 166, 167, and cases cited; *Pew v. Hastings*, 1 Barb. Ch. 452; *Sipperly v. Baucus*, 24 N. Y. 46.

A fortiori, in cases where a will, the basis of the administration, is a forgery, should this authority pertain.

That a probate court has inherent authority to vacate its decrees when obtained by fraud seems to be well settled in this Commonwealth.

Blake v. Ward, 137 Mass. 96; *Stetson v. Bass*, 9 Pick. 27; *Waters v. Stickney*, 12 Allen. 1.

Ruffin, Ch. J., in *Crump v. Morgan*, 3 Ired. 92, 40 Am. Dec. 451, used the following language concerning the jurisdiction of courts of probate: "Again, it was said that these are the adjudications of the ecclesiastical courts, and are founded, not on the common law, but on the canon and civil laws, and therefore not entitled to respect here. But it is an entire mistake to say that the canon and civil laws as administered in the ecclesiastical courts of England are not parts of the common law." The same view has been held by other States, and the authority of courts of probate to revoke a probate once granted is held to be a part of their necessary power, although nowhere expressly recognized in the statutes.

Bowen v. Johnson, 5 R. I. 119, 120.

In *Muir v. Leake & W. Orphan House*, 3 Mass.

Barb. Ch. 477, *Chancellor Walworth* recognized the power of the surrogate to call in or annul the probate, notwithstanding that, by the statute of New York, as by the statute of Massachusetts, every will was proved in solemn form, after citation to all parties interested; and that the next of kin, if they had not appeared and contested the will upon the probate thereof, might come in and do so within one year.

The power of courts to revoke the probate of a will for cause is well settled.

Gaines v. Hennen, 24 How. 567 (65 U. S. bk. 16, L. ed. 707); *Clagett v. Hawkins*, 11 Md. 381; *Schultz v. Schultz*, 10 Grat. 358; *County Court of Mecklenburg v. Bisell*, 2 Jones, 389; *Lawrence's Will*, 3 Halst. Ch. 215; *Roy v. Segrist*, 19 Ala. 810.

The power we contend for in this case is a necessary power. Without it a forged will would be as effectual in transferring estates, if once approved, as a valid one.

"This power does not make the decree of a court of probate less conclusive in any other court, or in any way impair the probate jurisdiction; but renders that jurisdiction more complete and effectual, and, by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitles them to be deemed conclusive upon other courts."

Waters v. Stickney, 12 Allen, 16.

I now submit that the Probate Court for Barnstable County, in the Commonwealth of Massachusetts, is the only court possessed of original jurisdiction over the subject matter set forth in the petition which is now before this court on appeal.

The supreme court of probate has only appellate jurisdiction, and can only pass on such matters as are presented on appeal; and all orders and decrees must be carried into effect in the probate court; therefore it follows that the jurisdiction in all probate matters, in the first instance, vests in the probate court.

The supreme judicial court, after it has remanded a case to the probate court for further proceedings, has no control over the case, and cannot take jurisdiction, unless the case be again brought up on appeal.

Peters v. Peters, 8 Cush. 542, 543.

The supreme judicial court, as a supreme court of probate, has no original probate jurisdiction; and, in the exercise of its appellate jurisdiction from the probate court, can only make such decrees as the court should have made.

Grinnell v. Baxter, 17 Pick. 383; *Waters v. Stickney*, 12 Allen, 16.

The decree that the petitioners seek to have annulled is not the decree of the supreme court of probate, but the decree of the probate court.

Supp. Mass. Gen. Stat. 1860 to 1872, vol. 1, chap. 189, p. 31.

The effect of an appeal since the Act of April 4, 1860, which was in force in 1869, was not to vacate the decree of the probate court, but only to suspend proceedings in that court until the determination of the supreme court of probate could be had; and when the decree of the probate court was affirmed by the supreme court of probate, the original decree of the probate court remained in force.

The supreme court of probate, in its opinion in the case at bar, held that the probate court had no jurisdiction over the subject-matter of the petition; and that the petition, in the first instance should have been presented to the supreme court of probate, for that court to determine whether, upon the facts presented, its decree of affirmance should be vacated, and, in support of that view, cited the case of *Cleveland v. Quilly*, 128 Mass. 578, and commented upon the cases cited in that opinion in support of its decree of affirmance. We submit that the cases cited in *Cleveland v. Quilly*, *supra*, would have had more direct application prior to the Act of 1860. The decree in those cases had been vacated, and the court below was not, as in this case, enforcing its own decree, which had never been vacated, but was carrying into effect the decree of the appellate court; and the decree of the appellate court in the cases cited was the only decree in existence, and therefore the only decree the inferior court could proceed upon. In the case at bar the probate court proceeds on its original decree.

The question now raised by the petitioners was not pending in the supreme court at the time it entered its decree of affirmance. This is a new question of fact presented after the decree.

The position assumed by the learned court in the opinion in this case would make the supreme court of probate a court of original jurisdiction in all matters where a decree of a probate court had been affirmed, notwithstanding the grounds relied upon for vacating the decree had arisen or been discovered after the affirmance, and were not before the probate court when its decree was entered, and had never been before the supreme court of probate, and therefore had never been considered by either court. This position, we most respectfully contend, cannot be sustained.

The case was remanded to the probate court for further proceedings in that court; and, after the case had been remanded, a new objection was offered in the probate court, which, if true in fact, would preclude all further proceedings in the premises under the will. This objection is addressed to the court where the case is pending, the court of original jurisdiction; and the only court that can have cognizance of the objection is the court where the case is pending at the time the objection is made. How can the supreme court of probate, a court where the case is not pending, act? The case was only pending in the supreme court of probate on the appeal that was before it, and when it was remanded to the probate court for further proceedings, its jurisdiction over the case on that appeal ceased.

Peters v. Peters, 8 Cush. 542, 543.

We contend that any question of fact tending to show that further proceedings should not be had because the will is a forged instrument, that arose after the case had been remanded, was, in the first instance, within the jurisdiction of the probate court; and that it was the duty of the probate court to determine such question of fact.

"Where a question of fraud arises in the probate court, as incidental to any subject of

which the court has jurisdiction, the judge must take cognizance of it, and try it in the same manner as any other question of fact."

Wade v. Lobdell, 4 Cush. 510.

The only court, therefore, that can take jurisdiction of the petition for the purpose of determining the truth of the facts stated in the petition is the probate court, as no other court can exercise its functions; and therefore it follows that the petition was properly presented in the probate court.

Messrs. Robert M. Morse, Jr., and William F. Griffin, for respondents:

I. The petition was rightly dismissed. It was, in effect, a petition to set aside a decree allowing a will, on the ground that it was not signed by the testator, and that he was not of sound mind. But this decree was made by the supreme court, and was binding and conclusive on the probate court.

Opinion of Holmes, J.; *Davis v. Davis*, 1 Pick. 206; *Cleveland v. Quilly*, 128 Mass. 578; *Durant v. Essex Co.* 101 U. S. 555 (Bk. 25, L. ed. 961); *Southard v. Russell*, 16 How. 547 (57 U. S. bk. 14, L. ed. 1052); *Clayton v. Wardell*, 2 Bradf. 1; *Lyon v. Merritt*, 6 Paige, 473; *Shedden v. Patrick*, 1 Macq. 535; *Wolcott v. Wolcott*, 140 Mass. 194, 1 New Eng. Rep. 212.

II. The petitioners claim that, by the terms of the decree of the supreme court, November 13, 1869, remitting the case to the probate court "for further proceedings," authority was given the probate court to entertain a petition of the character of the one at bar without vacating the decree of the supreme court.

But the expression, "further proceedings," is the language usually employed by appellate courts in probate and equity cases, in remitting a case to the court below, when something remains to be done in the lower court. In the present case the "further proceedings" were the proceedings to be thereafter had in the probate court in carrying into effect the decree allowing the will.

Dunham v. Dunham, 16 Gray, 577; *Choate v. Jacobs*, 136 Mass. 297; Gen. Stat. chap. 117, § 16; Pub. Stat. chap. 156, §§ 17, 18; *Southard v. Russell*, 16 How. 547, 567 (57 U. S. bk. 14, L. ed. 1052); *Boynston v. Dyer*, 18 Pick. 1, 8; *Murphy v. Walker*, 131 Mass. 341, 344; *Harvard College v. Amory*, 9 Pick. 446, 465.

III. If it is open to the parties at present to argue any other question than that of the jurisdiction, the respondents submit that the petition should be dismissed as not stating a case to justify the action of the court which it prays for.

1. The petitioners and those under whom they claim, having neglected to take an appeal, and showing no reason or excuse for such neglect, are bound by the decree.

Kent v. Dunham, 14 Gray, 279; *Lawrence v. Englesby*, 24 Vt. 42; *Noell v. Wells*, 1 Lev. 226; *Homer v. Fish*, 1 Pick. 441; *Harvard College v. Amory*, 9 Pick. 446.

2. After an unexplained delay of more than sixteen years, the petitioners have lost their right to complain.

Conant v. Perkins, 107 Mass. 79-82; *Essex v. Bacon*, 99 Mass. 213; *Plymouth v. Russell*, 11 Allen, 488; *Peabody v. Flint*, 6 Allen, 56; *Fuller v. Melrose*, 1 Allen, 166; *Fuller v. Boston*

2 Allen, 324; *Homer v. Fish*, 1 Pick. 435; Gen. Stat. chap. 117, §§ 11, 12, 14; Pub. Stat. chap. 156, §§ 9-11.

3. In the reasons for appeal are various claims not stated in the petition, *e. g.*, that some of the petitioners are new parties. But the petitioners cannot be helped by new statements in the reasons for appeal.

Opinion of Holmes, *J.*, in this case; Story, Eq. Pl. §§ 257, 257 *a*, and cases cited; also §§ 246, 28, 28.

4. There is in the petition an imperfect allegation that the proceedings in the probate court were illegal, fraudulent, and irregular. But if there were any fraud or irregularities therein, that decree was vacated by the appeal to the supreme court.

Commonwealth v. O'Neil, 6 Gray, 345; *Commonwealth v. Lynch*, 14 Gray, 383; *Paine v. Cowdin*, 17 Pick. 142; *Commonwealth v. Holmes*, 119 Mass. 195; *Commonwealth v. Fredericks*, 119 Mass. 199, 205; *Murdock's App.* 7 Pick. 304, 327; *Leyden v. Sweeney*, 118 Mass. 418.

Unless a charge of fraud upon the court is specific, pointed, and relevant, it will not be of any avail.

Shadden v. Patrick, 1 Macq. 585; *Cammell v. Sewell*, 3 H. & N. 617.

This allegation in the petition, not being assigned as a reason of appeal, is waived.

Murphy v. Walker, 131 Mass. 341; *Boynton v. Dyer*, 18 Pick. 1, 4; *Slack v. Slack*, 123 Mass. 443.

IV. After such lapse of time, it must be presumed that the will has been carried fully into effect. What has been done in pursuance of the will cannot now be undone.

Stone v. Peasley, 28 Vt. 720; *Hale v. Hale*, 1 Gray, 522; *Petee v. Wilmarth*, 5 Allen, 144; *Loring v. Steineman*, 1 Met. 204, 208; *Dorr v. Wainwright*, 18 Pick. 328, 331, 332; *Bradford v. Boudinot*, 3 Wash. 122; *Hale v. Stovel*, 1 Ch. Cas. 126; *Allen v. Dundas*, 3 T. R. 129, 130, 132; *Kittredge v. Folsom*, 8 N. H. 98, 110; *Peebles' App.* 15 Serg. & R. 89.

Morton, Ch. J., delivered the opinion of the court:

This is a petition to the probate court to revise and reverse a decree approving and allowing the will of John Nickerson. It is, in its nature, an application for a rehearing and new trial of the question of the probate of the will. The will was duly presented for probate, and was proved and allowed by the probate court, in July, 1869. An appeal was taken, and in November, 1869, by consent of all parties, the decree of the probate court was affirmed by this court, and the case remitted to the probate court for further proceedings.

Our statutes make no provision for a new trial or review in case of a decree allowing a will. *Pope v. Pope*, 4 Pick. 129. But we think there is an inherent power in probate courts, in cases where justice clearly requires it, to revise such a decree. Thus, if after a will is proved, a later will or codicil is discovered, or if there is newly-discovered evidence proving that the will is forged, the court may reopen the case, and reverse the decree. This subject is fully discussed in *Waters v. Stickney*, 12 Allen, 1.

But decrees allowing wills and appointing

executors are peculiar; they are in the nature of judgments *in rem*; they vest the personal property of the testator in the executors, and it is their duty to proceed at once to execute the will. The whole policy of our laws looks to the speedy settlement of estates; and applications for new trial cannot be entertained unless the applicant makes a strong case, both of error and injustice in the decree, and of diligence on his part.

In the case before us, the petition seems to have been dismissed by the probate court upon the ground that it had no jurisdiction of such a petition. This point is not essential to the decision of the case; but as it has been argued by counsel, and as it presents an interesting question of practice, we have considered it.

Under our system the relation between the county courts of probate and this court sitting as the supreme court of probate are peculiar. The supreme court has no original jurisdiction of probate matters. A right of appeal to this court exists from any order or decree of the probate court. Upon such appeal, the whole matter involved in the order or decree, both of law and fact, is heard and tried in this court, and the court may affirm or reverse the decree below, or may make such order and decree as the probate court ought to have made. The statutes provide that, after an appeal is taken, all proceedings in pursuance of the decree or order appealed from shall be stayed until the determination of the supreme judicial court of probate is had; but if, on such appeal, such decree or order is affirmed, it shall thereafter be of full force and validity. Pub. Stat. chap. 156, § 512. Speaking exactly, it is not correct to say that an order or decree is vacated by an appeal; it is suspended, but, upon being affirmed by the supreme court, it takes effect and operates as a decree of the probate court; and any intermediate action which may have been had under the decree is valid. *Dunham v. Dunham*, 16 Gray, 577.

It is to be borne in mind that an appeal does not remove the cause to this court, but only the question of the validity and propriety of the decree appealed from. The probate court still retains jurisdiction over the cause and the parties. It is therefore not like the cases where the effect of an appeal is to remove the case to the appellate court, as in appeals from municipal, police, or district courts to the superior court; or, under the old practice, from the court of common pleas to the supreme judicial court. In such cases, it is clear that the inferior court cannot entertain any motion, or take any action in the case, because the whole case is taken out of its jurisdiction. On the other hand, in the modern practice, the case is not removed from the superior court to this court by an appeal, or by exceptions or report; but only the questions of law, the decision on which is appealed from. The case remains in the superior court, and is open to a motion in that court to arrest judgment, to grant a new trial, or to allow amendments, although the rescript of the supreme court has directed judgment for the plaintiff or defendant. *Terry v. Brightman*, 133 Mass. 536, and cases cited.

A probate appeal lies between these two classes of cases. It does not bring the cause to the supreme court; that remains within the

jurisdiction of the probate court. It does more than to bring here the questions of law ruled on by the probate court; it brings the whole question, including both law and fact, whether the decree appealed from is invalid for any of the reasons of appeal assigned by the appellant. We think it more nearly resembles an appeal, under our present practice, from the superior to the supreme court, though more extensive in its scope; and, upon the whole, we are of opinion that it is more in harmony with our system, and more convenient in practice, than a motion for a new trial or rehearing of a decree of the probate court affirmed by the supreme court should be heard, in the first instance, in the probate court.

Such a practice prevails in regard to reopening and revising accounts of executors, administrators, trustees, or guardians. Under our system the probate court has the jurisdiction and power to reopen an account, even to the extent of rehearing and revising a matter in dispute which has been previously heard and determined by the probate court, and, upon appeal, by this court. Pub. Stat. chap. 144, § 9; *Blake v. Pegram*, 101 Mass. 592; *Same v. Same*, 109 Mass. 549; *Wiggin v. Sweet*, 6 Met. 194.

We are aware that the general current of the authorities, though there is some conflict, is that an inferior court cannot review or revise a decree of a superior court, which is sent down to the inferior court to be executed, without leave being first given by the appellate court. *Southard v. Russell*, 16 How. 547 [57 U. S. bk. 14, L. ed. 1052]; *Durant v. Essex Co.* 101 U. S. 555 [Bk. 25, L. ed. 961]; *United States v. Knight*, 1 Black, 488 [66 U. S. bk. 17, L. ed. 76]; *Clayton v. Wardell*, 2 Bradf. 1; *Stafford v. Bryan*, 2 Paige, 45; *Lyon v. Merrill*, 6 Paige, 478; *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 578; *Ryerson v. Eldred*, 18 Mich. 490; *Jewett v. Dringer*, 81 N. J. Eq. 586; *Singleton v. Singleton*, 8 B. Mon. 340; *Bush v. Madeira's Heirs*, 14 B. Mon. 212.

We are largely influenced in our decision by the peculiar features of our system.

The argument that to allow an inferior court to review or revise a judgment or decree of a superior court is to disregard the due subordination of the lower court to the higher, under our system, is sentimental rather than of practical importance. By entertaining a motion for a new trial, the probate court does not overrule the decision of this court; it decides that, by reason of newly-discovered evidence, a new case is made out which this court has never passed upon. It will be a more convenient practice that such motions should be first heard in the probate court. There is a full guaranty against any danger, not only in the high character of that court, but in the fact that any decree granting a new trial may be brought to this court for revision, by an appeal, which will suspend the operation of the decree until the determination of this court is had; so that, in fact, no new trial can be had, the effect of which is to reverse a decree of this court without leave of this court, if either party chooses to appeal to it. As we have before said, the appeal from the decree of the judge of probate brings to this court the whole question of the validity and propriety of the decree. If, for any reason, the petition ought to be dis-

missed, the decree of the probate court must be affirmed, although the judge may have assigned unsound reasons for the dismissal. The whole question is tried here *de novo*.

Upon examining the petition, it is clear that it does not set out a case which entitles the petitioners to reopen the probate of the will. Stripped of its tautology, it assigns as the only reasons for a new trial or rehearing that the petitioners are informed and believe that said will of John Nickerson "was not in law his last will and testament, and that he never, in his own clear and unclouded mind and sound judgment, executed a will in writing, of the kind filed in the said probate office; * * * that the said alleged will was, and is, a false and fraudulent one, and the signature thereto is not the signature of the said John Nickerson, but is a forgery, as will appear on inspection of the paper itself, and on comparison with the genuine signature of the said John Nickerson, deceased; that there are several alterations in the said alleged will, made at times subsequent to the alleged date thereof, which, upon the face of the will itself, show material and substantial alterations, sufficient of themselves to render the said will invalid." The petition in several other places loosely speaks of the will, the executors, and the proceedings at the last probate as "false and fraudulent," but it nowhere specifies any fraud practiced upon the court or the parties interested. It nowhere alleges that there is any newly-discovered evidence upon the issues which it seeks to retry. All these issues were open and tried in the probate court before the decree allowing the will, and they are all raised in the reasons for appealing from this decree filed in this court. The very matters now sought to be reopened were tried and determined then. The petitioners, or their ancestor, then had their day in court, and the full opportunity to try these questions. It would be an absurdity to hold that, after a delay of sixteen years entirely unexplained, they are entitled to a new trial upon the bare allegation that the issues then tried were not rightly decided, which is all that the averments of the petition amount to.

Petition dismissed.

Michael F. DWYER

v.

Charles E. FULLER.

1. Where the bill of exceptions sets out the whole charge of the judge on a subject in issue, and then says that to "these instructions and rulings the plaintiff excepted," and there were no requests for rulings and no specifications of any exceptions to the charge,—*Held*, that such exceptions were irregular and improper, and cannot be entertained.
2. When plaintiff objected to the admission in evidence of a receipt purporting to be given to a brother of plaintiff and to be signed by defendant's agent, on the ground that no connection between the plaintiff and the party producing the receipt was shown,—*Held* that, under the facts of the case, evi-

dence that the receipt had been in the possession of plaintiff's mother, and that it had been shown by plaintiff's counsel to defendant's counsel as one of the papers relating to the action, **connected the plaintiff with the receipt.**

(Middlesex—Filed May 9, 1887.)

ON plaintiff's exceptions. *Overruled.*

Action to recover the proceeds of a sale of certain shares of corporate stock belonging to plaintiff. Trial in the superior court before Brigham, Ch. J.

The facts appear from the opinion.

Mr. M. H. Swett, for plaintiff:

If it is contended that the silence and conduct of the plaintiff after knowledge of the unauthorized acts might amount to a ratification operating by way of estoppel, then the court erred in not instructing the jury that the silence or acts relied upon must have been accompanied by a design; that they should be acted upon; and that the defendant did act upon them and was prejudiced thereby.

Carroll v. Manchester & L. R. R. 111 Mass. 1; *Plumer v. Lord*, 9 Allen, 455; *Turner v. Coffin*, 13 Allen, 401.

The mere silence or failure of plaintiff to repudiate the unauthorized acts, and to demand the stock or its proceeds, would not authorize the inference that the plaintiff ratified such acts.

Thayer v. White, 13 Met. 348; *Bragg v. Boston & W. R. R.* 9 Allen, 54.

The evidence of receipt offered by defendant should have been excluded, as there was no evidence that it was in the handwriting of the defendant or of his agent, or that it was delivered by them, or either of them. No connection of plaintiff was shown with this receipt.

The jury should have been instructed that the acts and conduct of plaintiff relied upon would not authorize the inference of a ratification, unless the plaintiff had known of these acts in time to make a repudiation of them of some avail.

Amory v. Hamilton, 17 Mass. 103.

Messrs. Samuel D. Warren, Jr., and Louis D. Brandeis, for defendant:

If this evidence relating to the receipt was originally incompetent, plaintiff has waived the objection by subsequently permitting defendant's counsel to testify, without objection and without contradiction, to the contents of the receipt (obviously the same one) which, at a later date, just before the commencement of this suit, was shown to him by plaintiff's counsel.

Cf. Commonwealth v. Cooper, 180 Mass. 285; *Jennings v. Whitehead & A. Mach. Co.* 188 Mass. 504.

Nothing is open to the plaintiff under the general exception to the rulings on the question of ratification. The plaintiff presented no requests for rulings. He made no specific objection to the rulings given. He merely excepted generally to the instructions upon the point of ratification.

A general objection to all the instructions upon one branch of the case, like a general exception to the whole charge, is nugatory.

See *Curry v. Porter*, 125 Mass. 94; *McMahon v. O'Connor*, 187 Mass. 216; *Jackman v. Arlington Mills*, 187 Mass. 277, 285; *Wright v. Wright*, 190 Mass. 177.

2 Mass.

The rule is the same, though the bill of exceptions purports to recite all the evidence.

Cf. Armour v. Pecker, 128 Mass. 143, 145; *Franklin Sav. Inst. v. Reed*, 125 Mass. 365, 367; *Stone v. Simonds*, 181 Mass. 457, 463; *Petty v. Allen*, 184 Mass. 265; *Talbot v. Taunton*, 140 Mass. 552, 555, 1 New. Eng. Rep. 615.

The verdict of a jury will not be set aside on exception for a misdirection or erroneous ruling to which the objecting party omitted to call the attention of the presiding judge.

Cf. Commonwealth v. Hogan, 11 Gray, 812; *Hamilton Woolen Co. v. Goodrich*, 6 Allen, 101, 200; *Commonwealth v. Stahl*, 7 Allen, 808, 804; *Bond v. Bond*, 7 Allen, 1, 6; *Franklin Sav. Inst. v. Reed*, 125 Mass. 365; *Ayling v. Kramer*, 138 Mass. 12, 13; *Bell v. Walsh*, 180 Mass. 163, 166; *Smith v. Colby*, 186 Mass. 562.

Morton, Ch. J., delivered the opinion of the court:

At the trial there was evidence on the part of the plaintiff tending to show that he deposited with the defendant certain shares of stock, and that the defendant sold them and applied the proceeds to the benefit of a brother of the plaintiff. One of the controverted questions of fact was whether the plaintiff had ratified this appropriation of his stock. The bill of exceptions sets out the whole charge of the judge on the subject of ratification, and then says that to "these instructions and rulings the plaintiff excepted." There were no requests for rulings, and no specifications of any objections to the charge. Such exceptions are irregular and improper, and cannot be entertained by this court. The reasons for this rule are stated in *Curry v. Porter*, 125 Mass. 94, and are equally applicable to the case at bar.

The plaintiff excepted to the admission in evidence of a receipt purporting to be signed by the defendant's agent, which the plaintiff's mother exhibited to the defendant, of the following tenor:

"Rec'd of R. J. Dwyer 50 shares of M. K. & T., to be delivered on demand.

C. E. F. & Co. by W. E."

June 16, 1879.

There was evidence tending to show that the defendant had given only one receipt for Missouri, Kansas, and Texas Railroad stock to the plaintiff or to any of his family, and the plaintiff testified that he took from Ellis, the clerk of the defendant, a receipt running to him, and which he had lost. The testimony objected to tended to contradict him, and to support the ground taken by the defendant that he dealt, in regard to the stock, with R. J. Dwyer, and not with the plaintiff. The plaintiff objected to the receipt because "no connection between the plaintiff and the party producing the receipt was shown."

But beside the close relation—business as well as social—which was shown to exist between the plaintiff and his mother and brother, it appeared in evidence that this same receipt was afterwards shown by the plaintiff's counsel to the counsel of the defendant as one of the papers relating to this action. This connected the plaintiff with the receipt.

Exceptions overruled.

Parker KENISON

v.

Town of ARLINGTON.

1. Under Stat. 1878, chap. 242, authorizing the Town of Arlington to take lands for waterworks, a description of the land taken must be filed in the registry of deeds.
2. The right to maintain a dam, under such Act, in such a way as to flow other lands, unless dammed against,—if the owner of the flowed land has the right to protect it,—is an easement over or interest in such land, and is land; and the requirement of the Act that a description shall be filed applies to lands thus flowed; and, if not compelled with, the flowing of such land is a trespass for which an action will lie; and the owner is not confined to his remedy under the statute.
3. The taking and filing a description of a dam which is capable of flowing adjoining land is not the taking or describing such adjoining land.
4. If the plaintiff's land was flowed by the dam as soon as the dam was taken, and such flowing amounted to a taking of plaintiff's land, that fact would not enlarge the purport of a description of the dam, or of the land on which the dam stood, or make it a description of the land flowed.
5. Where the town took and described "all the water-rights and other privileges and appurtenances" of the land on which the dam stood, while this covered the prescriptive rights thereto attached, it was not a taking or description of a right to flow beyond such prescriptive rights; and a description must be filed of the lands flowed which were not covered by such rights; or the owner can maintain trespass for such flowing.

(Middlesex—Filed May 9, 1887.)]

ON defendant's exceptions. *Occurred.*
 Action of tort to recover damages to plaintiff's crops and lands by flowage from defendant's reservoir in East Lexington, between July 1, 1881, and December 8, 1884, the date of the writ. Trial before Blodgett, J., with a jury, who allowed the following bill of exceptions:

Chapter 242 of the Acts of 1878, among other things ratified the purchase, by defendant town, of the franchise, property, rights, and privileges of the Arlington Lake Water Company; authorized the town to take and hold the Great Meadows, so called, in East Lexington, the waters of Sucker's Brook, and the tributaries thereto; to build aqueducts and maintain the same by any works suitable therefor; to erect and maintain dams, and to construct and maintain reservoirs; and provided for an assessment of damages by petition to the superior court. The statute may be referred to for greater certainty.

The plaintiff's land bordered upon Sucker's Brook, which emptied into the Great Meadows.

At the opposite and lower end of the Great Meadows was a dam, and a mill privilege known as Lewis' or Slocum's Mills. There was a prescriptive right in the owners of this dam and mill privilege to flow the Great Meadows, between September and May, to a certain height. A ridge of land separated the brooks and waters purchased of the Arlington Lake Water Company on the east from Sucker's Brook and its tributaries on the west.

Within 60 days prior to July 10, 1878, the defendant, in compliance with the provisions of said Act, took from various persons who were named certain parcels of land comprising the greater part of the Great Meadows so called, and all the water-rights and other privileges and appurtenances thereof, and on said day filed in the registry of deeds for the southern district of the county of Middlesex, a description of the land so taken, sufficiently accurate for identification, and stated the purposes for which it was taken.

Within 60 days prior to October 18, 1878, in compliance with said Act, the defendant took from William H. Slocum certain parcels of real estate, on which were situated said dams and mills known as Lewis' or Slocum's Mills, and all the other water-rights and privileges and appurtenances thereof; and on said day filed in said registry of deeds a description of the land so taken, sufficiently accurate for identification, and stated the purpose for which it was taken.

By warranty deed with full covenants, dated October 17, 1878, and recorded February 5, 1879, William H. Slocum conveyed to the defendant town the land taken from him, with the buildings and mill privileges thereon, and all the rights, easements, privileges, and appurtenances thereto belonging, subject to the said taking of said land by the grantee.

The mill privilege was leased for several years by the town to its tenant, and used for the purpose of a mill. Prior to June 13, 1881, the buildings were burned, and the property has not since been used as a mill, and had been absolutely abandoned for mill purposes prior to that date.

Within 60 days prior to November 26, 1878, in compliance with the provisions of said Act, defendant took a strip of land 20 feet wide through the ridge before mentioned, along the southeastern side of the plaintiff's land, and all the water-rights and other privileges and appurtenances of the land so taken; and on said day filed in said registry a description of the land so taken, sufficiently accurate for identification, and stated the purpose for which it was taken. None of the takings or the deed of Slocum included any part of the plaintiff's land, but one of the pieces so taken bounded on his land.

The defendant dug a tunnel or artificial sluiceway from Sucker's Brook through said ridge, so that, when the tunnel was open, the waters of Sucker's Brook would be diverted from the Great Meadows, and carried into the town's main reservoir on the east of the ridge. When the tunnel was closed, the water pursued its original channel into the Great Meadows. It was the practice, in November or December in each of the years complained of, to close the tunnel and fill the Great Meadows,

as a store reservoir, with water to the height of Slocum's dam, and then to open the tunnel, holding back the water on the meadows by a retaining dam. The tunnel was always open as early as in April, and, when opened, the plaintiff's land was drained before May 1 in each year.

No objection was made to the sufficiency of these takings or to the correctness of the proceedings under the statute.

Plaintiff's land, consisting of about 16 acres, was adjacent to, but not a part of, the land taken by the town. It was purchased by him June 18, 1881. He offered evidence tending to show that his land was flowed from November or December to April, in each year, by the defendant's dam at Slocum's Mill; that his land did not bear as good hay and other crops as it otherwise would have done; that he burned it over and cleaned it up, cultivated it, and gathered the crops in each year, but at a loss.

The plaintiff claimed that his land had never been flowed by the milldam prior to the taking by the town, and that the defendant, since its takings and erections, had flowed the waters from a foot to a foot and a half higher than ever prior thereto; and he offered evidence tending to prove this claim.

Defendant contended and asked the court to rule that this action could not be maintained, and that plaintiff's remedy was by petition under the statute of 1878.

The court declined so to rule, and instructed the jury that, upon the uncontroverted or admitted facts, the plaintiff was entitled to recover, and said: "I instruct you that the defendants, by their deeds and acts of taking, acquired no rights, as against the plaintiff, to flow his lands described in his declaration, for the purpose of supplying the inhabitants of the town of Arlington with water."

At plaintiff's request the court further instructed the jury: "That if by the deed of William H. Slocum to the town, dated October 17, 1878, or by the taking by the town against said Slocum, the town acquired any rights to flow the land now owned by the plaintiff, all such rights ceased upon the abandonment and discontinuance of the mill prior to June 18, 1881, and that any such right or rights did not exist in or over the plaintiff's land since he has been the owner of the same."

The defendant asked the court to rule as follows, viz.:

"1. This action cannot be maintained.

"2. This action cannot be maintained for damage, if any, by flowage from dam at the tunnel or artificial sluiceway built by the town.

"3. This action cannot be maintained for any act done by town under the authority of the Legislature.

"4. This action cannot be maintained for damage, if any, resulting from flowage by Slocum's dam, unless the town has authorized the raising of said dam, and has raised it since the taking thereof by town.

"5. This declaration does not set up any unskillful or negligent exercise of the powers granted by the Legislature; and damage, if any, from such exercise of such powers, cannot be recovered.

"6. If the jury find that the dam at Slocum's

Mills has been raised since the taking thereof by the town in 1878, and the damages to the plaintiff's land have been caused by such additional height of the dam, this action cannot be maintained.

"7. Under the taking of the mills and dam therewith connected, and the subsequent deed thereof by Slocum, the defendants acquired the right to flow all lands that could be flowed by the use of said dam as then erected and maintained, for the purposes of carrying out the intent of the Acts of the Legislature authorizing such taking, without filing any certificate of location of such lands flowed at any time thereafter in the registry of deeds."

The court declined to give any of said instructions except the fifth, and respecting the fourth and sixth instructed the jury as follows: "That if the water commissioners or other officers having charge of this matter did not instruct or authorize anybody to raise that dam above the height at which it was maintained by the millowners; but yet, if the persons who made the alterations upon the dam, and acting in good faith, and intending to conform to their instructions, by mistake raised the dam to a greater height than it was before, and such raising was unintentional on their part, and while they were acting in good faith, still the town would be liable."

The plaintiff contended that in 1878 Slocum's dam was raised by defendants, and that the water had been held on the Great Meadows and adjacent lands at a greater height than the millowner had a right to hold it; and the jury was asked to answer, and they answered in the affirmative, the following question:

"Since July 1, 1881, have the defendants held waters on the Great Meadows and flowed the lands of the plaintiff to a greater extent than the millowners, prior to the taking by the town, had a right to hold the water and flow the plaintiff's land?"

The jury returned a verdict for the plaintiff for \$500 damages. The defendant, being aggrieved by said rulings and refusals, duly excepted to each of the same.

Messrs. Samuel J. Elder and John H. Hardy, for defendant:

The defendant was authorized by statute to establish its system of waterworks, to take lands and water rights, to erect and maintain dams, and to do all things necessary and incidental to the maintenance of the same.

Stat. 1878, chap. 242; Stat. 1871, chap. 245; Stat. 1870, chap. 98.

The bill of exceptions declares "no objection was made to the sufficiency of the takings, or to the correctness of the proceedings under the statute." The declaration does not claim, nor the evidence disclose, that the defendant was liable for any unskillful or negligent exercise of the powers granted by the Legislature. The simple issue is therefore presented, whether the acts of the defendant were justified by the authority of the statute, and were in conformity with that authority.

It requires neither argument nor authorities before this court to sustain the proposition that the statute remedy provided for the benefit of parties claiming damages under legislative Acts of eminent domain must be strictly pur-

sued, to the exclusion of the action of tort or trespass at common law.

Smith v. Drew, 5 Mass. 514; *Boston v. Shaw*, 1 Met. 189; *Tower v. Boston*, 10 Cush. 235.

There may be a taking of water-rights under the statute without necessarily filing a location of the lands affected by such water-rights, in the registry of deeds. Filing the location is simply evidence of such taking.

Northborough v. County Comrs. 188 Mass. 263; *Moore v. Boston*, 8 Cush. 274.

The difference between the statute authorizing the defendant to act in this case, and the statutes from which arise the decisions in support of the plaintiff's view of this action, regards the precision of the description required in these various statutes to be filed with the location in the registry of deeds.

Wilson v. Lynn, 119 Mass. 174; Stat. 1871, chap. 218, § 2.

"The mayor * * * shall, within 60 days after taking any of the land aforesaid, file in the registry of deeds * * * a description thereof sufficiently accurate for identification." In that case the city was authorized to take the waters and water-rights of Breed's Pond and lands not exceeding 5 rods around the margin of said pond. An attempt had been made to take the land actually damaged. The boundaries of the land were not identified by the description. No question of water-rights was considered in the decision. The statute did not seem to require that such water-rights should be particularly described in the location filed in the registry.

Wamesit Power Co. v. Allen, 120 Mass. 352; Stat. 1846, chap. 167, § 1.

"The city of Boston shall, within 60 days from the time they shall take any lands or ponds or streams of water for the purposes of this Act, file in * * * the registry of deeds * * * a description of the lands, ponds, or streams of water so taken, as certain as is required in a common conveyance of lands." By the terms of this Act a definite description of the water-rights taken was required. In the above case no such description was filed.

Lund v. New Bedford, 121 Mass. 286.

The taking of water-rights in this case was effected by the erection and maintenance of the dam. The evidence of such taking sufficiently appeared to the owners of the lands above said dam which might be affected by water raised to the height of said dam. We claim, therefore, no other description was required by the statute as evidence of such taking.

Dwight Printing Co. v. Boston, 122 Mass. 586; *Daniels v. Citizens Sav. Inst.* 127 Mass. 584.

All water-rights taken with said mill privilege and dam, and appurtenant thereto, are described sufficiently to show that rights of flowage over the plaintiff's land were taken.

Northborough v. County Comrs. 188 Mass. 263; *Martin v. Gleason*, 139 Mass. 183.

The raising of a head of water by a dam to drive a mill constitutes a mill privilege. A grant of land bounding on or near a pond, reserving the mill or water privilege, retains a reservation of the right of flowing those lands so far as it has been usual to flow them for the use of the mill. This has been the construc-

tion of a deed with reservation of a "mill privilege."

Pettee v. Hawes, 18 Pick. 324; *Richardson v. Bigelow*, 15 Gray, 154; *Merritt v. Morse*, 108 Mass. 270; *Howard v. Bates*, 8 Met. 484; *Morse v. Marshall*, 13 Allen, 288.

By such taking and location, added to the deed of Slocum, the defendant had acquired certain fixed and established rights over the lands now owned by the plaintiff. The extent of such dominant easement acquired by the defendant could be shown as clearly in 1873 as in 1881. It could be measured as fully as the right of the millowner could have been determined under the Mill Acts.

Brady v. Blackinton, 113 Mass. 238.

The descriptions in the takings and deed merely define the rights taken by the defendant. The dam as then taken, constructed, and since maintained, was capable of causing the damage claimed by the plaintiff. The defendant disclaims that it has taken or used the said dam as a milldam or flowed the plaintiff's land under the Mill Act; but it claims that, by such takings and descriptions filed therewith, the water-rights taken were defined and described by the extent of the mill privilege as previously maintained. By such acts of eminent domain, all prescriptive rights of owners of lands above the dam, relative to the time of flowing their lands, and all rights to the use of said mill for mill purposes, inconsistent with the rights of the town for public use, were extinguished. No reservations inconsistent therewith could have been implied or retained without express words in behalf of such former owners of lands or of rights affected.

Ham v. Salem, 100 Mass. 350; *Ipswich Mills v. County Comrs.* 108 Mass. 363.

A remedy for damages suffered by the lawful erection of a dam upon lands taken and held by the defendant is provided in § 4 of said Act. The damage is described separately from the damage caused by the taking of lands, water-rights, etc. The same rule should apply to this particular damage as would be applied to the maintenance of a dam under the Mill Acts. The remedy prescribed in this section clearly applies to all lands in any way affected by the use of said dam. It would apply in the same manner to the use and maintenance of the dam after the change in its height in 1876, as found by the jury. Any other construction of the Act would render defendants in similar cases liable to actions of tort for an indefinite period, from owners of lands or mills below a dam upon the same stream, for every slight change thereof, and even for the maintenance of the dam itself. To protect themselves from such an application of this rule, municipal corporations would be compelled to describe in their location all such property below the dam thus taken upon the stream.

Stowell v. Flagg, 11 Mass. 364; *Stevens v. Middlesex Canal*, 12 Mass. 468; *Heard v. Middlesex Canal*, 5 Met. 81; *Brady v. Blackinton*, *supra*.

No action of tort can be maintained for damages caused by the act of the defendant under statute authority. The rights affected and servient easements created by the erection and

maintenance of the dam, or the increase of its height, could have been shown by mathematical proof within three years from such taking or change. The provisions of the statute are broad enough, and the decisions of this court are sufficient, to sustain the exclusive remedy under the statute for damages to adjacent lands not directly taken for waterworks. Much more forcibly should this exclusive remedy be applied in the case of water-rights and easements taken in and over the plaintiff's lands, clearly defined, for which damages can be properly assessed.

Dodge v. Essex County Comrs. 8 Met. 382; *Call v. County Comrs.* 2 Gray, 282; *Tower v. Boston*, 10 Cush. 235; *Spaulding v. Arlington*, 126 Mass. 492; *Hull v. Westfield*, 133 Mass. 433; *Davis v. New Bedford*, 133 Mass. 549; *Brickett v. Haverhill Aqueduct Co.* 142 Mass. 394, New Eng. Rep. 818.

Messrs. Charles Robinson, J. O. Teele, and George A. Blaney, for plaintiff:

Upon the absolute abandonment of the property for mill purposes, the right to flow ceased; and the owners were liable at common law for damages occasioned by a subsequent flowing, even if the dam had not been raised.

Baird v. Hunter, 12 Pick. 556; *Fitch v. Stevens*, 4 Met. 428; *Hill v. Sayles*, 12 Met. 142; *Springfield v. Connecticut R. R. Co.* 4 Cush. 71; *Inlay v. Union Br. R. R.* 26 Conn. 255; *Cooley*, Const. Lim. 682 *et seq.*; *Gould, Waters*, §§ 348, 349.

The description required by Acts 1873, chap. 242, § 3, and duly filed, was conclusive upon the defendant and all other parties affected by it. Under the plea of justification the burden was on the defendant; and, not having shown a taking of plaintiff's land, or a right to flow it as it was subsequently flowed by them, their justification fails.

Hazen v. Boston & M. R. R. 2 Gray, 580; *Wilson v. Lynn*, 119 Mass. 174; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Lund v. New Bedford*, 121 Mass. 286; *Hamor v. Bar Harbor Water Co.* 1 New Eng. Rep. 691.

The injury done to the plaintiff's land was not incidental to the proper and necessary construction of the waterworks,—a temporary flowage for construction purposes,—but was the result of a scheme or plan for procuring a permanent supply of water beyond that which the dam, pond, and supply basin would otherwise hold; and therefore the cases of *Dodge v. County Comrs.* 3 Met. 380; *Tower v. Boston*, 10 Cush. 235; *Davis v. New Bedford*, 133 Mass. 549; *Wilson v. New Bedford*, 108 Mass. 261; *Drew v. Westfield*, 124 Mass. 461; *Hand v. Brookline*, 126 Mass. 824, and *Hull v. Westfield*, 133 Mass. 433, where the damages were incidental to the proper construction of the main work undertaken, do not apply.

What was Slocum's right? It certainly was not an easement or an interest or right in plaintiff's land.

Lowell v. Boston, 111 Mass. 467.

So far as can be learned from the bill of exceptions, it was a right to flow, under the Mill Acts, which right ceased on a discontinuance of its exercise for that purpose; and for the purposes of this case it is immaterial whether the right was acquired by prescription or not. *Jackson v. Harrington*, 2 Allen, 244.

The case does not show, indeed, that any right to flow the plaintiff's land existed by prescription; for his land was not a part of the Great Meadows.

Was it competent for the town to take the right to flow for mill purposes, and change it into a right to flow for the purposes of a storage basin for the public? The former is a private right, for which no compensation is ever awarded by the public (*Murdock v. Stickney*, 8 Cush. 118), and differs in all its essential elements from the latter, which rests wholly upon the law of eminent domain. The former may be interfered with by the owner by the building of dikes or embankments; but such interference with the latter might defeat the whole purpose of the taking.

If it be conceded that the right to flow for mill purposes may be taken for a public use, and the use thus changed, still it must appear affirmatively that the superior right was intended to be taken, and the new use exercised, so that the party to be affected by it could apply for his damages under the statute; otherwise he would have no notice.

Springfield v. Connecticut R. R. Co. 4 Cush. 71.

Evidence of such taking and intent is wholly wanting in this case, for the town took, in terms, only the rights of a millowner.

In case of doubtful or ambiguous language as to property or rights of property taken, the presumption is in favor of the owner of the land.

Glover v. Boston, 14 Gray, 282; *Wilson v. Lynn*, 119 Mass. 174.

The act of raising the dam cannot be construed as a new taking: (1) because the defendant does not justify under it; and (2) because no certificate of taking was filed as the statute required.

Wamesit Power Co. v. Allen, 120 Mass. 352.

Holmes, J., delivered the opinion of the court:

This is an action of tort for flowing the plaintiff's land. The defendant justifies under Stat. 1873, chap. 242, and earlier Acts, authorizing it to take lands for waterworks, etc., and certain takings in pursuance of the statute. As usual, the Act requires a description of the land taken to be filed in the registry of deeds; and if this condition applies to lands flowed, and was not complied with, the defendant's act was a trespass. *Wilson v. Lynn*, 119 Mass. 174; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Lund v. New Bedford*, 121 Mass. 286; *Warren v. Spencer Water Co.* 143 Mass. 9, 3 New Eng. Rep. 111. The description filed did not include the plaintiff's land, but did include land on which there was a dam and mill privilege capable, we will assume, of flowing it.

The first argument for the defendant, in logical order, is that the right to maintain a dam for the purpose of a water supply is no more an interest in land which the dam may have caused to be flowed than a similar right under the Mill Acts, which has been declared not to be an interest in such lands (*Lowell v. Boston*, 111 Mass. 454, 466, and cases cited); that the statute only requires a description to be filed of lands, some interest in which is taken, and therefore does not require a description of

lands merely liable to be flowed; that § 4 provides a remedy for damage caused by the erection of a dam as well when the damage does not amount to a taking of land as when it does; and that this remedy is exclusive.

But we are of opinion that the right to maintain a dam, under the Act before us, in such a way as to flow other land, unless dammed against,—supposing the owner of the flowed land to have the right to protect it,—is an easement over or interest in such land. Even under the Mill Act this is the law, where the damage has been paid in gross (*Jeale v. Arlington Five Cents Sav. Bank*, 135 Mass. 142); and there can be no doubt that it is so in other cases. See *Smith v. Langevald*, 140 Mass. 205, 1 New Eng. Rep. 449. The Act of 1873 contemplates a payment in gross. The provision in § 4 for filing a petition within three years from the sustaining of damages does not mean that a new petition is to be filed every time that the plaintiff's land is flowed, the height of the dam remaining unchanged. If the right in question is an interest in the land flowed, it is land, within Stat. 1873, chap. 242, § 3 (Pub. Stat. chap. 3, § 3; chap. 12). And the defendant, in order to justify under the statute and confine the plaintiff to his statutory remedy, must have filed a description of the land flowed. See *Hazen v. Boston & W. R. R.* 2 Gray, 574, 580.

The second argument is that the land flowed was described. *Northborough v. County Comrs.* 138 Mass. 263, was cited for the propositions that a description of land affected by the taking of a water-right need not be filed; and that, by taking and filing a description of the dam, the defendant took and described the right to flow the neighboring lands at least to the height possible with the dam as it was. But the case has no application to rights of flowage. There the water above a certain dam was taken and described, and it was held that the description covered the water-rights interfered with below the dam, the only interference with those rights being the withdrawal of the water described. But it can no more be held that to take and describe a dam which is merely capable of flowing adjoining land is either to take or to describe the adjoining land than that to maintain such a dam for twenty years would gain a right to flow the land which it was capable of flowing, unless it actually flowed it. See *Lawrence v. Fairhaven*, 5 Gray, 110, 119; *Ray v. Fletcher*, 12 Cush. 200, 208; *Horner v. Stillwell*, 6 Vroom, 307; *Daniel v. Citizens Sav. Inst.* 127 Mass. 534, 536. Even if the plaintiff's land was flowed by the dam as soon as the dam was taken, and such flowing amounted to a taking of the plaintiff's land, that fact would not enlarge the purport of a description of the dam, or, more accurately, of the land on which the dam stood, or make it a description of the land flowed. We are assuming, of course, for the moment, that the right to flow the plaintiff's land was not already attached to the dam by previous dealings independent of the taking.

There was attached to the dam and mill privilege a prescriptive right to flow what were known as the Great Meadows, between September and May, to a certain height. We will assume that the fact that this right was used in

connection with a mill did not confine it to use for mill purposes, but that, as against the plaintiff, it was a general right to flow. The defendant took and described "all the water-rights and other privileges and appurtenances" of the land on which the dam stood. We assume that this covered the prescriptive rights attached to the dam. But it was not a taking of any rights from the plaintiff, but only of rights which Slocum, the owner of the dam, had gained from the plaintiff at an earlier day. It was not a taking or description of a right to flow beyond the point to which Slocum was entitled to do so. The jury found specially that the defendant had flowed the plaintiff's land to a greater extent than the millowners had a right to before the taking by the town. The plaintiff's right of action is established by this finding. For it is plain that the same reasoning which shows that a description of all the lands flowed must have been filed, if the defendant got no rights from Slocum, also shows that a description must be filed of lands flowed which were not covered by Slocum's right. The case is not like those where all the water of a stream is taken in the first instance, although only a part of it is actually withdrawn. *Worcester Gas Light Co. v. County Comrs.* 138 Mass. 289, 291.

The defendant's argument is confined to the general question of the plaintiff's right to maintain this action. That we have disposed of. Our only doubt has been on the question of damages, which was not argued. The bill of exceptions is obscure as to some of the facts bearing on this point. We do not gather with certainty that the right of flowage, although abandoned for mill purposes, was abandoned altogether, as the jury was instructed; but as there is no evidence disclosed that Slocum's prescriptive right of flowage extended to the plaintiff's land, we do not think that we are warranted in ordering a new trial on that ground.

Exceptions overruled.

IMPORTERS AND TRADERS NATIONAL BANK of New York

v.

Fayette SHAW *et al.*

1. Notice to an indorser of the nonpayment of a note, sent to the proper address of the indorser when the note was issued, is sufficient to charge him, although, intermediate that time and the maturity of the note, he has changed his place of residence, if the holder has no notice or knowledge of the change.
2. Such holder can not be affected by the knowledge of or the results of inquiries made by his agents to make demand of the maker, who were not also his agents to give notice to the indorser.
3. Where the assignee of the indorser continued the business of the latter at the same place where he had carried it on, in the settlement of his affairs, and such place was used for pre-

senting notices of protest to such indorser; and he knew that such notices were given to him there, and were received and kept by his assignee, it may be inferred that the assignee had authority from the indorser to receive such notices sent to him there; and such inference will not be weakened by the fact that the indorser avoided taking the notices from the assignee, or giving him any instructions in regard to them.

(Suffolk—Filed May 9, 1887.)

ON defendants' exceptions. *Overruled.*

Action of contract against defendants as indorsers of certain promissory notes. Trial in the Superior Court before Pitman, J., without a jury. The court found for plaintiff, and defendants alleged exceptions.

The facts and questions raised appear from the opinion.

Messrs. John C. Lane and William Webster, for defendants:

Voluntary assignees are not general agents, and have no authority to receive notices to charge their assignors as indorsers.

House v. Vinton County Nat. Bank, 43 Ohio St. 846.

This point is likewise proved by the cases deciding that demand made upon a voluntary assignee of the maker of a promissory note, or at the maker's place of business then occupied by the assignee, is not a sufficient demand to charge an indorser.

Armstrong v. Thurston, 11 Md. 148; *Benedict v. Caffé*, 5 Duer, 226.

Notice to an assignee in bankruptcy is not sufficient to bind an indorser, and *a fortiori* is not, to bind a voluntary assignee.

The statements of the text-book writers as to the sufficiency of notice to an assignee in bankruptcy are conflicting, and are rested upon cases in which this particular point was not adjudged.

The decisions show that notice to the bankrupt is in all cases sufficient. It would seem, therefore, that notice to the assignee cannot be. To hold otherwise would be to hold that there were two persons at the same time to whom notice might be given.

Byles says: "If the drawer of a bill become bankrupt, notice must nevertheless be given to him, whether a trustee have been appointed or not."

Byles, Bills, 7th ed. § 294, citing: *Ex parte Baker*, L. R. 4 Ch. Div. 795; *Ex parte Molins*, 19 Ves. 216; *Rhode v. Proctor*, 4 Barn. & C. 517; *Ex parte Johnson*, 3 Dea. & C. 488; *Ex parte Chapple*, 3 Mont. & A. 490.

The foregoing cases have been variously cited, and opposite conclusions drawn from them.

Ex parte Baker, *supra*, actually decides that notice to the bankrupt himself is in all cases sufficient, even though his assignees are appointed.

Ex parte Molins, *supra*, decides that notice to the bankrupt before his assignees are appointed is sufficient.

In the other three cases the estate was held discharged for want of any notice.

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In *Rhode v. Proctor*, and in *Ex parte Johnson*, *supra*, the bankrupts had left their homes, and their houses were in possession, either of the messenger or of the bankrupt's family, and the court held that notice should have been left there.

Sir George Rose, in *Ex parte Johnson*, *supra* (p. 638), thus negatives the idea that there is any need of giving any notice to a voluntary assignee: "Suppose assignees of a trader, of his property on trust to pay his debts, could they refuse payment because notice of dishonor had not been given them? Surely not."

In *Ex parte Baker*, *supra* (p. 797), James, L. J., said: "No case has been cited to us in which it has been actually decided that notice of dishonor must be given to the assignee of a bankrupt drawer of a bill of exchange. Apparently there are two or three *dicta* which seem to imply that, and it is said, in *Mr. Justice Byles*' book, that perhaps the notice ought to be given to the assignees. That is the utmost." Also (p. 798): "It does not seem to me that any good reason can be suggested why the holder of a bill should give notice of dishonor to anyone but the persons whose names he finds upon the bill."

An attorney at law is not general agent to receive notice of dishonor in behalf of his client. His merely being the attorney at law of the principal will not be sufficient, for he is not, *virtute officii*, entitled to receive notice.

Story, Prom. N. 7th ed. § 809; 2 Dan. Neg. Inst. 3d ed. § 998; *Crosse v. Smith*, 1 M. & S. 545; *Louisiana State Bank v. Ellery*, 4 Mart. N. S. (La.) 87.

Besides, in this case, the notices were not directed so as to be received by the attorney. To bind by service on the attorney, the notices should have been sent to the attorney.

After making the assignments, the Shaws had no place of business in Boston.

The plaintiff did not use due diligence.

The Revere Bank and the notary were agents for the plaintiff, and their laches is attributable to the plaintiff.

Porter v. Judson, 1 Gray, 175; *Wheeler v. Field*, 6 Met. 290, 295; *Granite Bank v. Ayers*, 16 Pick. 892.

Messrs. Hutchins & Wheeler, for plaintiff:

The notices sent by the plaintiff from New York in season to go to Boston by the next mail after the plaintiff had received notice of the dishonor of the notes were sufficient in point of time.

The duty of the notary, and of the Boston bank which held the notes for collection, was simply to notify the plaintiff, the last indorser. This was done in due season, as the notices were sent by the notary on the afternoon of the same days the notes fell due.

It is usual for the holder of dishonored paper, whether it be held by him for value or for collection, to notify the last indorser, and to enclose notices to him, to be by him sent to the prior indorsers; and if the last indorser forwards the notices so received to the prior indorsers by the next mail, this is sufficient notice to them.

First Nat. Bank v. Smith, 132 Mass. 227; *West River Bank v. Taylor*, 84 N. Y. 128; *True v. Collins*, 8 Allen, 488.

It is not necessary to state in the address the particular street or number.

True v. Collins, 3 Allen, 438.

In a recent case, *Bank of America v. Shaw*, an action brought against these same defendants and where the same defense was interposed, it was held that No. 268 Purchase Street was the proper place to which to address a notice of dishonor.

Bank of America v. Shaw, 142 Mass. 290, 2 New Eng. Rep. 572.

When the place of business of an indorser is not his place of residence, notice given at either is sufficient.

Pub. Stat. chap. 77, § 16; *Berridge v. Fitzgerald*, L. R. 4 C. P. 639.

In this case it should be borne in mind that here the indorser was a partnership; and in such case a notice at the place of business, if there is one, is plainly the better.

Bank of America v. Shaw, 142 Mass. 290, 293, 2 New Eng. Rep. 572.

It has been held that notice to a trustee, under a general assignment of the property of an indorser for the benefit of creditors, is sufficient to charge the indorser (*Callahan v. Bank of Kentucky*, 82 Ky. 281); and the decision rests upon the ground that the assignee is a general agent, and as such, notice to him is notice to the principal.

It has also been held, in cases where the indorser was a partnership, that if the notice of dishonor be received by an agent appointed to liquidate the affairs of the firm, it is sufficient to charge the indorsers.

Fassin v. Hubbard, 55 N. Y. 465; *Bliss v. Nichols*, 12 Allen, 443.

But whether or not Boston was the proper place to which a person having knowledge of all the facts should send a notice of dishonor, all that was required of the plaintiff, a New York bank, was the exercise of reasonable care and diligence in giving notice.

Chouteau v. Webster, 6 Met. 1.

At the time plaintiff took the notes, its officers were correctly informed, by reliable sources of information, that the defendants' address was Boston, and that they there did business. The notes were all dated and made payable in Boston; and at the time the notes matured the officers of the plaintiff bank believed that the indorsers did business and lived in Boston. The plaintiff had received a copy of the assignment to Wyman, but there is no evidence that they knew that Boston had ceased to be the proper place to address them, if such was the fact. If an indorser changes his address after the note is made and indorsed, notice sent to the former address is sufficient, unless the holder has knowledge of the change of address.

Bank of Utica v. Phillips, 3 Wend. 408; *Rowland v. Rowe*, 48 Conn. 432; *McMurtrie v. Jones*, 3 Wash. C. Ct. 206; *Reier v. Strauss*, 54 Md. 278; 39 Am. Rep. 390; *Requa v. Collins*, 51 N. Y. 144.

Whether or not the notary practicing in Boston knew, or should have known, that Shaw's domicile was Newton, and his actual abiding place Montreal, is immaterial, as it was not part of his duty to give notice to the Shaws (*Phipps v. Millbury Bank*, 8 Met. 79); and in attempting to give notice to the Shaws, he was going beyond his duty, and in so doing is not

to be treated as their agent (*Church v. Barlow*, 9 Pick. 547).

W. Allen, J., delivered the opinion of the court:

This is an action against Fayette Shaw and Brackley Shaw, as copartners under the name of F. Shaw & Brothers, as indorsers of promissory notes. No service was made on Brackley Shaw, who was out of the Commonwealth, and the action proceeded against Fayette Shaw alone. Due demand was made upon the makers, and notice was duly sent by mail to the indorsers, addressed to the firm in Boston. The only question is whether there was evidence upon which the court could find that the notices so addressed were sufficient.

Fayette Shaw resided in Newton, in this State, and Brackley Shaw in Canada. The firm of F. Shaw & Brothers did an extensive business in New England, New York, and Canada. It had its principal place of business and its counting-room at No. 268 Purchase Street, Boston. Letters addressed to it at Boston were placed in its box at the postoffice, and there was evidence from which the court might have found that the notices in question were duly delivered and received at No. 268 Purchase Street. The only question made was whether notice at that place was sufficient. The notes were dated at Boston, and the makers had places of business there. The notes were all dated in March, 1883, and payable in six months from date. In July, 1883, F. Shaw & Brothers failed in business, and made an assignment for the benefit of their creditors, to one Wyman. They had for some time carried on a very extensive business as tanners and dealers in hides and leather; and the assignment includes property in Massachusetts, Maine, New York, and Canada; and the assignee had authority to carry on the business for completing the manufacture of stocks and materials on hand, and otherwise, so far as should be necessary and proper for the purposes of the trust; and the assignee was constituted the attorney of the firm therefor. The trusts were to convert the property into money, and pay the creditors, and pay any balance to the assignors; and the assignment was on condition to recover the property if the assignors should, by arrangement with their creditors, obtain their consent thereto. The assignee continued the business until long after the notes became due, at the place of business of the firm, No. 268 Purchase Street, Boston, on which the sign "F. Shaw & Brothers" remained, and retained the box in the postoffice, which continued to be used exclusively for the business, and in which letters addressed to the firm were placed and taken out by him.

Fayette Shaw was employed by the assignee as clerk, but left the Commonwealth after the assignment, and did not return until after the notes became due; but he retained his residence in Newton, where his family resided. He gave no instructions in regard to forwarding his mail from Boston, although he had counsel there who was to communicate to him any matter of importance affecting his interest. Great numbers of notices of protest of commercial paper came by mail after Fayette Shaw left, and were received and filed away by the

assignee; and Shaw's counsel was informed of this, and made no arrangement in regard to it, but testified that, in answer to inquiries by the assignee, he told him that he (Wyman) had no duty in regard to them. There was no evidence that, after the assignment, any notice of protest was sent to or received by the firm or the defendant, except at said place of business. The plaintiff, when it took the notes, knew that F. Shaw & Brothers was a Boston firm, and knew its place of business at No. 268 Purchase Street. No notice was given to it of the dissolution of the firm (indeed, it does not appear that it was dissolved); and it had no notice or knowledge of the discontinuance of the business, or of the removal of the firm from the place of business, except what might be inferred from knowledge of the failure and of the assignment; and it believed, at the time the notices were given, that the firm did business and resided in Boston.

1. The notice was sufficient, because sent to the proper address of the indorsers when the note was issued, and the plaintiff had no notice or knowledge of a change. *Bank of Utica v. Phillips*, 3 Wend. 408; *Saco Nat. Bank v. Sanborn*, 63 Me. 340; *Rowland v. Rowe*, 48 Conn. 432. It is argued that it was put on inquiry by knowledge of the failure and assignment, and that it is affected by the knowledge, or the probable results of inquiries by its agents, the Boston Bank and the notary, through whom demand was made upon the maker. But they were its agents to make demand upon the maker only; not to give notice to prior indorsers. *Church v. Barlow*, 9 Pick. 547; *Phipps v. Millbury Bank*, 8 Met. 79. There was nothing in the assignment to indicate that the firm did not remain in its place of business.

2. But if the plaintiff had made inquiry, and been informed of all the facts, the court might well have found that the notice was rightly given. It is a fair inference from the evidence that the place of business for continuing and settling up the affairs of the firm was used as the place of presenting notices of protest to the firm, and that the defendant knew that such notices were given to the firm there, and were received and kept by Wyman; and the court would have been fully justified in inferring that Wyman had authority from the defendant to receive such notices sent to the firm at the place where he was carrying on its business; and the inference would not be weakened by the fact that the defendant studiously avoided, personally or by his counsel, taking the notices from Wyman, or giving him any instructions in regard to them. If the plaintiff had known that the defendant resided in Newton, and had known the other facts disclosed at the trial, we think that the notice would have been sufficient. See *Berridge v. Fitzpatrick*, L. R. 4 Q. B. 641; *Bank of America v. Shaw*, 142 Mass. 290, 2 New Eng. Rep. 572.

Exceptions overruled.

Mark A. BLAISDELL

v.

Honora AHERN et al.

1. A contract between an attorney and
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client, that the former should render his professional services in a suit without charge if the suit should not be successful, and that the latter should pay large and liberal fees to the former—not to exceed 50 per cent of the amount collected by him—if successful, is a lawful contract, and not void for champerty or maintenance.

2. Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or a part of them, as security for payment, the agreement is not champertous.

(Suffolk—Filed May 7, 1887.)

ON report. *New trial granted.*

Action of contract to recover for services as an attorney at law. The case was tried in the superior court before Mason, J., who ruled that, under the pleadings, evidence, and admitted facts (the substance of which appears from the opinion), the plaintiff could not recover, and reported the case to this court.

The case is stated in the opinion.

Messrs. N. Morse and J. L. Thorndike, for plaintiff:

Plaintiff was to depend on success for his fees,—not because that was a part of the agreement, but because the defendants would not otherwise have anything to pay him with. This construction of the agreement should be adopted, if any other would make it criminal.

Findon v. Parker, 11 M. & W. 682, 684.

The plaintiff was not to have any share of the property recovered or a remuneration proportional to the amount recovered. There cannot be champerty, though there may be maintenance, where there is not a sharing in the property recovered; and in every case of champerty there has been such a sharing.

Thurston v. Percival, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Met. 489; *Ackert v. Barker*, 131 Mass. 436; *Belding v. Smythe*, 188 Mass. 530; *Hutley v. Hutley*, L. R. 8 Q. B. 112.

If it was part of the agreement that the plaintiff, who was not to furnish the evidence or funds, should charge nothing unless successful, that would not make it champerty or maintenance.

Jennings v. Johnson, L. R. 8 C. P. 425; *McPherson v. Cox*, 96 U. S. 404, 416 (Bk. 24, L. ed. 746); *Christie v. Sawyer*, 44 N. H. 298; *Taylor v. Gilman*, 58 N. H. 417.

Besides this, there was evidence that the contingency of the payment was entirely on account of the poverty of the defendants, one of whom was a domestic servant in the plaintiff's family. It is lawful to assist a poor man, or for a master to assist a servant, without being guilty of maintenance; and so an agreement to take nothing, except in the event of success, would not make the agreement unlawful, even if it would have done so but for the poverty of the defendants or their relation to the plaintiff.

Harris v. Brisco, 17 Q. B. D. 504 (C. A.); *Thalhimer v. Brinckerhoff*, 3 Cow. 624, 648; *Lathrop v. Amherst Bank*, 9 Met. 490.

It was not champerty to agree that, if suc-

cessful, the plaintiff should have "very large and liberal fees, in no event to exceed 50 per cent of the amount collected."

The parties might properly have agreed upon a sum to be paid to the plaintiff for his services, however large and liberal the sum might have been.

McPherson v. Cox, *supra*; *Tapley v. Coffin*, 12 Gray, 420, 422; *Hubbard v. Woodbury*, 7 Allen, 422.

The transaction was clearly not within the statute (Pub. Stat. chap. 160, § 6).

Scott v. Harmon, 109 Mass. 287; *Fowler v. Callan*, 102 N. Y. 395, 399, 3 Cent. Rep. 814.

If the second agreement was champertous, the first one was not; and the plaintiff is at least entitled to recover for his services up to the date of the second agreement.

Thurston v. Percival, 1 Pick. 415.

If the provisions of the second agreement would render the agreement invalid according to the law of Massachusetts, still it would be valid according to the law of New Hampshire, by which this agreement was governed.

The agreement had reference only to proceedings in the courts of New Hampshire, and was to be performed there. Consequently its lawfulness is determined by the law of New Hampshire.

Pollock, Cont. 8d ed. 355; *Grell v. Levy*, 16 C. B. N. S. 78.

Such agreement is valid in New Hampshire.

Christie v. Sawyer, 44 N. H. 298, 303.

If the agreement amounted to champerty, it would be simply void; and the plaintiff, as he was employed by the defendants, and they have had the benefit of his services, is entitled to reasonable compensation for his services, just as if the agreement had not been made.

Grell v. Levy, 16 C. B. N. S. 78, 79; *Re Masters*, 1 Harr. & Woll. 848; *Ackert v. Barker*, 181 Mass. 488; Add. Cont. 6th ed. 883.

In the English cases above cited the word "costs" is applied to the attorney's remuneration; but it will be noticed that they were "costs as between attorney and client," and in the English practice the word "costs" is applied to all the charges an attorney has a right to make to his client; and the client always has a right to have his attorney's bill taxed.

Archb. Pr. Ch. 12th ed. 117, 125.

Messrs. Edward O. Cooke and Joseph Bennett, for defendants:

The written agreement contains a recital of all of the essential terms of, if it does not exactly repeat, the oral agreement. By this recital all parties are bound.

Whart. Ev. p. 920, and cases there cited.

The agreements in question were clearly champertous.

Pub. Stat. chap. 160, § 6; *Sweet v. Poor*, 11 Mass. 549; *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Met. 489; *Ackert v. Barker*, 181 Mass. 486; *Belding v. Smythe*, 188 Mass. 530; *Wood v. Downes*, 18 Ves. 120.

The contract was a Massachusetts contract, and should be interpreted under Massachusetts law.

Blanchard v. Russell, 13 Mass. 4; *Coolidge v. Poor*, 15 Mass. 427; *Pine v. Smith*, 11 Gray, 38; *French v. French*, 126 Mass. 361.

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W. Allen, J., delivered the opinion of the court:

This is an action by an attorney at law to recover for professional services. The only question argued is whether the services were rendered under a contract illegal for champerty or maintenance, so that no compensation can be recovered for them.

The parties were residents of this Commonwealth. The defendants were children of a father who had been a stranger to his family for years. They earned their living as domestic servants, and one or more of them had lived in the family of which the plaintiff was a member, and had known him from boyhood. They heard that their father had died in New Hampshire, leaving estate there, and consulted the plaintiff in regard to recovering it, and gave him a power of attorney to collect their shares of it. They had no means except their earnings, and were unable to defray the expense of legal proceedings. The plaintiff verbally agreed with them to take charge of their case, upon the terms that they should furnish money for all actual expenses, and that, in the event of success, he should charge more for his services than if he was sure of his pay in the outset. The plaintiff rendered services under this agreement. The case was tried in the probate court in New Hampshire, and a decision rendered adverse to the defendants, and an appeal taken to the supreme court. Pending this appeal there was some difference between the defendants and counsel employed in New Hampshire, and the counsel withdrew from the case, but was persuaded by the plaintiff to return; and, in consequence, a written agreement was signed by the defendants, which recited that they had retained the plaintiff and authorized him to retain counsel in New Hampshire; "and whereas said counsel and attorney are to depend upon the contingency of success for the fees for all services rendered in and about said prosecution," agreeing that the plaintiff and the counsel employed "shall, in view of the uncertainty of the result, in their payment be entitled to very large and liberal fees, in no event to exceed 50 per cent of the amount collected by them; and that we will furnish all the evidence and pay all the actual costs in the prosecution of said claims." The defendants afterward, without notice to the plaintiff, employed other counsel, and on trial recovered \$9,300.

According to the terms of this agreement the plaintiff could unquestionably have maintained an action against the defendants for his fees, if successful in the suit. In that event he "is to be entitled to very large and liberal fees," for which he would have a right of action against the defendants. This is inconsistent with a champertous agreement, an essential element of which is a sharing in the fruits of the litigation. There was no agreement that the plaintiff should receive a share of the amount recovered as compensation for his services. It is immaterial that the avails of the suit were the means or the security on which he relied for payment, if it was to be payment of a debt due from the defendants. *Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Met. 489; *Ackert v. Barker*, 181 Mass. 486, and *Belding v. Smythe*, 188 Mass. 530.

are cases of champerty, where a part of the amount recovered was to be received in compensation for services, and there was to be no personal liability. Where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or a part of them, as security for payment, the agreement is not champertous. *Tapley v. Coffin*, 12 Gray, 420; *Scott v. Harman*, 109 Mass. 236; *McPherson v. Cox*, 96 U. S. 404 [Bk. 24, L. ed. 746]; *Christie v. Sawyer*, 44 N. H. 298; *Anderson v. Redcliffe*, E. B. & E. 806, 817.

We do not see anything in the agreement which renders it void for maintenance. In a sense, a lawyer may be said to maintain another in a suit when he gives his advice or services, as formerly it would have been maintenance for a layman to do so; but such acts have long since ceased to be unlawful; and it would now nowhere be held to be in itself unlawful for a lawyer to give his services to prosecute a suit, with the understanding that his services are to be free unless success shall give to his client the ability to pay him, and that, in that case, he will expect liberal fees. There may be circumstances in which such a contract would be meritorious; and there may be circumstances in which it would partake of the worst evils of maintenance. Under what circumstances a contract of that nature might be held void as against public policy, we need not consider. The contract under consideration was nothing more than an agreement by the plaintiff to give his services without charge if the suit should not be successful, and an agreement by the defendants to pay large and liberal fees if successful; and we know no authority, and no reason in public policy, why, under the relations and circumstances of the parties, it was not a lawful contract which they had a right to enter into. We think that the ruling, as matter of law, that the action could not be maintained, was wrong.

New trial granted.

Hugh QUINN

v.

LOWELL ELECTRIC LIGHT CORPORATION.*

1. In an action for damages for the continuance of a nuisance in the use of machinery for generating electricity, in which the defense was a license from the city, and in which plaintiff sought to recover for acts done in excess of the license,—*Held*, that a judgment for damages for the continuance of such nuisance, recovered by plaintiff against defendant before the license was granted, was not admissible in evidence.
2. Testimony of the extent of the jarring, trembling, and shaking caused by such machinery after the time laid in the declaration, and after defendant's occupancy ceased, as compared with

what it had been during such time, is inadmissible in such action.

(Middlesex—Filed May 10, 1887.)

ON plaintiff's exceptions. *Overruled.*

Action of tort for the continuance of a nuisance. Writ dated November 22, 1883. The nuisance complained of was the maintenance and use of a steam engine, boilers, and heavy machinery for generating electricity for lighting purposes, at the works of the defendant on Middle Street, in Lowell, and close to and within 500 feet of plaintiff's dwelling-house. The defendant filed a general denial, and also claimed that whatever it did it was authorized by law to do, and that it was duly licensed by the mayor and aldermen of the city of Lowell.

At the trial in the superior court, before Blodgett, J., the plaintiff offered in evidence, under the second and third counts of the declaration, a judgment for \$60 damages, recovered by him against the defendant October 26, 1883, in the Superior Court of Middlesex, in an action of tort for a nuisance, commenced May 16, 1883, for erecting, maintaining, and running the same steam engine, boilers, and machinery from December, 1882, up to May 16, 1883, and for the noises, jarring, and vibration therefrom, as set forth in said counts.

The declaration in the action in which the judgment of October 26, 1883, was obtained alleged that the defendant, in the month of December last (1882), did erect, and has ever since maintained and used, a certain building containing heavy machinery to furnish power for electric lighting; and has placed and maintained therein, to wit, in said building, steam boilers, a large steam engine and pipes, flues, and apparatus connected therewith, and other heavy machinery for generating electricity; and has maintained, used, and worked said engine, boiler, fixtures, and machinery in close proximity to said plaintiff's house; and by so doing has greatly injured the dwelling-house of the plaintiff; and has greatly annoyed the plaintiff and rendered his occupation of said house unpleasant and unsafe; and has made it impossible to rent said house or get a tenant therefor since said machinery of the defendant was started, by reason of the loud noises caused by said machinery, especially at night; and has jarred, cracked, and broken the walls and other parts of plaintiff's said house, and has thereby greatly reduced the value of plaintiff's premises for renting, and for his occupancy and use; and has greatly increased the risk and hazard of said premises in obtaining insurance thereon, and has rendered them unsafe and unfit for occupancy as a residence, or for renting.

To this declaration the defendant filed in answer a general denial, and also therein claimed that, whatever it did, it was justified in doing by a license from the board of aldermen of the city of Lowell, granted in pursuance of Pub. Stat. chap. 102, § 47.

It was admitted by the plaintiff, in answer to a question by the court, that the license from the mayor and aldermen to the defendant, relied upon as a justification in the former suit, was not granted until March 20, 1883,

* See 1 New Eng. Rep. 101.

and it was not suggested by him that there was any evidence in the former suit of a failure to comply with the terms of the license after it was granted.

There was evidence introduced by the plaintiff in the present case tending to show that the terms of the license, during the time covered by the present suit, to wit, from May 16 to September, 1883, were not complied with by the defendant.

The court ruled that the judgment obtained October 26, 1883, was not admissible, and excluded the same.

After the plaintiff had put in evidence, by the testimony of several witnesses, the amount of jarring, trembling, and shaking during the time covered by this action, the plaintiff was asked what the amount of the jarring and trembling and shaking at the time of the former trial (in October, 1883) was, compared with what it was through the summer of 1883 (the time covered by this action), for the purpose, as stated by counsel for plaintiff, of introducing testimony of other parties who visited the premises at that time, to wit, October, 1883, as to the amount then of the jarring, shaking, and trembling; but the court ruled that the question was not admissible, and refused to allow it to be answered.

The jury found for the defendant, and the plaintiff alleged exceptions.

Mr. W. H. Anderson, for plaintiff:

The judgment recovered by plaintiff on October 26, 1883, was admissible in evidence, and was improperly excluded. It is not claimed that the former judgment was conclusive, but that it was admissible; and this point has been fully discussed and so decided.

See *Vroght v. Winch*, 2 Barn. & Ald. 662; *Smith v. Elliott*, 9 Pa. 845; *Kilheffer v. Herr*, 17 Serg. & R. 319; *Parker v. Standish*, 3 Pick. 288; *Richardson v. Boston*, 19 How. 268 (60 U. S. bk. 15, L. ed. 639). See also 2 Pick. 21, note.

Nor does the fact, as found in the case, that the license of the mayor and aldermen was not granted till March 20, 1883, affect the argument, because, in both the former and the present suits, the defendant filed a general denial, and in each claimed that it was justified by its license. It was the same as though there had been no license; and in this respect the two cases stand alike.

The plaintiff should have been permitted to show the amount of jarring, etc., in October, 1883, as compared with what it was in the summer of 1883. It was not too remote.

Messrs. D. L. & G. F. Richardson, for defendant:

A judgment in a former action is not admissible in evidence in a pending suit, unless it appears that the subject-matter in controversy in both were the same, and that the verdict in the first action was rendered upon an inquiry into the merits of the questions tried in the second.

Dutton v. Woodman, 9 Cush. 261.

The verdict which the jury rendered might have been for damages sustained between December and March 20, during the whole of which time the defendant carried on its work without any authority of law.

Sage v. McAlpin, 11 Cush. 165; *McDowell v. Langdon*, 3 Gray, 518; *Lea v. Lea*, 99 Mass. 493; *Tracy v. Merrill*, 108 Mass. 280; *Littlefield* 504

v. Huntress, 106 Mass. 121; *White v. Cham*, 128 Mass. 158; *Cromwell v. Sac*, 94 U. S. 351 (Bk. 24, L. ed. 195).

The burden was upon the plaintiff to show that an issue in the case at bar was in fact litigated in the former suit. This he has not done.

It is clear that the merits of the questions tried in the case at bar were not, and, from the nature of things, could not be, inquired into in the former suit. Even if the acts complained of were similar, the judgment would not be admissible.

Bates v. Santom, 116 Mass. 123.

The plaintiff having put in evidence, by the testimony of several witnesses, the amount of jarring, etc., during the time covered by his action, could not prove the extent of such jarring, etc., at another and different time.

C. Allen, J., delivered the opinion of the court:

In the former action, in which the plaintiff recovered judgment against the defendant, the time covered by the declaration extended from December, 1882, to May 16, 1883. During a portion of that time, namely, until March 20, 1883, the defendant had no license. For all that appears, the damages recovered by the plaintiff in that action were only for the defendant's acts before the license was granted. In the present action, the plaintiff sought to recover for acts done by the defendant in violation or in excess of its license. It is obvious that there is nothing to show that this issue was tried in the former action, and the recovery in that action may have been upon grounds entirely independent of it. The record of the judgment was therefore properly excluded.

In respect to the second point taken by the plaintiff, the bill of exceptions at first sight is not quite clear. In the amended declaration, the plaintiff seeks to recover damages for the period of time from May 16, 1883, to November 22, 1883. In the answer to the amended declaration the defendant sets forth, among other things, that, until September 1, 1883, it conducted and carried on its business on the premises referred to, and that, on said 1st day of September, it sold and conveyed said premises, and no longer owned or occupied the same, or carried on any business therein. It is not stated in the bill of exceptions, in express terms, that the defendant did in fact discontinue its business there at that time; but this is to be inferred, since the bill of exceptions speaks of "the time covered by the present suit, to wit, from May 16 to September, 1883;" and again it speaks of the summer of 1883 as the time covered by this action. As we understand the question intended to be presented, it arises thus: The plaintiff had been allowed to put in evidence, by the testimony of several witnesses, the amount of jarring, trembling, and shaking during the time of the defendant's occupancy which was covered by this action, to wit, up to September 1, 1883; and the plaintiff was then asked by his counsel, what was the amount of jarring, trembling, and shaking in October, 1883, after the defendant's occupation had ceased, as compared with what it had been through the summer of 1883, the time covered

by this action; the purpose being, after getting the plaintiff's testimony as to the comparative amount at the two periods, to introduce testimony, which otherwise would clearly be irrelevant, of other persons who visited the premises in October, 1883, as to the amount at that time of jarring, shaking, and trembling. October being thus treated as outside of the time practically covered by the action, the judge ruled that the question to the plaintiff was not admissible. This was correct. Admitting the plaintiff's testimony would have introduced a new issue, of itself traversable; and the testimony to which it was intended to open the way was too remote. The plaintiff was properly confined to testimony as to the results of the defendant's acts during the time of its occupancy of the premises.

Exceptions overruled.

James E. DODD *et al.*

v.

J. P. C. WINSHIP, Guardian.

appropriate a part of such fund, it is a breach of trust, and they cannot charge it in their account against his children.

(Suffolk—Filed May 9, 1887.)

ON report. Decree affirmed.
Appeal from a decree of the Probate Court of the County of Suffolk, disallowing two items charged in a supplemental account of the appellants.

At the hearing in the supreme judicial court before Gardner, J., the following facts appeared:

John Hooper died in 1854, leaving a widow and six children; among the latter, Dwight B. Hooper. In his will, proved October 16, 1854, he gave the residue of his property to the trustees, Dodd and Hooper, the appellants, with directions to pay Mrs. Hooper, his widow, "the net rents, income, dividends, and profits thereof during her life," and, at her decease, "to pay, convey, and assign the trust property to and among my children, their heirs, personal representatives, and assigns, in equal proportions, the issue of any deceased child to stand in their parent's stead and receive their parent's share." Said Dwight B. Hooper died in 1871, and the testator's widow in 1878. After the death of the widow, the trustees returned an account, and in it they credited themselves and charged to the children of said Dwight B. Hooper the sum of \$872, and interest thereon, called in such account "income," and interest received by him. The probate judge disallowed these items; and on appeal to the supreme court, it appears from the report in that case as follows: "It further appeared, and the court found that, during the lifetime of the widow, said Dwight B. Hooper collected at sundry times certain rents or other income belonging to said estate, amounting in all to \$872, and kept and appropriated the same to his own use, and was allowed to do so by the said trustees; and that afterwards, during the lifetime of the widow, in 1871, said Dwight B. Hooper died, leaving six minor children, of whom said J. P. Cushing Winship is guardian; that the widow died in 1878; and in 1879 this account, as a final probate account, was filed by the trustees, in which they credit themselves and charge to the children of said Dwight B. Hooper the said sums of money so received by him (\$872) and interest on the same, \$381.50, making the two items of said account disallowed by the probate court." Upon these facts the judge ruled "that the appellants were entitled so to charge said sums against the estate of Dwight B. Hooper, and that the said items in said account should be allowed in that form;" but the case being reserved, the full court affirmed the decree of the probate court on the ground that it was income. See 138 Mass. 359. The trustees then filed a supplemental account, the one in question, in which they stated that the sum of \$872 was principal, being the sum received by Dwight B. Hooper from the Saco Water Company, without authority from the trustees, when that property was wound up and divided; that it was then applied by him to his own use, the former entry calling it "income" being an error. The appellants offered evidence tending to show that this sum was principal collected, as stated in the annexed account, from the

1. In probate proceedings great latitude is allowed in reopening and correcting errors in the accounts of executors, guardians, and trustees.
2. If a trustee, through inadvertence and without any fault on his part, erred in admitting, in an account rendered by him, that an amount therein stated was a part of the income of the trust fund, the probate court, or, upon appeal, this court, can grant him leave to reopen the account and correct the error, if it was material.
3. Under a devise by which the testator gave the residue of his property to trustees in trust to pay the income to his widow during her life, and, at her death, to pay and convey to his children the trust property in equal proportions, the issue of any deceased child to take their parent's share, the children of the testator took interests which vested at his death.
4. It was the intention of the testator by such devise, not merely to postpone the enjoyment to the period of distribution, but to create a condition subsequent, that if any child died before the widow, leaving issue, such issue should take under the will as substituted legatees, and such child took a vested estate liable to be divested and defeated if he died before his mother, leaving issue. He could assign it, but his assignee would take the estate subject to the same contingency; and neither he nor the trustees could enlarge his interest or defeat that of his issue.
5. In the contingency of a child of the testator dying before his mother, his issue is entitled, under the will, to that share of the principal of the fund which would have come to their father if he had survived his mother; and, in such case, if the trustees had purposely or negligently allowed such child, while living, to ap-

Saco Water Company, when that company was wound up, and not income, and that the entry in the original account was made by error and inadvertently. Upon objection by the appellee, the court excluded the evidence, and ruled that the decree of the judge of probate be affirmed, and reported the case to the full court.

Messrs. Sohler & Welch, for appellants:

We contend that each child took a vested remainder in fee at his father's death, and the words "at her decease" merely show when the trustees are to convey and assign the property to the children,—in other words, when the remainder shall take effect in possession. The words "and assigns" strengthen this view. "The issue of any deceased child to stand in their parent's stead and receive their parent's share" refers to a child who should de cease during testator's lifetime, and whose issue would be entitled to their parent's share. Of course, if vested, any child in whom it was vested could use and dispose of it during his lifetime, if he saw fit.

Hill v. Bacon, 106 Mass. 578; *Darling v. Blanchard*, 109 Mass. 176; *Kimball v. Tilton*, 118 Mass. 311; *Pike v. Stephenson*, 99 Mass. 188; *Moore v. Lyons*, 25 Wend. 119, 126, 127; 4 Kent, 12th ed. note a; *Livingston v. Greene*, 52 N. Y. 118; *Minot v. Tappan*, 122 Mass. 535.

Assuming, as we must for the purpose of this case, that Dwight B. Hooper took a portion of "the principal belonging to the estate," namely, an amount received by him from Saco Water Power Company when the company was dissolved, and applied it to his own use, his share is accountable for it; and it is proper, he having deceased, to deduct it from what his children receive on the life tenant's death. If he had a right to dispose of and alienate it during his mother's life, he would certainly have been bound, on her death, if he had survived her, to allow for the principal of the fund which he had taken, no matter how he had disposed of it; and if he died before his mother, as was the case, his children were in no different position from what he would have been in had he survived. These points being sustained, we contend that it makes no difference that, at a former hearing, a different state of facts appeared, and a decision was rendered upon those facts.

The question is whether a mistake in an account can be corrected when the account has been acted upon by the supreme court of probate; or whether the mistake binds the parties; or what is the proper mode of correcting such a mistake.

It must be allowed that, if the mistake cannot be corrected by the court sitting as a probate court, it cannot be corrected at all.

See Pub. Stat. chap. 156, § 6.

No adjudication has been had upon the question now before the court, but a decision has been made upon an entirely different matter. If an adjudication had been made upon this present claim, and it had been disallowed by the court of final resort, that adjudication would have ended the matter. But the accountants are in the same position as if they had rendered an account charging entirely a new item which had been omitted by mistake. That such a mistake, such an omission, may

be corrected at any time before a final settlement, is shown by the following cases and authorities:

Pub. Stat. chap. 144, § 9; *Blake v. Peggam*, 101 Mass. 592; *Same v. Same*, 109 Mass. 541; *Davis v. Cowdin*, 20 Pick. 510; *Stetson v. Bass*, 9 Pick. 27.

Mr. William E. Russell, for appellee:

I. At the former trial "it appeared and the court found that, during the lifetime of the widow, said Dwight B. Hooper collected at sundry times certain rents or other income, etc." Upon this fact the supreme court based its decision.

Dodd v. Winship, 133 Mass. 359.

The fact so determined was *res judicata*, and could not afterwards be reopened between the same persons.

Cummings v. Cummings, 123 Mass. 270; *Chamberlain v. Preble*, 11 Allen, 370, 375; *Boston & W. R. R. Co. v. Sparhawk*, 1 Allen, 448; *Blair v. Bartlett*, 75 N. Y. 150, 152, 153. See *Gates v. Preston*, 41 N. Y. 118; *Bellinger v. Craigie*, 31 Barb. 544; *Dunham v. Bower*, 77 N. Y. 76; *Foster v. Busted*, 100 Mass. 409, 412.

An error in the report of facts, whether the facts are found or agreed, cannot be corrected by subsequent litigation between the parties.

Chamberlain v. Preble, 11 Allen, 370.

If the merits have been tried, and the entire cause determined, the decision is a final judgment, no matter what may be its technical designation.

Board of Comrs. v. Lucas, 93 U. S. 108 (Bk. 23, L. ed. 822).

If the evidence offered is competent, then the former trial in this court was merely upon a moot question. The parties have been put to great delay and expense without result; and may be put to endless litigation. It certainly seems a dangerous principle to establish that a party may retry his case if he can prove that he blundered in his first trial; or that, after decision by the full bench, he may show in a new proceeding that the court was mistaken in the finding of a fact.

See *Baylies v. Davis*, 1 Pick. 206; Pub. Stat. chap. 144, § 9.

II. The evidence was immaterial. Assuming the money appropriated by Dwight B. Hooper to have been principal, it is submitted that it cannot be charged against his children. The children of the testator, it is admitted, under the will took vested remainders capable of alienation. Whether an alienation would be subject to the contingent interest of the grandchildren, as in *Gardner v. Hooper*, 8 Gray, 398; *Blanchard v. Blanchard*, 1 Allen, 223, 228; *Smither v. Willock*, 9 Ves. 233; or would pass the estate clear of such contingent interest, as in *Hill v. Bacon*, 106 Mass. 578, does not arise. It is admitted that the direction to the trustees to pay, on the death of the widow, the remainder to the children and their assigns, made the interest of the grandchildren subject to an alienation by their father.

In the absence of such alienation, the death of their father before the life tenant devested his interest in favor of his children,—substituted legatees.

The interest of the father was a vested remainder, "so far contingent that, if he should not survive the widow, the amount would not

come to him;" but yet "descendible, transmissible, and assignable" (*Gardner v. Hooper*, 3 Gray, 403), giving him no seisin or right to immediate seisin of the real estate sufficient to raise a dower interest (*Wilmarth v. Bridges*, 113 Mass. 407), and no right to immediate payment of his share of the personal estate. His power to alienate and bar contingent interests gives no right to a prepayment against the declared intent of testator.

Whittaker v. Whittaker, 99 Mass. 364; *Pike v. Stephenson*, 99 Mass. 188, 190.

It is therefore submitted that such payment was wrongful, and should not affect subsequent interests in the will; substituted legatees should not be charged with it.

The principle that a devise to heirs, of the same estate in nature and quality as that to which they would be entitled by descent, is void, does not apply.

Ellis v. Page, 7 Cush. 161.

The exact interest taken by the grandchildren under a provision like this in a will has been the subject of conflicting decisions.

Gardner v. Hooper, 3 Gray, 398; *Blanchard v. Blanchard*, 1 Allen, 233; *Smither v. Willock*, 9 Ves. 283. See *Hunt v. Hall*, 37 Me. 363.

It is submitted that the provision of the will in the case at bar is in effect the same as in the cases cited, and limited the estate over to the grandchildren on the happening of the contemplated contingency. They are mentioned as the remaindermen to be substituted.

Moore v. Lyons, 25 Wend. 119, 144.

It has been held that such provision would not prevent the remaindermen from conveying and giving a clear title during the life of the life tenant.

Hill v. Bacon, 106 Mass. 578; *Kimball v. Tilton*, 118 Mass. 311.

But it has never been held to be mere surplusage, giving no interest to those mentioned in it; at least it makes them take as legatees, and not as heirs.

Gardner v. Hooper, 3 Gray, 398; *Blanchard v. Blanchard*, 1 Allen, 233; *Kimball v. Tilton*, and *Hill v. Bacon*, *supra*; *Pike v. Stephenson*, 99 Mass. 188; *Gibbens v. Gibbens*, 140 Mass. 105, 1 New Eng. Rep. 98.

It is not inconsistent with the vesting of an estate at the testator's death, that it should not receive its final character till the happening of some subsequent contingency; *e. g.*, it may open to let in other objects, and so to substitute an object.

Ballard v. Ballard, 18 Pick. 41; *Dingley v. Dingley*, 5 Mass. 585; *Doe v. Moore*, 14 East, 601; 2 Jarm. Wills, Bigelow's ed. § 156.

There cannot be deducted from a legatee's share of an estate an amount wrongfully appropriated by a prior holder of the share. The substituted legatees do not succeed to his debt.

Cowdin v. Perry, 11 Pick. 503.

The wrongful appropriation was a loss to the trust estate, which should be borne equally by all the beneficiaries. (a) The money was taken by Hooper after the death of the testator; it was not, therefore, an advance which might, in anyone's hands, reduce and limit the share. (b) It was merely a debt from Hooper to the estate, which, at the time of distribution

tion, would give a right of set-off against him.

Jeffs v. Wood, 2 P. Wms. 128; *Waterman*, Set-off, 2d ed. § 209.

Till the time of distribution it in no way affected the share. The right of set-off relates simply to the payment of the share; "is founded on equities wholly extrinsic and having no connection with the will or with any right derivable from it."

Carson v. Carson, 1 Met. (Ky.) 800.

The equity must exist at the time of distribution, and against the one claiming the share. A debt of the husband to the estate may be set off against the wife's distributive share of the estate.

Carr v. Taylor, 10 Ves. 574.

But if, before the time of distribution, though after the testator's death, the husband loses his beneficial interest in the share,—as by his death or divorce,—his debt cannot then be deducted. The debt and the share have separated.

Fink v. Hake, 6 Watts, 131; *Harrison v. Andrews*, 13 Sim. 595.

If the grandchildren take their share in their own right, the trustees cannot deduct the debt of their father.

Carson v. Carson, 1 Met. (Ky.) 800; *Thatcher v. Cannon*, 6 Bush, 541; *Pierce v. Dustin*, 24 N. H. 417; *Skinner v. Wynne*, 2 Jones, Eq. (N. C.) 41; *Voorhees v. Voorhees*, 18 N. J. Eq. 223.

Morton, Ch. J., delivered the opinion of the court:

The question whether the appellants are entitled to charge in their account against the children of Dwight B. Hooper the sum of \$873 received by said Hooper in his lifetime, and interest thereon, was adjudicated in the case of *Dodd v. Winship*, 188 Mass. 359. In that case it appeared that the sum received by said Hooper was a part of the income of the trust fund. The court dealt with the case before it, and decided that, being a part of the income, it belonged to Mrs. Hooper, and could not be charged against the children in the probate accounts with them. The trustees have filed another account in which they credit themselves with the same sum and interest, alleging that it was a part of the principal of the trust fund.

The first question is whether the prior adjudication is a conclusive bar to their right to do this. Under our system of probate proceedings great latitude is allowed in reopening and correcting errors in the accounts of executors, guardians, and trustees. The statute provides that, "upon the settlement of an account, all former accounts of the same accountant may be so far opened as to correct a mistake or error therein, except that a matter in dispute which has been previously heard and determined by the court shall not, without leave of the court, be again brought in question by any of the parties to such dispute." Pub. Stat. chap. 144, § 9. It seems, therefore, that if the appellants, through inadvertence and without any fault on their part, erred in admitting that the amount appropriated by Hooper was a part of the income, the probate court—or, upon appeal, this court—could grant them leave to

reopen the account and correct this error, if it was material. *Blake v. Pegram*, 101 Mass. 592; *Same v. Same*, 109 Mass. 541. But it is not necessary to investigate or consider whether the alleged mistake in the first account was an excusable one, because it is not material. Whether the amount appropriated by Hooper was income or principal, the result is the same.

By the will of John Hooper he gave the residue of his property to the appellants as trustees, to pay the income to his widow during her life, and, "at her decease, to pay, convey, and assign the trust property to and among my children, their heirs, personal representatives, and assigns, in equal proportions; the issue of any deceased child to stand in their parent's stead and receive their parent's share." Under this devise the children of the testator took interests which vested at his death. *Gibbens v. Gibbens*, 140 Mass. 102, 1 New Eng. Rep. 98. The material question is as to the extent and quality of such interests.

The testator's clear intention was to postpone the possession and enjoyment of the estate by his children until the death of the widow, so that Dwight B. Hooper had no right of possession or enjoyment of any part of his share during his mother's life. It is not a reasonable construction of the clause we are considering, that the words, "the issue of any deceased child," refer only to the issue of any child who died before the testator. He is speaking of the time of the decease of the widow,—the time of the final distribution of the property,—and the meaning is the same as if he had said: "At her decease the trustees are to pay and convey the property to and among my children in equal proportions; but if any child be then deceased, leaving issue, such issue are to take the share their parent would have taken if then living."

It was the intention of the testator, not merely to postpone the enjoyment to the period of distribution, but to create a condition subsequent, that if any child died before the widow, leaving issue, such issue should take under the will as substituted legatees. The case falls within that class of cases where it is held that a devise creates a vested interest determinable by some future condition or contingency. *Blanchard v. Blanchard*, 1 Allen, 233, and cases cited; *McArthur v. Scott*, 113 U. S. 840 [Bk. 28, L. ed. 1015]. Dwight B. Hooper took a vested estate liable to be divested and defeated if he died before his mother, leaving issue. He could assign it, but his assignee would take the estate subject to the same contingency. *Putnam v. Story*, 132 Mass. 205; *Dunn v. Sargent*, 101 Mass. 336. Neither he nor the trustees could enlarge his interest or defeat the interest of his issue. In the contingency which has happened, they are entitled, under the will, to that share of the principal of the fund which would have come to their father if he had survived his mother. If the trustees purposely or negligently allowed Hooper to appropriate a part of this fund, it was a breach of trust; and they cannot charge it in their account against his children, thus defeating their rights and the intentions of the testator. *Coudin v. Perry*, 11 Pick. 503.

Decree affirmed.

Nora WALKER

v.

Francis C. WELCH, Admr.

1. The burden is upon the plaintiff to prove a perfected gift to her from her husband of a sum of money. It is not enough that he deposited the money in the savings bank in his name as trustee for her. There must be some further act showing his intention to part with the control of the deposit, and to make a perfected gift.
2. A finding of fact by the justice before whom the cause was heard is entitled to great weight, and ought not to be reversed by the appellate court unless it clearly appears to be erroneous.
3. Where there is no proof of any decisive act or declaration of the husband, showing that he intended to make a gift to his wife, and the bank-book was never delivered to her, and she never exercised any control over it or the deposit during his life,—the evidence fails to sustain a gift.
4. Testimony of witnesses interested and biased, and who differ from each other, and are uncorroborated, cannot be relied upon.

(Suffolk—Filed May 9, 1887.)

APPEAL by plaintiff from a decree of a single justice of the Supreme Judicial Court dismissing the complaint in an action to recover possession of a bank-book. *Affirmed.*

This was a bill in equity by Nora Walker against Francis C. Welch, administrator of Wilson Walker, deceased. The complaint, with its amendments, alleged that plaintiff was the widow of said Walker; and that, during his lifetime, said Walker deposited in the Roxbury Institution for Savings the sum of \$450, and received from said bank a savings-bank book as evidence of such deposit; that said sum was deposited in trust for the plaintiff, and the name and residence of plaintiff was disclosed to said bank, and no further notice of the terms and conditions of the trust has ever been given in writing to said bank; that said book was entitled as follows: "Number 37,993, Wilson Walker in trust for Nora Walker (wife) \$450;" that the intention of said Wilson Walker in making said deposit was that the plaintiff should have the benefit of it; that when said deposit was made, said Wilson Walker informed plaintiff that he had made said deposit as a gift to her, and she accepted the same; that one of the by-laws of said bank requires that the book be produced upon demand for the payment of any deposit, and that defendant, as special administrator of the estate of Wilson Walker, deceased, has taken possession of the book with other effects of the deceased, and refuses to deliver the same to the plaintiff. The bill prayed a decree commanding the defendant to deliver said bank-book to the plaintiff.

Defendant demurred to the bill, and also filed an answer, in which he denied that Wilson

Walker deposited any moneys in said bank in trust for plaintiff, and alleged that said deposit of \$450 in the name of Wilson Walker in trust for Nora Walker was made for the intestate's own use and benefit, and not for that of plaintiff; that on December 7, 1883, when the deposit in question was made, said Walker tendered to the bank for deposit the sum of \$1,450; that said institution refused to receive said sum on deposit in one name, whereupon said Walker deposited the sum of \$1,000 in his own name and the balance of said sum in the name of "Wilson Walker, in trust for Nora Walker (wife):" that, in receipt for and as evidence of said deposit of \$450, said Walker took a book containing a memorandum thereof, and immediately left said book with the cashier of the bank, with a request to keep the same for him; whereupon said cashier took the book, and continued to hold it during said Walker's life; that plaintiff was not informed of said deposit, and was ignorant thereof; and that the trust described in said book was not and never has been completed, and no acceptance of said trust was ever made by the plaintiff.

The case was heard in the supreme judicial court before a single justice, upon the pleadings and evidence given by the plaintiff, the material part of which appears from the opinion. Defendant offered no evidence. The court ordered the bill dismissed, and plaintiff appealed to the full bench.

Messrs. Crowley & Maxwell, for plaintiff:

There is no conflict of evidence. The reasons for sustaining the findings of the single judge, stated in *Montgomery v. Pickering*, 116 Mass. 227, and in *Reed v. Reed*, 114 Mass. 872, do not therefore apply to this case.

In *Nutt v. Morse*, 142 Mass. 1, 2 New Eng. Rep. 243, the facts were found and reported, and the case reserved for the consideration of the full court. It will be observed that the facts found related merely to the form of the deposits, the dealing of the depositor with the deposits, and the language, the words of the depositor to the alleged *cestui que trust*. The uncontradicted facts, as testified to in the case at bar, bear some similarity to those found in *Nutt v. Morse*, but are distinguished by circumstances favorable to the plaintiff.

This case is governed by *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159, and not by *Nutt v. Morse*, *supra*, nor by *Sherman v. New Bedford Sav. Bank*, 138 Mass. 581.

The doctrine of *Gerrish v. New Bedford Inst. for Savings* seems to be this: That, although manual delivery of the book is ordinarily essential to the gift, it is not essential to the constitution of a trust, possession by the trustee being entirely consistent with the trust. Hence, if A make a deposit in his name, as trustee for B, intending to give B a present equitable interest, and informs B of the fact of the deposit and its purpose, he thereby fully constitutes himself trustee for B, though no delivery of the book is made to B. These seem to be precisely the facts in the case at bar.

As to the intention of the deposit and the communication to Mrs. Walker, it may be that the judge below regarded this case as gov-

erned by *Nutt v. Morse*, *supra*. But in *Nutt v. Morse*, the alleged trustee said to each of the beneficiaries that the deposits were to remain his during his life, and were to become theirs upon his death, clearly excluding any present beneficial interest, and therefore being, as this court says in its opinion, "an attempted evasion of the Statute of Wills," and void.

The distinctions which we point out between *Gerrish v. New Bedford Inst. for Savings*, and *Nutt v. Morse*, *supra*, and our contention that this case comes within the former and not the latter, will be aided by an examination of *Sherman v. New Bedford Sav. Bank*, 138 Mass. 581. The latter case, however, might have been well decided upon the single ground that the alleged *cestui que trust* never had any knowledge of the deposit until after the death of the depositor.

Mr. Walter Badger, with **Mr. Solomon Lincoln**, for respondent:

Even if full credence had been given to the complainant's witnesses, the evidence offered was not sufficient to warrant a finding that Wilson Walker constituted himself a trustee for her benefit.

Nutt v. Morse, 142 Mass. 1, 2 New Eng. Rep. 243; *Scott v. Berkshire Co. Sav. Bank*, 140 Mass. 157, 1 New Eng. Rep. 221; *Clark v. Clark*, 108 Mass. 522; *McCluskey v. Provident Inst. for Savings*, 103 Mass. 300; *Brabrook v. Boston Sav. Bank*, 104 Mass. 228; *Id. v. Pierce*, 134 Mass. 260; *Pierce v. Boston Sav. Bank*, 129 Mass. 425; *Jewett v. Shattuck*, 124 Mass. 590; *Sherman v. New Bedford Sav. Bank*, 138 Mass. 582.

Morton, Ch. J., delivered the opinion of the court:

There is no dispute as to the rules of law which govern this case. The burden is upon the plaintiff to prove a perfected gift to her by her husband of the sum which she claims. It is not enough that he deposited the amount in the savings bank in his name as trustee for her. There must be some further act or circumstances showing his intention to part with the control and dominion of the deposit, and to make a perfected gift of the legal or equitable interest in it to her. *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159; *Sherman v. New Bedford Sav. Bank*, 138 Mass. 581; *Nutt v. Morse*, 142 Mass. 1, 2 New Eng. Rep. 243.

The case at bar was heard before a single justice, who, upon all the evidence, found as a fact that "Wilson Walker did not constitute himself a trustee for his wife, Honora Walker, the complainant." Such finding by a justice who saw the witnesses, and could best judge of their truthfulness, candor, and intelligence, is entitled to great weight, and ought not to be reversed by the appellate court unless it clearly appears to be erroneous. *Reed v. Reed*, 114 Mass. 872; *Montgomery v. Pickering*, 116 Mass. 227.

Upon examining the testimony it is found that there is no proof of any decisive act or declaration of the deceased, showing that he intended to make a gift to his wife. The bank-book was never delivered to her, and she never exercised any control over it or the deposit during his life. There is no reliable proof of any statement by him, showing such intention.

The plaintiff relies upon the testimony of herself, and her son by a former marriage. She testifies, in direct examination, that when her husband came back from the bank "he said he put \$450 in my name and \$1,000 in his own name." On cross-examination she said he told her that "the \$450 was for me." The son testifies that "he told us the facts that he had deposited the \$1,450, \$1,000 in his name and \$450 in his name in trust for his wife; the \$450 was to be my mother's, and if she saved her money she might have it." In cross-examination he testified that "he said it was his intention that my mother should have the \$450 deposited in trust for her." The witnesses

differ in their statements; and it is clear that neither can be relied on as giving the exact language used by the deceased. When we consider that both witnesses are interested and biased, and that they are not corroborated in any substantial way, their testimony fails to satisfy the mind that the deceased made a gift of this sum of \$450 to his wife. We are of opinion that the plaintiff failed to meet the burden of proving, by a preponderance of evidence, that such completed gift was intended and made, and therefore that the justice who heard the case rightly decided for the defendant.

Decree affirmed.

VERMONT.

SUPREME COURT.

STATE of Vermont

v.

Baxter PRATT.

That part of Rev. Laws, § 8952, which requires a license of a person peddling tea,—the growth of a foreign country,—is in conflict with the Federal Constitution, art. 1, §§ 8, 10.

(Orleans—Decided May 28, 1887.)

INFORMATION filed against respondent for peddling without a license. Heard on an agreed statement, September Term, 1885, Orleans County, Ross, J., presiding. The respondent was adjudged guilty. *Reversed.*

The case is stated in the opinion.

Mr. George W. Cahoon, for respondent: The statute (Rev. Laws, § 8952) is unconstitutional.

Welton v. State, 91 U. S. 275 (Bk. 23, L. ed. 347); *Brown v. State*, 12 Wheat. 436 (25 U. S. bk. 6, L. ed. 684); *Walt. Ch. J.* in *Hall v. De Cuir*, 95 U. S. 485 (Bk. 24, L. ed. 547); *State Tonnage Tax*, 12 Wall. 204 (79 U. S. bk. 20, L. ed. 370); *Sherlock v. Alling*, 98 U. S. 99 (Bk. 23, L. ed. 819); *Philadelphia & R. R. Co. v. Commonwealth*, 15 Wall. 284 (32 U. S. bk. 21, L. ed. 164); *Cook v. Commonwealth*, 97 U. S. 566 (Bk. 24, L. ed. 1015); *Guy v. Baltimore*, 100 U. S. 434 (Bk. 25, L. ed. 743); *Howe Mach. Co. v. Gage*, 100 U. S. 676 (Bk. 25, L. ed. 754); *Tiernan v. Rinker*, 102 U. S. 123 (Bk. 26, L. ed. 103); *Mobile v. Kimball*, 102 U. S. 691 (Bk. 26, L. ed. 238); *Webber v. Virginia*, 103 U. S. 344 (Bk. 26, L. ed. 565); *Walling v. People*, cited in 33 Albany L. J. 254; *State v. Furbush*, 72 Me. 493; *Western U. T. Co. v. Texas*, 105 U. S. 460 (Bk. 26, L. ed. 1067); *Brown v. Houston*, 114 U. S. 622 (Bk. 29, L. ed. 257).

Mr. C. A. Prouty, State's Attorney, for the State.

Powers, J., delivered the opinion of the court:

Rev. Laws, § 8951, imposes a penalty upon persons who become peddlers without a license. Section 3952 provides that "a person going from town to town, or from place to place in the same town, on foot or otherwise, carrying to sell or exposing for sale goods, wares, or merchandise, the growth or manufacture of a foreign country * * * shall be deemed a peddler."

The respondent, among other things, carried from town to town and exposed for sale tea; and he is thus prosecuted for peddling without a license. It is answered that so much of

§ 8952, *supra*, as requires a license from persons peddling tea,—an article of foreign growth,—is in conflict with the Federal Constitution, and therefore void.

The Constitution, in art. 1 § 8, declares that Congress shall have power "to regulate commerce with foreign nations and among the several States;" and, in § 10, that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports." In article 6 it is declared that "this Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding;" and, in art. 3, § 2, "The judicial power [of the United States] shall extend to all cases in law and equity arising under this Constitution." The construction, therefore, given to the clauses of the Constitution above referred to, by the Supreme Court of the United States, is conclusive upon the court.

In *Brown v. State*, 12 Wheat. 436 [25 U. S. bk. 6, L. ed. 684], it was held that a tax upon the sale of an article was in legal effect a tax upon the article itself; and that the law of the State of Maryland requiring persons to take out a license for selling imported goods in the original package was in conflict with the Constitution, in that it purported to tax an import and sought to regulate commerce with foreign nations. The opinion of Marshall, *Ch. J.*, in that case is exhaustive, and it has stood for more than half a century as the settled and unquestioned doctrine of the subject.

In *Welton v. State*, 91 U. S. 275 [Bk. 23, L. ed. 347], decided in 1875, the question again arose upon a statute of Missouri which required a license of peddlers selling goods not the growth, product, or manufacture of that State; and it was argued that the license fee was a new tax upon the occupation or calling of the peddler, and not upon the goods themselves. But the court said: "Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves." The court held that the Missouri statute was in conflict with the Constitution, as an attempted regulation of commerce between the States. It permitted the free sale of goods which were of the growth or manufacture of Missouri, but taxed the sale of those of the growth of other States.

The same rule obviously must apply to a statute which permits the free sale of goods of Vermont growth or manufacture, but taxes the sale of those grown in foreign countries; inasmuch as the clause giving to Congress the power to regulate commerce specified interstate and foreign commerce in the same section.

Under our system of dual government, wherein two existing jurisdictions are exerted over the same territory and people, it is of the highest importance that legislation in each be restricted to the proper boundaries that circumscribe it. Free intercourse and travel between the States and with foreign countries can be safely regulated only by that jurisdiction that looks to the general interests of the

NOTE.—*Interstate Commerce*. Recent decisions to the effect that a State cannot levy a license tax or impose any other restriction upon the citizens or inhabitants of other States for selling, or seeking to sell, their goods in such State before they are introduced therein, are *Robbins v. Taxing District of Shelby Co. Tenn.* 120 U. S. 430 (Bk. 30, L. ed. 694), 1 *Interstate Commerce Rep.* 45; *Corson v. Maryland*, 120 U. S. 502 (Bk. 30, L. ed. 689), 1 *Interstate Commerce Rep.* 50; *Re Hennick (D. C.)*, 7 Cent. Rep. 357, 1 *Interstate Commerce Rep.* 66.

nation as a whole, rather than the separate advantage of a particular locality. The clauses of the Constitution referred to are couched in clear and explicit language; and the cases cited are directly in point.

The judgment of the County Court is reversed; and judgment upon the agreed facts is rendered that the respondent is not guilty, and that he be discharged.

Daniel SHERWIN

v.

Unity SANDERS.

1. The promise of a married woman having a separate estate to pay for necessities furnished her upon the credit of her estate is a sufficient consideration for a new promise to pay for them, made after the death of her husband.
2. The supreme court will not consider questions which have not been raised in the court below.

(Windham—Decided May 26, 1887.)

GENERAL assumpsit. Plea, general issue. Trial by jury, September Term, 1886, Windham County, Walker, J., presiding. Verdict for the plaintiff to recover \$77.13. *Affirmed.*

The case is stated in the opinion.

Messrs. A. E. Cudworth, and Haskins & Stoddard, for defendant.

Messrs. Waterman & Martin, for plaintiff.

Powers, J., delivered the opinion of the court:

The jury has found that the defendant, whilst she was a married woman having a separate equitable estate, promised to pay the plaintiff for goods needed in her family, which he sold to her upon the credit of such estate, and that, after the death of her husband, she again expressly promised to pay the same debt.

This action is assumpsit based upon the latter promise.

In the court below the defendant took no issue upon the question whether she in fact had a separate estate capable of equitable pledge for necessities sold upon its credit; but she stood for her defense upon the ground that her promise made while covert was void at law, and capable of enforcement in equity only against her separate estate; and that her promise, after coverture ceased, was without legal consideration to uphold it.

This court sits for the correction of errors made by the county court in trial of the cases upon the issues made up by the parties. We have no authority to make up a new issue not raised in that court, and proceed to determine it for the first time. If no ruling is made by the county court upon a question that might have been raised, it is plain that no error is predicable of that question.

The court below treated the question of the existence of a separate estate as a fact not disputed, as the parties treated it. It was not directly presented, as it was in *Hubbard v. Bugbee*, 58 Vt. 172. There the referee directly presented the fact upon which it was to be determined

whether a separate estate existed. It was such, and no other, as the will conferred; and the referee submitted to the court whether the promise found, in view of the estate created by the will, was binding at law upon the defendant. Here, however, the terms of the deed are not disclosed, and were not considered by the county court; and that court had no call to construe them. The argument, therefore, in behalf of the defendant upon this branch of the case, should have been addressed to the court below.

We have no occasion to repeat what we said in *Hubbard v. Bugbee*, *supra*, respecting the facts essential to the creation of a separate equitable estate in married women. If such estate exists, the married woman may pledge it for necessities for herself and family. It must fairly appear that she intends to have the party dealing with her rely upon the credit of her estate, and that he does rely upon it. This much appearing, the equitable contract is perfected. During coverture, and by reason of coverture, this contract must be enforced by equitable remedies. After coverture a new promise to perform it is based upon sufficient consideration. During coverture a married woman's promise does not bind her personally; but, having a separate equitable estate respecting which she is not clogged by the fetters of coverture, her promise charges her conscience and binds her estate to fulfill it. The authorities cited in *Hubbard v. Bugbee*, *supra*, fully sustain this position.

The case of *Lee v. Muggeridge*, 5 Taunt. 35, was, like the case at bar, an action of assumpsit based on the promise of a widow having a separate estate to pay a debt contracted on the credit of such estate during coverture. The question was whether her promise after coverture was based on sufficient consideration. Lord Mansfield said: "It has been long established that when a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action." Heath, J., said: "The notion that a promise may be supported by a moral obligation is not modern."

This case has been criticised somewhat; not on the ground that, upon the special facts appearing, the decision was wrong; but that the propositions laid down were too broad for general application. *Eastwood v. Kenyon*, 11 A. & E. 447; *Beaumont v. Reeve*, 8 Q. B. 487; 1 Par. Cont. 492, note *s*. In these cases it is said that the subsequent promise is binding only when the antecedent obligation was a legal one. It is not improbable that this qualification of the rule laid down in *Lee v. Muggeridge* itself needs qualification. If the antecedent obligation is an equitable one,—that is, one that equity would enforce,—Lord Mansfield's doctrine is easily harmonized with that of his critic Baron Parke, in *Earle v. Oliver*, 2 Exch. 71 has harmonized both views as follows: "The principle of the rule laid down by Lord Mansfield is that when the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law; and, if he promises to pay the debt,—which is only what an honest man ought to do,—he is then bound by law to perform it."

In a later case, *La Touche v. La Touche*, 8 H. & C. 576, it was held that a promissory note given by a widow to extinguish a balance due upon her note given during coverture, which bound her separate estate, and which was barred by the Statute of Limitation, was based on good consideration. Channell, B., said: "The note of 1848, although made during coverture, was binding on the defendant's estate. Unless something occurred to discharge the defendant's separate estate from liability, there was, we think, a good consideration for the note now sued upon, made by her after her coverture was determined." In *Rusling v. Rusling*, 47 N. J. L. 1, Beasley, Ch. J., in discussing an analogous principle, formulates the rule thus: "By such a promise, what before was an equitable obligation is converted into a legal obligation."

In *Vance v. Wells*, 8 Ala. 399, it was held that when goods are furnished to a married woman on the faith of her separate estate, there is such a moral obligation to pay the debt as will support an action at law on a promise to pay after the coverture has ceased. In *Goulding v. Davidson*, 26 N. Y. 604, the same doctrine was laid down in a similar case.

In the case at bar the defendant received value to her own use from the plaintiff, who relied upon her promise to pay, and upon her separate estate as the means of enforcing pay. Her promise, by the accident of her coverture, was void at law, but valid in equity. Her subsequent promise to pay, after coverture, is clearly founded upon good consideration.

The item of \$3.45 was properly dealt with by the court. The jury found it was for necessities for the family, and the goods were procured by Hiland at the defendant's request. Hiland's willingness to pay his mother's debt does not absolve her from it. There is more question respecting the \$20 item. But the case fairly shows that this item was disallowed by the jury; so the defendant has suffered no harm.

The judgment is affirmed.

S. F. FRARY, Exr. of D. Gusha,

v.

A. B. GUSHA.

1. In an action involving the probate of a will, evidence is not admissible to show that the contestant did not deny collateral statements made by the testator at a hearing for the appointment of a guardian over him.
2. Where the defense was the insanity of the testator and undue influence, after evidence had been introduced by the proponent of the will, tending to prove that the testator held his son, the contestant, in disesteem, evidence was properly allowed to show that the son was industrious and had no vicious habits, as proving that, if his father did not esteem him, it was due to some unnatural condition or influence.
3. Evidence was admissible to show the business character and financial condition of one to whom the testator gave a

power of attorney to do his business, as bearing on his capacity to make the will.

4. A physician who attended the testator a few days before he committed suicide was asked to state whether the condition the testator had been in was an indication of insanity, and what the act of suicide would indicate as to soundness of his mind, and answered that he believed that the suicide was an insane act. Held, admissible; and that suicide is evidence tending to prove insanity.
5. Error cannot be predicated on an improper answer of a witness, when no attempt was made to check him, and the attention of the court was not called to it; and it is doubtful whether an exception should be allowed in such case.
6. An error in excluding evidence rendered harmless by the verdict is not vitiating.

(Orange—Decided May 27, 1887.)

APPEAL from an order of the Probate Court admitting to probate the will of David Gusha. Pleas, want of testamentary capacity because of insanity and fraud and undue influence. Trial by jury, December Term, 1885, Orange County, Rowell, J., presiding. Verdict that the paper propounded as the will of said Gusha ought not to stand and be established, because of his incapacity. *Affirmed.*

The case appears in the opinion.

Messrs. S. B. Hebard and J. H. Watson, for appellant:

Dr. Fletcher's testimony was not admissible. Suicide is not always a symptom or a result of insanity.

Whart. & St. Med. Jur. 637.

There is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity.

Miller, J., in *Terry v. Ins. Co.* 1 Dill. C. C. 408.

In *Merritt v. Life Ins. Co.* 55 Ga. 108, the court say: "The fact that the insured committed suicide is not of itself evidence of insanity."

Coffey v. Life Ins. Co. 35 N. Y. Super. Ct. 814; *Reg. v. Barton*, 3 Cox, C. C. 275; *Wood v. Mutual Benefit L. Ins. Co.* 70 N. Y. 564; *Duffield v. Robeson*, 2 Harr. (Del.) 375; *McElwee v. Ferguson*, 43 Md. 479; *Ferguson v. Hubbell*, 97 N. Y. 507; *Rogers, Exp. Test.* § 11; *Van Zandt v. Mutual Benefit L. Ins. Co.* 55 N. Y. 169.

It was for the jury to say what the suicide indicated.

Cases *supra*.

Messrs. C. W. Clark and Heath & Willard, for appellee:

Insanity is a disease. It is one of the recognized functions of experts to say what are and what are not symptoms or indications of disease. It has been decided in this State that suicide is an indication or proof of insanity.

Hathaway v. Nat. L. Ins. Co. 48 Vt. 835; *Fairchild v. Buscomb*, 35 Vt. 398; 1 Greenl. Ev. § 440.

Royce Ch. J., delivered the opinion of the court:

This was an appeal from the order of the

probate court admitting an instrument purporting to be the will of David Gusha to probate. The plea was want of testamentary capacity because of insanity, and undue influence of A. E. Richardson and others.

The will was executed June 30, 1879, and July 17, 1879, an application was made by the contestant, Alonzo Gusha, for the appointment of a guardian for the testator, upon the ground of his age, infirmity, and general incapacity to manage his business. On the hearing, both the testator and contestant were witnesses, and the testator testified as to how he had accumulated his property, the amount he had given his son, the contestant, and that, for reasons which he then gave, he did not intend to give him any more.

The proponent offered to prove that the contestant did not deny the statement so made by the testator, and an exception was taken to the exclusion of the evidence. There was no error in that ruling. The matter in issue upon the hearing was the truth or falsity of the allegations in the application for the appointment of a guardian. The contestant was not bound to admit or deny them. The matters testified to by the testator were collateral to the issue that the court was to determine, and so the evidence offered was not admissible.

After the proponent had introduced evidence tending to show that the testator held his said son in disesteem, the son was permitted, against the objection and exception of the proponent, to show that he was industrious, and had no vicious habits, as tending to show that his father did not hold him in disesteem, or that, if he did, it was due to some unnatural condition or influence. The case of *Fairchild v. Bascomb*, 35 Vt. 398, is full authority for the admission of the evidence for the purpose for which it was offered.

It appeared that, previous to 1878, the testator had been a farmer most of the time, and that, having sold his farm, he formed a partnership with a Mr. Ames in the sawmill and lumber business, and remained in partnership with him until about April 1, 1879; that he was an old man and unused to the management of so extensive a business, and that in February or March, 1879, he gave one Richardson a power of attorney to do his business, which, previous to that time, he had managed himself. The contestant was permitted to show the character of Richardson as a business man, and his pecuniary condition, as bearing upon the capacity of the testator to make the will in question; and we hold that the evidence was admissible.

It was admitted that the testator committed suicide August 24, 1880. Dr. Fletcher, who had been his physician since 1871, and saw him the last time a few days before his death, was allowed to testify as to his mental condition during the time he attended upon him, and that, some portion of the time, he was deranged and more or less melancholy. He was then asked to state, from his professional knowledge, whether the condition the testator had been in was or was not an indication of insanity, and what the act of suicide would indicate as to the soundness or unsoundness of his mind. It is said that Dr. Fletcher was improved as a common witness; but no objection was made

to his testifying on the ground that it did not appear that he was qualified to testify as an expert. The objection made to his answering the above question was that it was not a proper question to be put to an expert. The question was properly divisible, and there can be no doubt about the admissibility of an answer to the first part of it. There is a conflict of authority upon the question of the admissibility of such evidence as was called for by the second part of the question. While it has been generally held that the fact that one committed suicide is not conclusive evidence of insanity, it has as generally been held that it was evidence tending to show insanity; and the answer of the witness that he believed the testator's suicide an insane act was so treated by the judge in his charge to the jury. The act was an unnatural one; and the question put to the witness was undoubtedly understood by him as calling for his professional opinion as to the mental condition of the testator when he committed it; and it was probably so understood by the jury. Applying the rule laid down by Judge Aldis in *Fairchild v. Bascomb*, we think such an inquiry might well be put. It is, in substance, asking the professional opinion of a medical expert as to what the future mental condition of his patient will be. The trial in *Fairchild v. Bascomb*, and in *Hathaway v. Nat. L. Ins. Co.* 43 Vt. 335, proceeded upon that theory of the law. In the last-named case it was held that the same kind of evidence was properly admitted. The only difference we discover between that case and this is in the form of the questions and answers; so it was not error to admit the evidence.

Counsel for contestant inquired of a witness introduced by him if he had any occasion to look for Richardson's property. No objection was made to the question, but it is claimed that the answer given to it was improper. It does not appear that any attempt was made to check the witness while the answer was being given, or that the attention of the court was called to it; and the propriety of allowing an exception may well be doubted. But treating it as having been properly allowed, error cannot be predicated upon the impropriety of the answer. Counsel were not responsible for it, and all that the court could do would be to caution the jury as to the use to be made of it; and that, it is presumed, was done.

If the facts offered to be shown by Chandler were admissible, and it was error to exclude them (which it is not necessary to pass upon), such error was rendered harmless by the verdict of the jury. The evidence was offered as bearing upon the question of undue influence; the use that the proponent proposed to make of it was to negate the claim made by the contestant that the will was procured by undue influence; and the jury found that it was not so procured.

The judgment is affirmed, and ordered to be certified to the Probate Court.

Levi N. BARNARD'S ASSIGNEE

C. A. HASKINS.

No appeal is allowed by statute (Rev. Laws, §§ 1862-1864) from the decision of

a judge of the court of insolvency as to the priority of liens on the insolvent's estate, although there is from the decision of commissioners.

(Windsor—Decided May 28, 1887.)

APPPEAL from a decision of the judge of the Court of Insolvency for the District of Windsor. Heard May Term, 1886, Windsor County, Taft, J., presiding. Appeal dismissed. *Affirmed*.

The case is stated in the opinion.

Messrs. Davis & Enright, and *J. W. Pierce*, for assignee.

Mr. William Batchelder, for defendant.

Powers, J., delivered the opinion of the court:

The question argued before us is whether an appeal was allowable from the decision of the judge of the insolvency court.

The appellant claimed a priority of lien upon the assets of the insolvent. Rev. Laws, § 1862, provides that in such cases, if the priority is disputed, the judge in his discretion may, and upon the petition of the assignee or a creditor must, appoint commissioners to determine such dispute. By § 1864, either party may appeal from the decision of such commissioners. Such questions, in the first instance, are before the judge for decision, but he or the parties may shift the responsibility upon commissioners. The statute provides for no appeal if the judge decides the question; and in this case he made the decision. It serves no useful purpose to wonder why the Legislature provided an appeal in the one case, and not in the other. Thus saith the scripture. The Legislature created the court, gave it plenary jurisdiction in insolvency proceedings, and provided for appeals to the county court in such instances as, in its wisdom, seemed best. So far as the statute accords an appeal, so far only can it be had. None can exist except as thus provided. The reason for this holding is, the whole procedure is statutory, and no appeal lies to any order unless given by the statute. This was the holding of the court in Massachusetts, respecting their statute, in *Bassett v. Hutchinson*, 9 Allen, 199; and the same holding was foreshadowed in *Ripley Sons v. Griggs*, 52 Vt. 461, and *Re Soules*, 57 Vt. 386.

The judgment of the County Court dismissing the appeal is affirmed, and this judgment is ordered to be certified to the Court of Insolvency.

S. D. CARTWRIGHT

v.

NEW YORK & MONTREAL R. R. CO.

1. An action cannot be maintained which is founded on Rev. Laws, § 3372, which makes railroads liable to day laborers employed by contractors, for labor in constructing their roads,—where the work was done, and the contract made and to be performed, in New York, and governed by its laws.

2. If New York has a statute imposing a

similar liability on railroads, the action should have been based upon that statute.

(Bennington—Decided May 28, 1887.)

ACTION on the statute, Rev. Laws, § 3372. Heard on an agreed statement, December Term, 1886, Bennington County, Ross, J., presiding. Judgment *pro forma*, and without hearing, for the defendant. *Affirmed*.

The case appears in the opinion.

Mr. C. H. Mason, for plaintiff:

The defendant was subject to the jurisdiction of this court.

Richardson v. Vermont & M. R. R. Co. 44 Vt. 618.

The action should be sustained.

Chase v. Haughton, 16 Vt. 594.

Messrs. Batchelder & Bates, for defendant:

This statute does not have an extraterritorial effect.

The statute laws of a State have no operation in respect to transactions which take place wholly without the State.

Soule v. Chase, 39 N. Y. 342; *Whitford v. Panama R. R. Co.* 23 N. Y. 465; *Needham v. Grand Trunk R. R. Co.* 38 Vt. 294; *Van Hook v. Whillock*, 26 Wend. 43; *Le Forest v. Tolman*, 117 Mass. 109; *Story, Conf. L.* pp. 22, 23; *Bedell v. Scruton*, 54 Vt. 493; *McDougall v. Page*, 55 Vt. 187.

Rowell, J., delivered the opinion of the court:

This action is founded on Rev. Laws, § 3372, which makes railroad companies liable to day-laborers employed by contractors, for labor performed in constructing their roads.

The defendant is a New York corporation, owning and operating a railroad from Chatham, New York, to Bennington, this State, with its principal office in New York city, and the office of its general manager, superintendent, etc., in Bennington.

Plaintiff's labor was performed on that part of the road lying in New York, where we understand him to have lived, and to still live, and his contract for labor to have been made with the contractors, whose place of residence does not appear, nor where this contract with the company was made.

Plaintiff's contract, then, with the contractors, being made in New York and to be performed there, would be governed by the laws of that State; and whatever privity existed between him and the company by reason of that contract and his labor under it, and whatever liability was thereby imposed upon the company to pay for his labor, must have existed and been imposed by some statute of that State, as otherwise he could have no claim against the company; for at common law there was no privity between him and it.

But whether there is any such statute in New York does not appear; and if it did, it would make no difference; for this action is not based upon a New York statute, as it probably might have been if there is one, and a perfected cause of action under it (*McLeod v. Connecticut & P. R. R. Co.* 58 Vt. 727); but

upon our statute, which cannot be successfully invoked, as it can have no extraterritorial effect in this behalf.

Judgment affirmed.

John L. BULLOCK
v.
Town of GUILFORD.

1. Under the statute (Rev. Laws, § 270) **exempting personal estate** owned by an inhabitant of this State, but situated and **taxed in another State**, a debt evidenced by a promissory note owned by such inhabitant is **taxable here**, although secured on land in another State, **where the mortgagee's interest is taxed** as real estate, and the note and mortgage are in the possession of their owner's agent, living where the land is situated.
2. The statute requires, **when a person willfully omits to make his inventory**, that the listers "shall ascertain, as best they can, the amount of" his **taxable property**. The plaintiff stated on inquiry that he could not tell how much was due on certain notes. *Held*, that an error in determining the amount, by the listers, who acted in good faith and with common care and skill, did **not invalidate** the list.

(Windham—Decided May 10, 1887.)

ASSUMPSIT to recover taxes paid by the plaintiff under protest. Trial by jury. September Term, 1885, Windham County, Walker, J., presiding. Verdict directed for the plaintiff. *Reversed.*

The plaintiff, living in this State, loaned money to parties living in Massachusetts, which money was secured on lands situated there. The plaintiff's interest in the lands was assessed to him, and he paid his taxes there by his agent, who had possession of the notes and mortgage, and lived where the lands were situated.

The other facts appear in the opinion.

Messrs. J. M. Tyler and Waterman & Martin, for defendant:

The real question in the case is whether the fact that the plaintiff was subjected to taxation upon these mortgages in the State of Massachusetts exempted him from taxation on the debts in defendant town, where he resided. The case of *Kirtland v. Hotchkiss*, 100 U. S. 491 (Bk. 25, L. ed. 558), is decisive of this case. It recognizes the law as already well established: (1) That the debt, although a species of intangible property, is to be regarded as situated at the domicile of the creditor; (2) that the bond or promissory note is only evidence of the debt, and, if destroyed, the debt remains; (3) that the debt, for the purposes of taxation, is not affected by the fact that it is secured by a mortgage on real estate situated in another State, for the reason that the mortgage is only given as security for the debt; (4) that the mortgage itself has no locality independent of the party with whom it resides; (5) that a debt having its *situs* at the

creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State; (6) that it is for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government.

Bonaparte v. Appeal Tax Court, 104 U. S. 592 (Bk. 16, L. ed. 845).

Taxation is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation.

M'Culloch v. Maryland, 4 Wheat. 428 (17 U. S. bk. 4, L. ed. 607).

It is like the case of *Mann v. Clark*, 33 Vt. 55, where the plaintiff voluntarily submitted to be listed and taxed in Brookfield, when his legal residence was in Braintree, where he was also listed and taxed.

Messrs. Haskins & Stoddard, and C. B. Eddy, for plaintiff:

Plaintiff's list and the taxes assessed upon it were absolutely illegal and void. "The law places the subject-matter of the controversy beyond the authority of the listers. They had no warrant in law to list it or appraise it."

Cooley, Tax. 732.

The statute of Vermont exempts the money which plaintiff had in these Massachusetts mortgages from taxation in Vermont.

Rev. Laws, § 270.

Plaintiff took his money to Massachusetts, invested it, and left it there in real-estate mortgages. It was situated and taxed in another State. By the law of Massachusetts these mortgage investments were taxable, and actually taxed, to the plaintiff there. *Mass. Pub. Stat. 1881, chap. 11, § 14*, provides that the amount of a mortgagee's interest "shall be assessed as real estate in the place where the land lies. * * * For the purposes of taxation, mortgagors and mortgagees shall be deemed joint owners."

Fireman's Ins. Co. v. Commonwealth, 137 Mass. 80.

It follows that if these real-estate mortgages make the owner of them a joint owner of real estate with the mortgagors, and being situated in Massachusetts, the owner, though a resident of this State, is not taxable for the amount invested in them, here.

Cooley, Tax. p. 165, and cases there cited; *1 Desty, Tax. p. 199*, and cases there cited.

From the facts shown it is clear that the listers did not ascertain the amount due upon plaintiff's investments. Upon their own testimony it appears that the assessment of \$1,800 was arbitrarily made; and the doubling thereof made plaintiff's list illegal.

Rowell v. Horton, 58 Vt. 1.

Taft, J., delivered the opinion of the court:

I. The plaintiff claims that promissory notes due him, secured by mortgages upon real estate in Massachusetts, are not taxable in this State, for that such real estate is set in the list in that State and taxed to him; the taxes paid by him through his agent residing in that State, in whose custody the mortgages and notes are kept. Upon these facts he insists that the property was situated and taxed in

another State, and so free from taxation here, under Rev. Laws, § 270, subd. 3, which exempts from taxation "personal estate owned by inhabitants of this State, situated and taxed in another State."

Was this property situated in Massachusetts? The general rule is that a debt follows the person of its owner, and has its *situs* at his domicile, although in some instances it may, for the purposes of taxation, have a *situs* elsewhere; *e. g.*, where it is held in trust, as in *Catlin v. Hull*, 21 Vt. 152; but in such case it may well be claimed that the trustee becomes a *quasi* owner of the debt. A debt is simply an obligation of the debtor; it only possesses value in the hands of the creditor; with him it is property, and in his hands it may be taxed. A debt simply can have no locality separate from that of the party to whom it is due. *State Tax on Foreign held Bonds*, 15 Wall. 300 [82 U. S. bk. 21, L. ed. 179]. The *situs* of a debt is not affected by the locality of the security; it is still with the owner. Taxing the security makes the debt no less a debt than it was before such taxation. We do not intend to say that the plaintiff cannot place his property in mortgage notes in such a manner as to give them a *situs* elsewhere than at his domicile; admitting that he may, we are clearly of opinion that in this case he has not done so. It is doubtful, in our view, whether the place of keeping the evidence of a debt can in any way affect the *situs* of the debt. And this is the only circumstance as to the *situs* which distinguishes this case from any ordinary case of a simple debt. We think that the *situs* of the debt in question was with the plaintiff in Guilford, and was not in Massachusetts. Nor do we understand that the case of *Catlin v. Hull*, 21 Vt. 152, was controlled by the fact that the debtors resided in Vermont; but the case was put upon the ground that Catlin held the property in trust as the agent of Hammond, and so was clearly within Act No. 9 of the Session Laws of 1844, and we think the decision should have been the same had the debtor resided without the State. Wherever the debtors resided, Catlin held the property here, and so was taxable.

Holding that the property was not situated in Massachusetts renders it unnecessary to decide whether it was taxed there. We do not pass upon that question. It must be both situated and taxed there to exempt it here. If not situated there it is taxable here.

II. The plaintiff claims that the list in question was illegally made, because there was not so much due upon the mortgage notes as the sum at which the listers appraised their value. This case is unlike *Hovew v. Bassett*, 56 Vt. 141; and *Rowell v. Horton*, 58 Vt. 1, where no property was known to the listers. Here the property was found *in specie*. Its existence was admitted, and the listers appraised the same.

The statute requires the listers, in case the taxpayer omits to make a satisfactory inventory, "to ascertain, as best they can, the amount of the taxable property of such person." Would it do to say that any error in determining the amount due upon a note would invalidate the list? It would be substantially impossible to administer the law under such a rigid rule. No claim is made

that the listers acted in bad faith or were wanting in common care and skill. The existence of the mortgage notes for \$1,800 was known, and the evidence shows that, when the plaintiff was interrogated as to them, he stated he could not tell how much was due them, or how much had been paid on them. If the owner cannot tell the exact amount due,—and he testified upon trial that he could not,—is it not absurd to require a stranger to do it? We think, as was said in a similar case,—*Hartford v. Champion* (Conn.) 3 New Eng. Rep. 543,—"The object of the taxpayer is to keep his property out of sight and from the knowledge of the assessors. By frankly stating what he owns, he avoids all danger of an unjust impression on the part of the assessors. If they get at the property thus concealed by using their best judgment in the matter, and by inquiries that bring them to an honest belief on the subject, the taxpayer is, in the circumstances, in no position to make a reasonable complaint if they misjudge in the matter." We cannot say, as matter of law, that the listers erred in their appraisal, or that the two mortgages appraised by them at \$1,800 were not of that value. The list was valid.

Judgment reversed, and judgment for defendant.

Ruth B. SMITH

v.

David ROCK *et al.*

1. A **jurisdictional question** should be raised by plea or motion filed in the court of chancery; and it cannot be raised before the master.
2. Nor is an **application to amend** an answer available when made to a master.
3. A **bill in equity** will lie to **restrain a trespasser** from cutting growing trees on the only wood lot owned by the orator, **when it works a permanent injury** to the land; and especially when there is no denial of the allegation of irreparable injury.
4. The **oratrix** claimed that she had sold the **timber** on one acre of land to one of the defendants, and afterwards gave him the following writing: "I have sold to David Rock, and received payment in full for the **hemlock bark**, timber, and wood on **one acre, more or less** (within the bounds of the hemlock timber)." The master found in favor of the oratrix. **Held**, that the meaning of the receipt was that the **sale included** the timber of **only one acre**; that the words "more or less" did not enlarge the quantity before described.

(Orange—Decided May 28, 1887.)

BILL in chancery to restrain the defendants from cutting growing trees. Heard on the pleadings and a special master's report, with exceptions thereto, December Term, 1885, Orange County, Rowell, *Chancellor*. It was decreed that the bill be dismissed as to defendant Rock, and that the other defendants pay

to the oratrix the sum of \$150 damages. *Affirmed.*

The master found that the cutting of the timber worked a permanent injury to the land. The facts are stated in the opinion.

Messrs. Roswell Farnham, and Smith & Sloan, for defendants:

The question of jurisdiction can be raised at any stage of the proceedings.

Pom. Eq. 180; *Hipp v. Babin*, 19 How. 278 (60 U. S. bk. 15, L. ed. 638); *Graves v. Boston Marine Ins. Co.* 2 Cranch, 419, 444 (6 U. S. bk. 2, L. ed. 824); *Fowle v. Laurason's Exr.* 5 Pet. 495 (30 U. S. bk. 8, L. ed. 204); *Dade v. Irwin*, 2 How. 388 (43 U. S. bk. 11, L. ed. 308); *Curtier v. Rosebrooks*, 48 Vt. 34; *Niles v. Howe*, 57 Vt. 388.

Courts of equity will not interfere in cases of ordinary trespass.

Redfield, J., in *Smith v. Pettingill*, 15 Vt. 84; Story, Eq. Jur. §§ 207, 819, 927.

No waste was committed here.

Sarles v. Sarles, 3 Sandf. Ch. 601; Kerr, Inj. 288.

The oratrix had an adequate remedy at law. Pom. Eq. Jur. 1857; *Parker v. Winnipisogee Lake Cotton & Woolen Co.* 2 Black, 545 (67 U. S. bk. 17, L. ed. 388); *Gause v. Perkins*, 3 Jones (N. C.), Eq. 177; *Cornelius v. Post*, 9 N. J. Eq. 196; *Hatcher v. Hampton*, 7 Ga. 49; *Dunkart v. Rinehart*, 87 N. C. 224.

Mr. John H. Watson, foratrix:

The contract was not reduced to writing. The receipt only rehearsed the trade, and the rule as to parol evidence does not apply.

Bostwick v. Baltimore & O. R. R. Co. 45 N. Y. 712; *Hill v. Syracuse, B. & N. Y. R. R. Co.* 73 N. Y. 352; 72 N. Y. 90.

The court of equity has jurisdiction.

Livingston v. Livingston, 6 Johns. Ch. 497; *Kerlin v. West*, 4 N. J. Eq. 449; *Southmayd v. McLaughlin*, 24 N. J. Eq. 181; 29 N. H. 447; Pom. Eq. Jur. §§ 237, 1856; *Sarles v. Sarles*, 3 Sandf. Ch. 601; 113 U. S. 537 (Bk. 28, L. ed. 1116); 1 High, Inj. § 724.

The jurisdictional question was waived, as it was not properly pleaded.

Grandin v. Le Roy, 2 Paige, 509; *First Congregational Society v. Trustees*, 23 Pick. 148.

Royce, Ch. J., delivered the opinion of the court:

In order to understand the questions presented, it is necessary to refer to the pleadings. The oratrix, in her bill, after alleging her ownership of the thirty acres of land therein described, and her sale to the defendant Rock of the hemlock bark and timber on one acre of the same, and the transfer of the title Rock acquired to the defendant Reneau, and from Reneau to Knight, alleges that Knight was cutting the timber on four or five acres of said land, and was making preparations to remove the timber so cut and to be cut from said lot, and that his doing so would work irreparable injury to her; and prays for an injunction to prevent the defendants from felling any more timber on said lot, and from removing what they had cut, and for an accounting.

The bill as to the defendant Rock was dismissed with costs. The other defendants answered the bill, and claimed title to the timber and bark under the purchase made from Rock.

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They did not claim that the court of chancery had not jurisdiction of the parties or of the subject-matter, or deny that the cutting and removal of the timber would be an irreparable injury to the oratrix if it should be found that it was her property. The case was referred to a master to find and report the facts; and, upon the hearing before him, a motion was made to dismiss the suit for the want of jurisdiction. That motion was so far disregarded by the master that he proceeded with the hearing, and reported the facts found by him. The motion was not renewed in the court of chancery, and the jurisdictional question was not otherwise presented in that court than as appears in the report of the master. The chancellor was not called upon to decide the question without an appropriate plea, or a motion filed in that court. Making a motion before the master was not the proper way in which to raise the question. The master had nothing to do with the jurisdictional question; it was his duty to find and report facts; and upon his report being returned to the court of chancery, a motion to dismiss filed in that court might be predicated upon the report. The application for leave to amend the answer so as to present the question is of no avail to the defendants, as it does not appear that it was based upon any ruling made upon such a motion by the chancellor. The court might therefore be justified in treating that question as waived; but, treating it as properly here, we hold that the court had jurisdiction.

That a court of equity may interfere to prevent such threatened injury to property as is alleged in the bill is too well established to require the citation of authorities in support of the proposition; and the facts found and reported by the master warrant such interference, and the granting of the relief prayed for. The important question in the hearing before the master was as to the amount of timber, bark, and wood sold by the oratrix to David Rock, as it was conceded that the defendants had acquired by purchase all that was so sold. The oratrix claimed that she only sold the bark, wood, and timber on one acre of land; and the defendants, that her sale covered the wood, timber, and bark on a much larger tract, and embraced all the timber that they had felled and all that they intended to fell and appropriate. The master has found that the sale to Rock was of the timber, wood, and bark on one acre, and no more; and that, after the sale was made, and while Rock was negotiating a sale to Reneau, the oratrix, for the purpose of showing to Reneau that Rock had made the purchase and paid the purchase price, executed a receipt of the following tenor:

"South Newbury, Vt., Aug. 23d, 1881.

I, the undersigned, have sold to David Rock and received payment in full for the hemlock bark, timber, and wood, on one acre more or less (within the bounds of the hemlock timber).

Ruth R. Smith."

The defendants claim that this writing is the only evidence receivable of the sale, and that it should be construed as embracing all the timber within the bounds of the hemlock timber. In view of the fact that neither Rock nor the defendants understood that it should

be so construed, at the time they purchased, it would be inequitable to so construe it. We do not think that any such construction should be given to the paper. The addition of the words "more or less" should not have the effect to enlarge the quantity before described, and the words "within the bounds of the hemlock timber" are descriptive of the locality from which the acre should be selected. The writing could only operate as an estoppel as to the fact that the oratrix had sold the one acre therein described, and had received pay for the same.

The other facts found by the master justified the decree that was rendered by the court of chancery, and it is affirmed, and cause remanded.

Town of WARDSBORO

v.

Town of JAMAICA.

1. A decree of court ordering one town to aid in the maintenance of a highway in another town, on petition under the Statute of 1884, No. 18, may be vacated on proof of necessity for a considerable portion of the way for ordinary use, to an inhabitant of such other town. An absolute necessity, or any necessity for the entire length of the way, is not required.
2. The court refused to consider whether the petitionee had a vested right in an assessment, as it did not appear that any assessment was then due.

(Wardsboro—Decided April 30, 1887.)

PETITION under § 6 of No. 18 of the Acts of 1884. Heard by the court, March Term, 1886, Windham County, Walker, J., presiding. Judgment that the order previously made be vacated, and that all proceedings to collect assessments made under the order after the service of this petition be stayed. *Affirmed.*

The case is stated in the opinion.

Mr. E. L. Waterman, for petitionee.

Messrs. J. L. Martin and J. M. Tyler, for petitioner.

Royce, Ch. J., delivered the opinion of the court:

This was a petition brought under § 6 of No. 18 of the Laws of 1884, to vacate an order previously made assessing the town of Wardsboro a certain portion of the expense of keeping in repair a highway in the town of Jamaica. Said section provides that "any town assessed toward the expense of maintaining or repairing any bridge or highway in another town, under the laws now in force, may petition the court which ordered said assessment, such petition to be served upon the town to whom the assessment is paid, as provided in § 2 of this Act; and upon proof that said highway or bridge is a necessity to any inhabitant of said town to which the assessment is paid, said court shall vacate the order or decree for such assessment. And whenever any such petition is brought, the court shall, upon application, order a stay of any and all proceedings

VT.

to enforce the collection or payment of any such assessment."

The court found that the highway in question was a necessity of an absolute character to two of the inhabitants of Jamaica, for about one half its length; and that the highway for its whole length was necessary for giving said two inhabitants and several others reasonable highway facilities for the transaction of their ordinary business. The court thereupon vacated said order, and ordered that all proceedings to collect said assessments after the service of the petition should be stayed. The question presented is as to the validity of that order.

Its validity must depend upon the construction to be given to the Act under which the petition was brought. Counsel for the petitionee claims that the right to vacate such an order can only be exercised when it is shown that the highway for its entire length is a necessity to some inhabitant of the town in which it is located. We do not think that the Act should be so construed. The necessity spoken of in the Act means the necessity for the use of any considerable portion of the highway for ordinary use; not an absolute necessity, but such a necessity as highways are ordinarily used for in the transaction of usual business. So upon the facts found the order was properly vacated.

An exception was taken to the restraining part of the order. To justify a reversal of the judgment, it must affirmatively appear that it was erroneous; and the error complained of is that it deprived the petitionee of a vested right, in that it deprived it of the right to collect an assessment then due. The conclusive answer to that claim is that it does not appear that there was any assessment then due; and hence the case fails to show that there was any vested right of which the petitionee has been deprived.

There was no error, and the judgment is affirmed.

S. R. HOLLISTER

v.

Edson YORK et al.

A payment of the interest or part of the principal of a mortgage debt, by one of several parties who are interested in an equity of redemption, and who have had constructive notice, repels the presumption that the mortgage has been paid, and takes the case out of the operation of the Statute of Limitations, not only as to the payer, but as to all the owners of the equity.

(Washington—Decided April 30, 1887.)

BILL to foreclose a mortgage. Heard on the pleadings and special master's report, March Term, 1885, Washington County, Powers, Chancellor. Decree *pro forma* that the bill be dismissed. *Reversed.*

The case is stated in the opinion.

Mr. J. P. Lamson, for orator:

So long as the relation of mortgagor and

mortgagee exists, the statute does not commence to run.

2 Jones, Mort. § 18; *Waldo v. Rice*, 14 Wis. 310; *Green v. Turner*, 38 Iowa, 112; *Crawford v. Taylor*, 42 Iowa, 260; *Humphrey v. Hurd*, 29 Mich. 44; *Rockwell v. Servant*, 63 Ill. 424.

The payments made by Calvin affect Mahala and Edson the same as though they were made by them.

2 Jones, Mort. §§ 1198, 1201, 1202; *Pears v. Laing*, L. R. 12 Eq. 51; *Roddam v. Morley*, De G. & J. 1; *Harrington v. Slade*, 22 Barb. 161; *Martin v. Bowker*, 19 Vt. 527; *Hough v. Bailey*, 32 Conn. 288; *Bacon v. McIntire*, 8 Met. 87; *Hughes v. Edwards*, 9 Wheat. 499 (22 U. S. bk. 6, L. ed. 142); *Converse v. Cook*, 8 Vt. 164.

Mr. S. C. Shurtleff, for defendants:

There can be no foreclosure of the six acres conveyed to defendant Mahala. This debt is conclusively presumed to be paid, in analogy to the Statute of Limitations.

Whitney v. French, 25 Vt. 663.

She never acknowledged the mortgage, and did not know of its existence. The mortgage, then, would rest on the balance of the real estate.

Lyman v. Lyman, 32 Vt. 79; *Root v. Collins*, 34 Vt. 178.

Royce, Ch. J., delivered the opinion of the court:

The mortgage which the orator seeks to foreclose was executed July 30, 1854, by Ira Batchelder to Jeremiah Carleton, to secure the payment of three promissory notes payable to said Carleton. The orator purchased of said Carleton two of said notes for the sum of \$300, September 25, 1863. There was then due on said notes \$340.40; but the orator only asks to have the \$300 and annual interest allowed. Some portion of the mortgaged premises was owned by and had been in the possession of the defendant Mallory and his grantees since 1865, and the bill as to him was dismissed. The only contention is as to the remaining portion of the mortgaged premises.

July 12, 1866, one Bemis, who was then the owner, conveyed by deed of warranty eight acres of the same to Calvin York. January 16, 1861, D. B. Pitkin and wife, who were then the owners, conveyed to Mahala York, the then wife of Calvin York, six acres of the same; and on the same day Pitkin and wife conveyed the remainder of the mortgaged premises, lying in lot four of the fifth range, to Calvin York. February 18, 1875, Calvin York and wife conveyed the premises that had been so conveyed to them to their son Edson; and on the same day Edson executed a mortgage to the said Calvin and Mahala of the same premises to secure their maintenance during life, which was the consideration for the conveyance to him; and, in addition to the stipulation contained in said mortgage, agreed with the said Calvin by parol, at the time of the execution of the mortgage, to assume and pay a certain debt of the said Calvin to the orator, at the time represented to him to be about \$100, and not to exceed that sum. The said Mahala, Calvin, and Edson have been in the possession of the premises ever since the respective conveyances to them. Calvin died about July, 1800

1876, and Mahala since the commencement of this suit. The defendants Mahala and Edson, by their answers, claimed payment and the benefit of the Statute of Limitations. Whether either defense is available must depend upon the facts found by the master.

It is found that, at the time Pitkin conveyed to Calvin and Mahala, Pitkin paid Carleton one of the notes secured by the mortgage, and that Calvin assumed and agreed to pay \$300 of the Carleton mortgage; that, after the two notes passed into the hands of the orator, Calvin had conversation with him in relation to them, and acknowledged that it was his duty to pay them, and on October 31, 1871, paid the orator \$78, which was indorsed upon the \$100 note; and that July 6, 1874, Calvin York paid the orator \$95 on this mortgage. This last finding was made upon the testimony of the orator, against the defendants' objection, but no question has been made as to its admissibility. That an indorsement was made upon one of the notes, with the consent of Edson, October 1, 1876, of \$17.50, for money that was then due from the orator to Edson, he then supposing it was being made upon the \$100 which he had assumed and agreed to pay, and which he then acknowledged and promised the orator to pay. Neither Mahala nor Edson had any other knowledge than what the record furnished, of the existence of the mortgage. It is not found that any payments have been made except those that have been applied upon the notes; so the defense must rest upon the claim that the right is barred by the Statute of Limitations.

It was held in *Martin v. Bowker*, 19 Vt. 536, that courts of equity act in analogy to the Statute of Limitations, and if the lapse of time has been such that a suit at law could not be maintained for the recovery of the mortgaged premises, a court of equity would not sustain a suit for the foreclosure of the equity of redemption, but would presume payment and satisfaction of the mortgage debt; but that the payment of interest upon the debt, or any portion of the principal, or any other act recognizing the existence of the mortgage, and that it was unsatisfied and obligatory, would be sufficient to repel the presumption of payment, and take the case out of the operation of the statute. In 2 Jones, Mort. § 1198, it is said that a payment of interest or part of the principal renews the mortgage, so that an action may be brought to enforce it within the statutable period thereafter; and that this rule is universally recognized; and that, where there are several persons interested in the equity of redemption, such payment by one of them keeps alive the right of entry, not only against him, but also against all the other owners of the equity.

The record was constructive notice of the existence of the mortgage. The orator had no other claim against the Yorks but the mortgage notes; and he had a right to understand that the payments made by them were intended to apply upon these, and to treat them as an admission of the debt and their liability to pay it. The orator could not be deprived of the security given by the mortgage by any conveyances that might be made by the mortgagor or his grantees. As affecting his security, he

was not bound to inquire what conveyances had been made; and when the statute bar was removed, he was entitled to all the security given by the mortgage.

The mortgage having been renewed by the payments made, that portion of the premises deeded to Mahala is equally liable with the portion deeded to Calvin, for the payment of the debt secured by the mortgage.

Decree reversed, and cause remanded, with a mandate in accordance with the views above expressed.

John E. SENNOTT

v.

ST. JOHNSBURY & LAKE CHAMPLAIN
R. R. CO. *et al.*

1. An equitable owner of land who becomes the legal owner has a lien for damages on land taken by a railroad company, enforceable against a company now in possession which succeeded to the rights of the company that first took the land; but the measure of damages is not an agreement made between the owner and the first company, as there was no such privity between the two companies as would bind the last one; but in this case, it is the value of the land actually taken,—as the orator was not the owner of the land contiguous to that taken when the last company took possession.
2. Interest is recoverable from the time the company in control took possession, instead of the time the orator acquired the legal title.

(Franklin—Decided May 28, 1887.)

BILL in chancery. Heard on the pleadings and a special master's report, September Term, 1885, Franklin County, Royce, *Chancellor*. Decree *pro forma* that, unless the defendant pay to the orator the sum of \$431.20, and interest thereon from the 18th day of June, 1883, and the orator's costs, on or before the 1st day of June, 1886, that the defendant be perpetually enjoined from running and operating its railroad over the farm in question, and from interfering in any manner with the exclusive occupancy and possession thereof by the orator. Appeal by the orator. *Modified and affirmed.*

The orator owned a farm of 450 acres in Bakersfield, Franklin County. The Lamaille Valley Company located its road through said farm, and commenced its construction, completing it in 1876, and operated it until 1880. The holders of the mortgage bonds foreclosed the mortgage at December Term, 1879, of Caldonia County Court, and organized under the name of the St. Johnsbury & Lake Champlain Company, and went into operation of the road on the 1st day of July, 1880. The orator's farm was mortgaged for a large sum prior to the survey of the railroad; and in 1876 he sold to W. M. Sennott a portion of the farm, it being that through which the survey of the railroad extended, but reserved all the land embraced in the survey, not exceeding 6 acres.

VT.

In 1883 this land was redeeded by W. M. Sennott to the orator, and Burton, the mortgagee of the farm, at the same time,—June 18, 1883,—deeded the farm to the orator, taking a mortgage back. In 1878 the orator was adjudged a bankrupt; and in pursuance of an agreement with the orator, said Burton purchased the interest which the bankrupt estate had in the farm, and held it as security till said 18th day of June. Said Burton signed a writing by which he agreed and directed that the said land damages be decreed and paid to the orator.

Messrs. Edson, Cross, & Statt, for orator:

The statute providing for the assessment of damages for land taken for a railroad (Rev. Laws, §§ 3359-3366) contemplates that the parties may agree on the amount of damages, and provides for an assessment in case they do not agree; and the amount fixed, either by the agreement or by the assessment, is, in contemplation of law, the equivalent for the land taken, which the Constitution requires to be paid in money. After the agreement was made, no assessment could be made by the commissioners; for the jurisdiction of commissioners is confined to cases where the parties do not agree. Between the owner of land, with whom the agreement or assessment was made, and the railroad company taking the land and its successors, the amount fixed by the agreement or assessment is conclusive, and is the constitutional equivalent to be paid.

Hart v. Missisquoi R. R. Co. 56 Vt. 96; *Kutell v. Missisquoi R. R. Co.* Id.

Where the suit is by a party who is not a party to the agreement fixing the amount, or where no agreement or assessment was made, the court will, by its master, fix the amount; but not otherwise.

Kendall v. Missisquoi & C. R. R. Co. 55 Vt. 498; *Adams v. St. Johnsbury & L. C. & L. V. R. R. Co.* 57 Vt. 240.

The rule is the same against the St. Johnsbury Company as against the Lamaille Valley Railroad. The title was conveyed by mortgage, and was made absolute by decree. The decree of the court of chancery was for the actual value of the land taken,—\$431.20,—excluding the damages to the farm, and interest from June 18, 1883. This decree is wrong as to the amount and as to the interest, in any view. The claim of the orator as to the amount of the recovery is that it was fixed by the agreement of December 6, 1875, and that his right to interest was fixed by the same agreement.

If this view is not sustained, then the orator is entitled to his full damages by reason of the taking of his land, as of the time it was taken,—January 1, 1873,—and interest from that date; or, if the case turns on the rights of the St. Johnsbury Railroad to condemn the land, July 1, 1880, then, in addition to damages for land, the orator should recover for the track, ties, and wood station thereon taken, and interest on the whole from July 1, 1880, and the case should be recommitted for the finding of such additional damages.

Messrs. Burt & Burt, for defendants:

The St. Johnsbury Railroad Company was not a party to the agreement between the orator and the agent of the Lamaille Valley Rail-

road Company, and therefore is not bound thereby.

Adams v. St. Johnsbury & L. C. & L. V. R. R. Co. 57 Vt. 240.

The orator, having the farm on both sides of the road long prior to the possession of the St. Johnsbury Railroad Company, and not having repurchased it until after that road had been for years in continuous operation, cannot now claim damages on account of any inconvenience arising from the fact that the farm so purchased by him lies on both sides of the railroad.

Rowell, J., delivered the opinion of the court:

The orator seeks to stand, as against the St. Johnsbury & Lake Champlain Company, on his agreement of December 6, 1875, with the Lamouille Valley Company, whereby his land damages were fixed at \$678, with interest thereafter. But the St. Johnsbury Company was not a party to that agreement; and, following the *Adams Case*, 57 Vt. 240, the agreement cannot be regarded as binding on that company on the ground of privity between it and the Valley Company; for it did not succeed to the property in a way to establish such privity.

Nor is the agreement binding on the St. Johnsbury Company by reason of the statute, as a judgment would have been; for, in the *Bridgman Case*, 58 Vt. 198, a judgment against the Valley Company was held binding on the St. Johnsbury Company solely by force of the statute, and not at all on the ground of privity. But the statute has no effect upon the binding quality of agreements in this behalf, but leaves them to stand on general principles.

The St. Johnsbury Company is liable, therefore, only by reason of its own taking; but it is liable for the land actually taken, as of the time when it first took it; for the orator was then the equitable owner of it, and has since become the legal owner. But it is not liable to him for damage to the land contiguous to the land taken, for he was not the owner of it at the time of taking.

The decree is modified so as to give the orator interest on the sum decreed from July 1, 1890, when the St. Johnsbury Company first took possession, instead of from June 18, 1883, when the orator acquired legal title from Burton; but in all other respects the decree is affirmed, and the cause remanded.

Taft, J., dissents.

Fredrick KOPPER

v.

John M. DYER.

John M. DYER

v.

Fredrick KOPPER *et al.*

1. When a **mortgagor**, without his fault or neglect, is **prevented** by accident from **paying** an installment on the day named in a decree of foreclosure, on a bill brought to redeem, **equity will grant relief**; and he **will be reinstated**,

but on terms that he satisfy the equitable rights of the other party.

2. The **mortgagor** had taken means to **obtain the money** for redeeming the premises, which rendered it reasonably certain that he would succeed; and he did not, by reason of the **failure of the party promising** the money to meet him at the appointed time; and as the result of this unexpected occurrence, of which his agency was not the cause, he was **delayed** until after banking hours, and was thereby **prevented** from sending the money to the clerk of the court in season for payment within the time limited by the decree. *Held*, that it was an **accident**, and that the **mortgagor was entitled to redeem**.
3. The bill was defective in that it was **framed on the theory** that the orator's personal **check** deposited with the clerk of court for the installment was a **payment** of it; and that it did not contain an offer, or an averment of willingness, to redeem; but an **amendment was allowed**.
4. **New parties** cannot be brought into a case by cross-bill.
5. One purchasing *pendente lite* is **bound by the decree**, and need not be made a party.
6. A **cross-bill** will be **dismissed** where some of the defendants therein succeed, although it was taken *pro confesso* as to others, if they all are jointly interested.
7. As the orator put his **bill upon false ground**, the defendant is entitled to his costs.

(Addison—Decided April 30, 1897.)

BILL to open a decree and redeem.

Heard on the pleadings and a special master's report, December Term, 1896, Addison County, Taft, *Chancellor*. Decree that the orator is entitled to prevail according to the prayer of his bill, and that the cross-bill be dismissed. *Decree dismissing cross-bill affirmed. Decree for orator in original bill reversed.*

The prayer of the bill was for such relief as shall give the orator the benefit of the payment already made, as much as he would have had if the currency had been paid into court, as was ordered by said decree; that the decree be opened, and further order made on terms meet to the court to relieve the orator, etc.; and for an injunction restraining the defendant. An injunction was granted restraining the defendant from conveying the premises, and from interfering with the orator, his family, or boarders, etc.

Dyer's mortgage was on hotel property and certain personal property. He foreclosed it on the real estate, and the decree became absolute January 1, 1895, and a writ of possession was issued on the next day to Dyer, which was served. This bill is dated January 6, 1895. On May 29, 1895, the orator conveyed the property to W. H. Merritt and Frank E. Briggs as security for money to tender to said Dyer. On June 1, 1895, said Briggs tendered to Dyer \$8,060. Said Kopper afterwards filed

a supplemental bill claiming the benefit of the tender. April 14, 1886, Dyer filed a cross-bill, making Kopper, Briggs, and Merritt defendants. They demurred. The demurrer being overruled, Kopper answered, and the bill was taken as confessed as to the other two.

The other facts are sufficiently stated in the opinion.

Messrs. Stewart & Wilds, for defendant:
The original and supplemental bills cannot be maintained; for, in a bill to redeem, a mortgagor must offer to pay the mortgage debt.

Goldsmith v. Osborne, 1 Edw. Ch. 560; *Perry v. Carr*, 41 N. H. 371; *Kemp v. Mitchell*, 36 Ind. 249; 2 Jones, Mort. § 1095; 5 Wait, Act. & Def. 434; Bisph. Eq. 62; 1 Pars. Eq. Cas. 16; Story, Eq. Pl. § 40; *Thomas v. Warner*, 15 Vt. 110; *Dalton v. Hayter*, 7 Beav. 313.

The cross-bill was the proper remedy.

Story, Eq. Pl. §§ 156, 346, 393, 429; *Bishop of Winchester v. Paine*, 11 Ves. 197; *Echloff v. Baldwin*, 16 Ves. 267; *Turner v. Wight*, 4 Beav. 40; *Hozie v. Carr*, 1 Sum. 173; *Humble v. Shore*, 3 Hare, 119; *Whitbeck v. Edgar*, 2 Barb. Ch. 106; *Johnson v. Thompson*, 129 Mass. 398; 1 Smith, Ch. Pr. 459.

New parties may be joined in a cross-bill.

Brown v. Story, 2 Paige, 594; *Stockard v. Pinkhard*, 6 Humph. (Tenn.) 119; *Fletcher v. Holmes*, 25 Ind. 458.

Messrs. Ormsbee & Briggs, J. M. Slade, and Noble & Smith, for orator:

A court of equity will grant relief in cases of fraud, accident, or mistake.

1 Story, Eq. Jur. §§ 110, 439, 823; Pom. Eq. § 439; *Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 556; *Williams, Ch. J.*, in *Pierson v. Claves*, 15 Vt. 93; 2 Jones, Mort. § 1569; *Williamson v. Dale*, 3 Johns. Ch. 290.

The case of *Bostwick v. Stiles*, 35 Conn. 195, is in all essential respects like this one.

The cross-bill was properly dismissed. *Rutland v. Paige*, 24 Vt. 181.

Rowell, J., delivered the opinion of the court:

Kopper seeks relief on the ground of accident. That chancery may grant relief on that ground in cases of this kind cannot be doubted; and the first question that arises is, Has the orator made a case that calls for the interposition of the court in his behalf?

The term "accident," in its legal significance, is difficult to define. Judge Story defines it as embracing "not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence or misconduct in the party" affected thereby. 1 Story, Eq. § 78. Mr. Pomerooy justly criticises this definition as including what are not accidents at all, but mistakes, and as omitting the very central element of the equitable conception, and defines it thus: "Accident is an unforeseen and unexpected event, occurring external to the person affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right, or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good

conscience for the latter person, under the circumstances, to retain." 2 Pom. Eq. § 823. And the chief point of the thing is that, because of the unforeseen and unexpected character of the occurrence by which the legal relation of the parties has been unintentionally changed, the party injuriously affected thereby is in good conscience entitled to relief that will restore those relations to their original character and place him in his former position. Id. § 824. But, as a general rule, relief will not be granted unless it can be done with justice to the other party; for if he cannot be put in as good a situation as he would have been in had the other party performed, the court will not interpose. *Ross v. Ross*, Amb. 381.

Equity, in many instances, relieves against forfeitures occasioned by the nonpayment of money at a day certain; and this, although there is no accident, but negligence instead, on the ground that the condition and the forfeiture are regarded as merely security for the payment of the money. This is the ground on which tenants are relieved from forfeitures for the nonpayment of rent as stipulated, and mortgagors are allowed to redeem after the law-day has passed. And although the agreement is not wholly pecuniary or measured by pecuniary compensation, still, if the party bound by it has been prevented by accident without his fault from an exact fulfillment, so that a forfeiture is thereby incurred, equity will interpose and relieve him from the forfeiture upon his making compensation, if necessary, or doing anything else in his power to satisfy the equitable rights of the other party. 2 Pom. Eq. § 833.

In *Cage v. Russell*, 2 Vent. 352, it is laid down as a standing rule of equity that a forfeiture shall not bind when the thing can be done afterwards, or any compensation can be made for it. Forfeitures are odious, and courts struggle against them; and relief is granted for the nonperformance of divers collateral acts whereby they are incurred; as, for not laying out a specific sum in repairs in a given time (*Sanders v. Pope*, 12 Ves. 282); for cutting down timber when covenanted against (*Northcote v. Duke*, Amb. 511); for not renewing a lease in time (*Ravestorne v. Beniloy*, 4 Bro. C. C. 415); and the like. Relief is also granted against forfeitures incurred by unintentional breaches of the condition of mortgages for support, on terms that the party in fault fully compensate and indemnify the other party for all he has lost by reason of the breach. *Henry v. Tupper*, 29 Vt. 358.

In *Adams v. Haskell*, 10 Wis. 123, the defendants were prevented by accident from reaching the place of a foreclosure sale until after it was completed; and the court for that reason ordered a resale, but on terms.

In *Pierson v. Claves*, 15 Vt. 93, the orator, by reason of pending negotiations of settlement, without negligence on his part, let the time of redemption expire; and he was relieved by opening the decree and giving further time to redeem.

The case of *Bostwick v. Stiles*, 35 Conn. 195, is confessedly much in point. That was a bill to open a decree of foreclosure and obtain further time. The mortgage debt was about \$4,000, and the value of the premises twice

that sum. The time limited for payment was August 5. The petitioner intended to redeem, but, not having sufficient means of his own, he applied to his uncle—a man of property—to help him, and he agreed to, and to furnish the money on August 3, on which the petitioner relied; but, for some reason not explained, he did not furnish the money as agreed, and the petitioner delayed making other arrangements until the evening of August 5, when he applied to Russell for assistance. Russell had no money, but plenty of government bonds, and agreed to make payment in them if defendant would take them, and accordingly went to defendant's house that evening after defendant had gone to bed, and told his wife that he had come prepared to redeem the mortgage for the petitioner; but defendant did not get up, but sent word by his wife that he was sick, and Russell went away. On this state of facts the court held that the petitioner's failure to pay on August 5 was occasioned by accident, without fault or neglect on his part, and that the accident lay in the fact of his uncle's failure to furnish the money as agreed, and as the petitioner had reason to believe he would. The court says that there is a degree of uncertainty in regard to all business expectations, and that no more ought to be required in respect of future obligations imposed by law than that such means shall be taken to fulfill them as will render it reasonably certain, as far as human sagacity can foresee, that they will be performed.

It is common in England to enlarge the time of redemption on application before the day of payment; and though the indulgence is not granted of course, it is said not to require a very strong case to obtain it. And the time may be enlarged more than once. Thus in *Jones v. Crestwick*, 9 Sim. 304, after the time had been enlarged, and after the order absolute had been made, though not drawn up, the time was again enlarged, on the ground that the man who had agreed to lend the defendant the money was prevented by illness from going up to London on the day it was due, and his wife, whom he had deputed to carry it up, was prevented from doing so because the London coach was full the day before. And see *Edwards v. Cuntiffe*, 1 Madd. 287.

And the decree may be opened after the order absolute has been made and enrolled. Thus in *Ford v. Wastell*, 6 Hare, 229, notwithstanding the order absolute had been drawn up and enrolled, the decree was opened because all the plaintiff's property was involved in an administration suit that she was justified in believing would terminate in season to enable her to avail herself of her property with which to meet the payment, but which had not yet terminated. See also *Thornhill v. Manning*, 1 Sim. N. S. 451, in which the promptness of the mortgagor in applying was regarded as the great and important feature in the case to guide the court in deciding what it ought to do.

Applying these principles as shown and illustrated by the cases, it is quite out of the question to say that the defendant is entitled to keep this property, and that the orator has not made a case that calls for the interposition of the court in his behalf.

The orator gave \$18,500 for the property, and had paid \$2,724 towards it, and expended about \$10,000 upon it in improvements and repairs; and on January 1, 1885,—the time limited by the decree for paying the installment of \$500,—he believed the real estate fairly worth \$5,000 or \$6,000 more than he gave for it. He was exceedingly anxious to redeem the property, but had no available means of his own, and relied for means wherewith to pay his debts partly on income assured to members of his family, and partly on the equity of redemption in the property, his ability to make which available at the value he put upon it being his only means of escape from absolute bankruptcy. It appears that his wife and her sister, Miss Jenkins, owned property in New York city, as to which he was agent, and that before and on December 29, 1884, he had been in negotiation with one Martin, of that city, in respect to leasing it to him; and it was agreed that, on delivery of proper lease thereof, Martin should advance to him \$650 towards performance on his part; and Kopper relied on the use of that money to pay the \$500 installment. Accordingly he went to New York on December 30, with the lease executed, found Martin, and made an appointment with him for eleven o'clock the next day; and, on going to the place at the time appointed, found a message postponing the appointment to the office of an attorney down town, at two that afternoon; whereupon, being unable to communicate with Martin, he went to the office down town at two, and found that Martin had been there, but had gone. He afterwards met Martin on the street, and, being exceedingly anxious to obtain the money, persuaded him to go back to the attorney's office, but, he being out, they went to another attorney's office, and he was out; and finally he persuaded Martin to give him his check for \$650 before the leases were approved by an attorney. But this was after three o'clock, when all the banks in the city were closed. Said check was good, but being drawn on a bank in the upper part of the city, and it being after banking hours, it was impossible for Kopper to draw the money on it that day. He had for several years kept a deposit account with the Second National Bank of that city, and had at this time a small balance standing to his credit there, and that bank was accustomed to place to his credit the amount of such checks as he deposited there properly indorsed. He had previously carried checks to that bank after business hours for deposit, handing them in over the railing to be credited to him at the opening of the bank the next day. On this occasion he properly indorsed said check "for deposit," and sent it to said bank by a district messenger boy; but whether it reached the bank or not that day does not appear. At the same time he drew two checks on said bank to the order of the person who was then the clerk of the court in which the decree was obtained,—one for \$575, which he supposed to be the amount required to pay said installment, but which was in fact more than was required; and one for \$25, for a sum otherwise payable to the clerk,—enclosed them in an envelope with a letter to the clerk, went to the Grand Central Depot, and sent the package to Middlebury by the porter of the sleeping-car, enclosing it in

another envelope to the station-agent there, requesting him to deliver the package to the clerk immediately, which he did on the morning of January 1, which day was a legal holiday in New York; and the \$650 check was passed to Kopper's credit by the Second National Bank on the next day,—the first business day after it was received. Dyer refused to take Kopper's check of the clerk, and the clerk did not treat it as payment of the installment, or regard it as available funds in his hands, until it was paid and the avails credited to him by the collecting bank, which was on January 5, on which day he was trusted by some of Kopper's other creditors; and on the 6th this bill was brought.

On these facts, and the others disclosed by the record, Kopper cannot justly be charged with negligence. The means he had taken to obtain the money rendered it reasonably certain that he would succeed, and that he was anxious to obtain it abundantly appears. That he did not meet Martin at eleven or at two was an unforeseen and unexpected occurrence, external to himself, of which his agency was not the proximate or even the remote cause; and thereby he was prevented from sending his money seasonably in a form that would have been treated and regarded as payment; whereby, contrary to his own intention and wish, he lost his legal right to pay, and Dyer acquired a legal right not to have him pay; and in these circumstances Kopper is entitled to relief that will reinstate him in his former position, on terms that he satisfy the equitable rights of the other party.

But he cannot have relief under his bill as drawn, for it is not adapted to his case. The original bill goes upon the ground that he is entitled to have his attempted payment of the first installment treated as an actual, seasonable payment; while the supplemental bill sets up a tender of the other installment, and asks that it be adjudged a payment thereof, and that the defendant be decreed to accept and receive the same in full satisfaction and discharge of the decree. But his attempted payment was not payment; and he is not entitled to have it treated as such, because neither the money nor its equivalent seasonably came into the hands of the clerk, and Dyer was not bound to accept and receive his check as payment, though he might have safely taken the money after the time expired if he could have got it; for taking an installment after the time for paying it is expired does not open the decree as to installments for the payment of which the time has not expired. *Smalley v. Hickok*, 12 Vt. 153; *Gilson v. Whitney*, an unreported case in Windsor County a few years ago, *ut audioi*. Nor was the tender of the second installment effective; for, not having paid the first, he had no legal standing for tendering the second.

Redemption is the appropriate relief in this case. Indeed, it is said that whenever a mortgagor is driven to the necessity of filing a bill against the mortgagee, it must be one to redeem, and that the court can relieve him only by allowing a redemption. *Goldsmith v. Osborne*, 1 Edw. Ch. 560; *Chotmley v. Oxford*, 2 Atk. 267; *Lord Langdale*, in *Dalton v. Hayler*, 7 Beav. 818. But the bill lacks some of the essential elements of a bill to redeem. It

neither offers nor avers a willingness to pay, which is necessary by all the authorities. But inasmuch as the orator is entitled to relief, he should not be turned out of court, but allowed to amend his bill into a bill to redeem, if he shall be so advised. *Harrington v. Bacon*, 57 Vt. 644.

There was no necessity for bringing the cross-bill. The chattel mortgage was not embraced in the original bill, and so could not be the subject of a decree; and discovery of property subject to it could not aid in defending the original bill. As to the execution of the decree by giving possession, that can be done by summary process. *Rev. Laws*, §§ 766, 767; *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Ludlow v. Lansing*, Hopk. Ch. 381; *Valentine v. Teller*, Id. 422; *Yates v. Hamby*, 2 Atk. 237. As to the use of the premises pending suit, the defendant would be entitled in respect thereof, if at all, only on failure of the original bill; in which event he could avail himself of his rights by way of claim for injunction damages. And as to the alternative prayer for foreclosing any remaining equity, that would be the result of any decree on the original bill. Nor was there any necessity for bringing in Briggs and Merritt, for they purchased *pendente lite*, and so will be bound by any decree made. Besides, treating them as entitled to the benefit of their demurrer, as they were treated at the bar, they are not proper parties to the cross-bill; for new parties cannot be made in that way. A cross-bill, by force of the term, is a bill by a defendant against the plaintiff or other defendants in the same suit, or both. If an orator desires to make new parties, he amends his bill and makes them, although it be in respect of matters that have transpired since the filing of his bill; though until very recently, in respect of such matters, he would have brought a supplemental bill. If the interest of the defendant requires the presence of new parties, he takes his objection for want of them, and the orator is forced to bring them in or have his bill dismissed; and if at the hearing the court finds new parties indispensable, it refuses to proceed. These remedies cover the whole subject; and a cross-bill to make new parties is not only irregular and improper, but wholly unnecessary. *Shields v. Barrow*, 17 How. 180 (58 U. S. bk. 15, L. ed. 158).

But if they are not entitled to the benefit of their demurrer because the bill has been taken as confessed as to them, yet Kopper's defense avails for them; for when the defendants are jointly interested, a decree *pro confesso* as to some merely takes away their standing in court, and disentitles them to appear or be heard on many questions, certainly without an order of court, but the success of the others avails for them, and the bill will be dismissed as to all. 1 Hoff. Ch. Pr. 554; *Clason v. Morris*, 10 Johns. 524; *Provo v. De La Vega*, 15 Wall. 552 (52 U. S. bk. 21, L. ed. 60).

As to the terms that will satisfy the equitable rights of Dyer: As between the two, it belonged to Kopper to pay the Goddard mortgage, and Dyer stood as his surety in respect thereof. *Field v. Hamilton*, 45 Vt. 35; *Wells v. Tucker*, 57 Vt. 228; *Comstock v. Drohan*, 71 N. Y. 9. Hence Dyer is entitled to be reimbursed not only the principal sum that he

paid to redeem said mortgage, but his reasonable costs and expenses in that behalf in good faith incurred. *Hayden v. Cabot*, 17 Mass. 169; *Downer v. Baxter*, 80 Vt. 467; *Hewlett v. Sullard*, 26 Vt. 295; *Comstock v. Drohan*, 71 N. Y. 139.

As to the costs of that foreclosure, it sufficiently appears that they were properly incurred, and Dyer is justly entitled to reimbursement. But as to the amount paid by him to the insurance company for holding in readiness the money wherewith to redeem, it does not sufficiently appear that that was such a prudent and necessary thing to do in the circumstances as to entitle him to reimbursement.

The mortgage of the premises in question being conditioned to keep the property insured for Dyer's benefit, which Kopper neglected to do, he is chargeable with the insurance premium of \$75 that Dyer was compelled to pay in 1884; and this was included in the decree. He is also chargeable with the \$60.30 paid by Dyer for taxes, as shown by the master's report, as well as with all the other taxes that Dyer has since paid, or that he shall hereafter pay, or become liable to pay, on the property.

As Kopper put his bill upon false ground, namely, that he had performed the decree when he had not, Dyer was justified in defending it, and should recover his costs; and as Dyer had a right, after the decree became absolute, to deal with the property as his own, he is entitled to the costs of his writ of possession and of the execution of it. *Ores v. Lord*, 25 Vt. 498. In *Thornhill v. Manning*, 1 Sim. N. S. 451, the costs of an ejectment were allowed in a similar case.

The decree dismissing the cross bill is affirmed, but the decree for the orator in the original bill is reversed, and the cause remanded with mandate.

Nathaniel PERRY

o.

Harvey S. DOW.

In an action of **trover** for the conversion of **property secured by a chattel mortgage**, evidence is not admissible to prove that the **mortgages**, immediately after the mortgage was executed, and in the presence of the mortgagor, and without his denial, **told** the justice who administered the oath to the parties that there was **no consideration** for the mortgage, and that it was given for a cover; nor what the justice said.

(Washington—Decided April 30, 1887.)

TRESPASS and trover for certain personal property secured by a chattel mortgage executed by the defendant to the plaintiff. Trial by jury, September Term, 1885, Washington County, Taft, J., presiding. Verdict for the plaintiff. *Judgment affirmed.*

The facts appear from the opinion.

Mr. S. C. Shurtleff, for defendant:

The evidence was admissible.

Res v. Smithies, 5 C. & P. 382; *Res v. Bart-*

lett, 7 C. & P. 382; *McCann v. Hallock*, 36 Vt. 233; *Fenno v. Weston*, 31 Vt. 345.

Mr. J. P. Lamson, for plaintiff:

The evidence was not admissible.

2 Stark. Ev. 28, 37, 100, 398; *Vail v. Strong*, 10 Vt. 457; *Gale v. Lincoln*, 11 Vt. 153; *Wornden v. Powers*, 37 Vt. 619; *Elkins v. Hamilton*, 20 Vt. 627; *Banfield v. Parker*, 36 N. H. 356; *Chase v. Spencer*, 27 Vt. 412.

Royce, Ch. J., delivered the opinion of the court:

The only question presented by the exceptions is as to the admissibility of certain testimony that was offered by the defendant. After the mortgage had been executed and delivered to the plaintiff, but before the parties had left the room in which it was executed, the defendant offered to show, by himself and the justice who administered the oath to the parties, that he told the justice there was no consideration for the mortgage, that it was given for a cover, and there was nothing to it, and the reply that was made by the justice. The defendant was allowed to prove the reply made by the plaintiff, and he had testified to the fact that there was no consideration for the mortgage, and the purpose for which it was given.

The only purpose to be answered by the introduction of that evidence was to lay the foundation for the claim that the plaintiff, by his silence, or failure to deny the truth of the statement made by Dow, was estopped from denying its truth. He would be so estopped if the statement was made under such circumstances as called for a denial by the plaintiff. It will be noticed that the statement was not directed to him, and that he was not called upon to admit or deny its truthfulness. He was under no obligation to notice or take part in the conversation that was going on between the defendant and the justice, and his neglect to do so did not prejudice his rights. The question of the admissibility of such evidence was before this court in *Vail v. Strong*, 10 Vt. 457; *Gale v. Lincoln*, 11 Vt. 153, and in other cases cited on page 279 of Robert's Digest; and it was held inadmissible.

The evidence was properly excluded, and *the judgment is affirmed.*

Town of ROCKINGHAM

o.

Town of SPRINGFIELD.

The **pauper**, a married woman with four children, had a settlement in the defendant town, and, while residing in the plaintiff town with her family, was **abandoned** by her husband, who had **no settlement** in this State; and she, being only able to support herself, applied to the plaintiff's overseer to assist her children, which was granted. The pauper in a short time sold her furniture, closed the house where she lived, and, in the space of a few days, went into several towns, but gained no legal residence, and, when the order of removal was made, was living in the defendant

town. *Held*, (1) that the aid thus rendered was rendered to the wife, who became the head of the family on the abandonment of the husband; (2) that her residence continued, and she was constructively present when the order of removal was made; (3) and that she was legally removed to the town of her settlement.

(Windham—Decided May 27, 1887.)

APPEAL from the order of removal of one Susan L. Smith, a pauper. Heard on a referee's report, March Term, 1885, Windham County, Walker, J., presiding. Judgment that the pauper was unduly removed. *Reversed*.

The case appears in the opinion.

Messrs. C. B. & C. F. Eddy, and L. M. Read, for plaintiff:

Susan L. Smith, after the abandonment, became in law the head of the family, as much so as her husband was before the abandonment; and as she had an actual residence or home in Rockingham at the time of the abandonment, such residence in law continued to the date of the order of removal.

Bethel v. Tunbridge, 13 Vt. 445.

Being the head of the family actually domiciled in Rockingham previous to and at the time of obtaining aid for the support of her family, and not having abandoned her family, it follows that the family must, at the time of the removal, have had, in legal sense, somewhere one and the same residence or domicile. "The domicile of an infant is always presumed to be that of the mother."

Sprague v. Litherberry, 4 McLean, 442; 2 Abb. Nat. Dig. 183.

It necessarily follows that the law presumes that the domicile of the mother is the same as that of her young children.

A person cannot be without a legal domicile somewhere.

Desmare v. United States, 93 U. S. 605 (Bk. 23, L. ed. 959).

A domicile once existing continues until another is acquired.

Ibid.

By the term "domicile," in its ordinary acceptance, is meant the place where a person lives and has his home.

Mitchell v. United States, 21 Wall. 350 (88 U. S. bk. 22, L. ed. 584).

To constitute a new domicile two things are indispensable: first, residence in the new location; second, the intention to remain there. Mere absence from a fixed home, however long continued, cannot work the change.

Ibid.; *Anderson v. Anderson*, 42 Vt. 352.

Residence acquired in any town continues until another has attached.

Stamford v. Readsboro, 46 Vt. 611; *Abington v. North Bridgewater*, 23 Pick. 177.

Messrs. Waterman & Martin, for defendant:

Residence is a fact. It does not rest in mere intention. Where a person is actually in one town, and has no home in another town,—no place in which to live,—he cannot be considered as a resident in the latter, no matter how strong an intention he may have to go there.

Jamaica v. Townshend, 19 Vt. 267; *Egleston v.*

Battles, 26 Vt. 548; *Mann v. Clark*, 33 Vt. 55; *Barton v. Irasburgh*, 38 Vt. 159; *Hartford v. Hartland*, 19 Vt. 397.

The validity of the order must be determined upon the facts as they existed at the time the order was made.

Harland v. Windsor, 29 Vt. 354, and cases there cited.

The family was broken up, the children taken in charge by the overseer, goods moved out of town, and no house or tenement in which to live, and the mother removed from town with no intent to return. This state of things left her in the same position as if she had been a single woman as to residence. She came to reside in Springfield when she went there.

Rev. Laws, § 2815, 2830, 2832; *Houston v. Kimball*, 23 Vt. 575.

This is a much stronger case than *Middletown v. Poultney*, 2 Vt. 437, where it is held that, though all members of the family except the father remained in town, but the home was broken up and abandoned, the residence is not continued as to the father.

The fact that the mother notified the overseer of the condition of the family is of no consequence. It was his duty to take care of the children, if in need, without application.

Powers, J., delivered the opinion of the court.

This was an appeal from an order of removal of Susan L. Smith, with her children, as paupers, from the town of Rockingham to the defendant town. Sylvester L. Smith, the husband of Susan L., resided, with his family, in Rockingham in September, 1881. Although prior to this time he had moved from place to place often with his family, still, at this time, as the referee's report says, "he resided" in Rockingham and had a home there. In the language of the pauper laws, he had "come to reside" in that town.

His residence there was the legal residence of his wife and minor children. When he came there to reside, in legal effect they came there to reside. September 22, 1881, Sylvester abandoned his wife and family, and never afterwards returned to them. This abandonment by him made his family paupers, and Mrs. Smith applied to the overseer of the poor for aid. The overseer provided assistance by taking care of the children, Mrs. Smith professing to be able to take care of herself if the town provided for the children. The aid thus rendered by the town, we think, was, in legal significance, aid rendered to Mrs. Smith. She was the responsible head of the abandoned family, charged with the duty of providing for its wants and support. Being unable to furnish such support, she calls for aid, and she receives such aid by being relieved, in part, of the burden then upon her. The expense incurred in providing for the wants of the children was the same thing as like expenses incurred in supplying her personal wants. *Croydon v. Sullivan County*, 47 N. H. 179. Mrs. Smith then became chargeable to the town of Rockingham as a pauper.

As the husband, Sylvester L., never had a legal settlement in this State, the remedy of Rockingham to recover compensation for the aid thus furnished, or to be relieved against

further expense, was enforceable against the town in which Mrs. Smith had a legal settlement. The case shows that she had such settlement in the town of Springfield. Accordingly the case is this: The town of Rockingham furnished aid to paupers belonging to Springfield. If, when the aid was furnished, the paupers had come to Rockingham to reside, and had become chargeable, the remedy of Rockingham was to take an order of removal and transport the paupers to Springfield, where they belonged. If they had not come to reside in Rockingham, the remedy was by way of an action to recover the money paid out.

The right to an order of removal embodies two elements: residence and chargeability. Both existed in this case.

It has, in general terms, been said in some of the cases that the validity of an order of removal must be tested by the facts existing when it is made. This rule is not, however, to have a technical and impracticable application. If, pending a complaint before the justices, the pauper runs away from town, with intent never to return, the jurisdiction of the justices would not be defeated; they might nevertheless proceed and make their order for removal. The moment the town has furnished aid to the needy pauper, the town acquires the right to relief against the town of legal settlement. Thenceforth it is a question between the two towns, in which the pauper is wholly disinterested; and no act of the pauper can affect the rights of either against the other.

Here the pauper had become chargeable,—aid was being furnished. The town of Rockingham had a cause of action to be enforced against some unknown town of legal settlement, if such town could be found. Some time naturally would elapse before the question could be investigated and the town of legal settlement ascertained. Within a very few weeks it is learned that Springfield is the town of legal settlement, and the order is made. Meantime Mrs. Smith has left Rockingham, and, at the date of the order, is in fact in Springfield. The right to make the order was perfected before she left, and we think it was not lost by absence.

But in this case we think Mrs. Smith was constructively present in Rockingham when the order was in fact made, as that was the town of her legal residence. She resided there when she became chargeable. That residence continues until a new one is created. She left Rockingham with "no intention to return there to reside;" but she "never made any place, after that, her home in this State." She went to Chester, then to Andover, then to Springfield, then back to Rockingham, then to New Hampshire. After first leaving Rockingham she answered Judge Hattock's graphic definition of a transient person,—"a wanderer ever on the tramp." *Middlebury v. Waltham*, 6 Vt. 200. She was always a transient person after leaving Rockingham, and so never came to reside elsewhere. While thus on the tramp, her residence in Rockingham, for all legal purposes affecting its remedy against the town of her legal settlement, continued unbroken. This was so held by this court in *Stamford v. Readboro*, 46 Vt. 606, 611, and is the doctrine generally recognized. *Desmare v. United States*, 93 U.

S. 605, 610 [Bk. 23, L. ed. 959]; *Mitchell v. United States*, 21 Wall. 350 [88 U. S. bk. 22, L. ed. 584]; *Abington v. North Bridgewater*, 23 Pick. 170, 177.

This is the doctrine applied in cases of disputed residence for purposes of taxation, and analogous cases. *Mann v. Clark*, 33 Vt. 55, 59; *Anderson v. Anderson*, 42 Vt. 350, 352.

The judgment of the County Court is reversed, and judgment on the report that the pauper and her family and effects were duly removed.

Rowell, J., dissenting.

VERMONT BAPTIST STATE CONVENTION

v.

Alfred LADD'S ESTATE.

1. The probate of a will establishes the capacity of the testator; and evidence is not admissible, on an appeal from a decree of distribution, to prove his incapacity.
2. A legatee may take by a reputed name.

(Franklin — Decided April 30, 1887.)

A PPEAL by the plaintiff from a decree of the Probate Court of distribution of the estate of Alfred Ladd, denying to the plaintiff any benefit under the will of said Ladd. Heard on a commissioner's report, April Term, 1886, Franklin County, Royce, Ch. J., presiding. Judgment *pro forma*, and without hearing on the report, for the defendant. *Reversed.*

The plaintiff, the Vermont Baptist State Convention, is a corporation duly chartered by the Legislature.

The case is stated in the opinion.

Messrs. Noble & Smith, for plaintiff:

Evidence was not admissible to prove the incapacity of the testator after the probate of the will.

Rev. Laws. § 2018; Wms. Exrs. pp. 549, 619.

Messrs. Farrington & Post, for defendant:

The evidence was admissible.

6 Walt, Act. & Def. 388; 1 Greenl. Ev. §§ 287, 528; 5 U. S. Dig. § 8147.

Taft, J., delivered the opinion of the court:

The question at issue in this cause is, To whom did the testator give the \$400 mentioned in the fifth clause of his will? The clause reads: "I will and bequeath to The Vermont State Convention the use of \$400." The appellant claims the legacy,—that it was intended for it,—and offered evidence in support of such claims; and from the evidence the referee found that when the testator used the words, "The Vermont State Convention," in the fifth clause of the will, he meant the appellant, unless the evidence offered by the appellee to show that, at the time of the execution of the will, the testator was unable to form an intention, and was not of sound and disposing mind, was admissible. We think the probate of the will conclusively settled the question of the capacity of the testator, and established the fact that he was, at the time the will was executed, of

sound and disposing mind; and the evidence offered, upon the distribution of the estate, tending to show that he was not of sound mind, and had no intent in making the bequest, was inadmissible. These questions were *res judicata*. The only question made in the exceptions was as to the admissibility of the evidence offered by the appellee.

It may be further noted that no one save the appellant claims the legacy; and the referee reports that the appellant was called by the various names of "The State Convention," "The Vermont Baptist State Convention," and "The Vermont State Convention." The latter designation was one of the reputed names of the appellant; one that the testator himself used in speaking of it. The question before us is not, Which of two persons was meant? thus calling for the intent of the testator; but, Is the claimant sufficiently designated and described in the will so that it can be identified? Why may not a person take under a will by a reputed name? If the devise was given to the appellant by any one of the names by which it was known to the testator, why need we inquire about his intent?

Judgment reversed; judgment for the appellant, and ordered certified to the Probate Court.

Wyman FLINT *et al.*

v.

William H. JOHNSON *et al.*

William H. JOHNSON *et al.*

v.

Wyman FLINT *et al.*

1. When a contract has been reduced to writing, and one of the parties refuses to sign it unless a certain construction, stated by him, should be put upon it, the other party, who by his silence and conduct has induced him to sign it, will be estopped from claiming a different construction; otherwise it would be a fraud, especially where the parties acted on the theory that the construction given when the contract was executed was right,—even in the conduct of the trial below. *Rowell, J., dissents.*

2. A bill was brought to dissolve a partnership, and a master was appointed, who made a report. Thereupon the defendants filed a cross bill, and another report was made by the same master; the case was heard in the supreme court, and a mandate agreed on; but, on motion of the defendants, it was withheld to file further proceedings in the court of chancery. Accordingly, an additional bill was filed, the decree was reversed *pro forma*, and the cause remanded. The additional bill was answered, an accounting ordered, a report made by a new master, and the case came up on appeal. *Held*, that the mandate was not conclusive, and that the court was not embarrassed by it in considering the case as presented by the last report.

(Windham—Decided May 28, 1887.)

BILL in Chancery. Heard on the pleadings and a special master's report, September Term, 1885, Windham County, Walker, Chancellor. Ordered *pro forma*, and without hearing, that the additional bill be dismissed. *Reversed.*

Bill in equity brought by Wyman Flint, John G. Flint, and George Hart, against William H. Johnson and George H. Babbitt, for the dissolution of a partnership existing between the parties to the suit, for a receiver, and for an accounting.

The case is stated in the opinion.

Mr. Aldace F. Walker, with **Messrs. C. B. & C. F. Eddy**, for Johnson and Babbitt, appellants:

In our view of the case, the true legal principle to be applied in the light of the findings of the master is that of estoppel. And this can be properly appealed to, under the issues as framed, and our general prayer for relief.

Montpelier & W. R. R. Co. v. Langdon, 45 Vt. 137; *Stafford v. Ballou*, 17 Vt. 329; *Miller v. Bingham*, 29 Vt. 89.

A man who has induced a course of action in another by his conduct or declarations must stand by them, whether true or false.

Soper v. Frank, 47 Vt. 374.

The agreement having been signed by Johnson & Babbitt upon the openly-declared understanding of its meaning found by the master, known by the Flints, without which understanding it would not have been executed, the Flints keeping silence, at the time and for years after, respecting any other interpretation, taking all the property of the firm and of the Eureka Marble Company to themselves as the fruits of the trade, it cannot be but that the Flints are now estopped from asserting this remarkable claim.

Chitty, in his work on Contracts, 10th Am. ed. 77, 78, says: "The rules of construction are in general the same at law and in equity." And on page 79 he says: "But where the language of an agreement is plain and unequivocal, there is no room for construction; and, though the party may have misapprehended it, or it may not express his real intent, yet it must be carried into effect according to its plain meaning."

Eaton v. Lyon, 8 Ves. 692; *Doe v. Laming*, 2 Burr. 1108; *Strohecker v. Farmers Bank*, 6 Pa. 41; *Benjamin v. McConnell*, 4 Gilm. 536; *Anson, Cont.* 234, 120, 125.

Again, Chitty says, on page 78: "A party who enters into a contract in writing, without any fraud or imposition practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect."

1 Greenl. Ev. § 275; *Lovry v. Adams*, 22 Vt. 165; *Wing v. Cooper*, 87 Vt. 178; *Bradley v. Bentley*, 8 Vt. 244.

Messrs. I. M. Read, and **Waterman & Martin**, for the Flints and Hart, appellees:

Conceding the mistake as alleged in the bill, and all the circumstances as there alleged, the fact remains that the appellants had all the knowledge of the facts which they now possess as early as the summer of 1881; and, resting upon their claim as to the construction of the contract, carried the question to the supreme court, and got beaten.

Help must be seasonably asked when the

ground and occasion for it are seasonably known, or the court feel bound to decline application for it; and by no means will it accord it to relieve a party from the result of an experiment of his own, involving delay, vexation, and expense to the other party.

St. Johnsbury v. Bagley, 48 Vt. 75; *Barker v. Belknap's Est.* 27 Vt. 700; *Beard v. Hubble*, 9 Gill, 420; *Morgan v. New Orleans M. & T. R. R. Co.* 2 Woods, 244; *Ludington v. Renick*, 7 W. Va. 273; *Treacy v. Hecker*, 51 How. Pr. 69; 17 Vt. 434.

The appellants insisted that the contract at issue was their contract, and meant precisely what they agreed to at the time they signed it. They insisted upon this claim at their accounting before the master under the cross-bill.

Both parties must be mistaken, or the court will not interfere.

Kerr, Fr. 409-422; *Lyman v. United Ins. Co.* 17 Johns. 373; *Nevins v. Dunlap*, 33 N. Y. 876; *Wemple v. Stewart*, 22 Barb. 154; *Ruffner v. McConnell*, 17 Ill. 212; *Gordere v. Downing*, 18 Ill. 492; *Bellows v. Stone*, 14 N. H. 175; *Thompsonville Scale Mfg. Co. v. Osgood*, 26 Conn. 16; *Hearne v. Marine Ins. Co.* 20 Wall. 490 (87 U. S. bk. 22, L. ed. 396).

A mistake in construing a contract is not sufficient.

Kerr, Fr. 428; *Leake*, Cont. 169; *Hunt v. Rousmaniere*, 1 Pet. 1 (26 U. S. bk. 7, L. ed. 30); *McDaniels v. Bank of Rutland*, 29 Vt. 230.

A court of equity will not interfere where the instrument reads as the parties designed to have it. If they voluntarily choose to express themselves in the language of the instrument, they are bound to it.

McElderry v. Shipley, 3 Md. 25; *Leavitt v. Palmer*, 3 N. Y. 19; *Stoddard v. Hart*, 23 N. Y. 556; *Garnar v. Bird*, 57 Barb. 277; *Barnes v. Bartlett*, 47 Ind. 98; *Smither v. Calvert*, 44 Ind. 242.

No fraud can be imputed to a party to a contract who merely keeps silent when all the facts and circumstances are equally within the knowledge of both parties, or may, by the exercise of reasonable diligence, be ascertained.

Kerr, Fr. 414; *Judd v. Blake*, 14 Vt. 410.

Royce, Ch. J., delivered the opinion of the court:

The original bill was brought to procure the dissolution of a copartnership that then subsisted between the parties to the suit, for the appointment of a receiver, and for the taking an account of what was due said firm from each member thereof, and what was due to each member of said firm, and for an injunction against the defendant Johnson.

After the defendant Johnson's answer had been filed, and while the cause was pending, on the 1st day of July, 1878, the orators Wyman Flint and John G. Flint, and the defendants, Johnson and Babbitt, entered into an agreement under seal, by which the copartnership was dissolved, and Johnson and Babbitt, for the consideration therein specified, conveyed all their interest in the property of the copartnership to the Flints. After said agreement had been made, an accounting was ordered and had under the original bill, and the master made a report, which was filed November 15, 1880. On the 2d day of February,

1881, and before any action had been taken on the report, the defendants, Johnson and Babbitt, brought a cross-bill against the orators, which was answered, and an accounting was taken under it, and the master's report was filed at the September Term, 1881.

The case came on for hearing on the original bill and answer and the master's report therein, and the cross-bill and answer and the master's report therein, and a *pro forma* decree was ordered for the defendants, and an appeal was allowed to the orators. At the general term in 1882 the cause was heard, the *pro forma* decree of the court of chancery was reversed, and cause remanded, with mandate that the original bill be dismissed without costs, and that a decree be entered in the cross-bill that W. & J. G. Flint hold the uncollected debts due the firm in trust for the several partners in proportion to their respective interests in the partnership, and that there is due on the accounting to W. & J. G. Flint, from George H. Babbitt, \$1,271.69, from George Hart, \$5,623.56, and from them to William H. Johnson, \$2,272.28, with interest on said sums from June 1, 1878, and that the orators in the cross-bill recover costs. But, on motion of the defendants, the decision was withheld for sixty days, for time to file in the court of chancery further proceedings. Such proceedings were filed, and the decree was then reversed *pro forma*, and cause remanded for further proceedings in the court of chancery agreeably to the orders that had been and might be made by that court. The further proceeding which the defendants were permitted to file consisted of an additional bill of complaint against the orators in the original bill. The additional bill was answered, and another accounting was ordered and had, and the report of the master filed; and at the September Term, 1885, it was ordered *pro forma* that the additional bill of complaint be dismissed; and the cause comes here upon an appeal taken by Johnson and Babbitt from that order.

I have regarded it proper to be thus explicit in stating what has been done, as explanatory of the anomalous manner in which the matters for adjudication have been brought here.

The equitable rights of the parties are dependent upon the contract entered into by them on the 1st day of June, 1878, as expressed in the written contract, or as it should have been expressed. The orators claim that the construction given to said writing by the mandate before recited is conclusive, and that the rights of the parties are to be determined by the construction therein given.

We do not so regard it. What was said by the mandate was but the expression of the opinion of the court upon the case as it was then presented, and how it must be ultimately determined if no supervenient facts should be brought on to the record. That it was not intended to be absolute and conclusive is obvious from the fact that leave was granted to file further proceedings, and the decree reversed and cause remanded to the court of chancery, to be proceeded with under the orders of that court,—so that the mandate is no obstacle to a full consideration of the case as it is now presented.

The fourth article of said written agreement—

and which is the only part of it that need be recited—provided that the stipulated value of Johnson and Babbitt's four sixteenths of the property of the firm, not including debts due the firm, was understood and agreed to be \$4,500; and the Flints agreed to pay and assume for Johnson and Babbitt \$4,500 of the indebtedness of the firm; and it was agreed and understood that, if the debts due from the firm should exceed the debts due to it, Johnson should pay three sixteenths of such excess, and Babbitt one sixteenth; and if the \$4,500 should be insufficient to pay their share of the debts of said firm beyond the debts due to it, then Johnson and Babbitt should pay or secure such deficiency in the proportion stated.

The principal contention has been as to whether the Flints, under that contract, should account for all the debts that appeared to be due to the firm, or only such as were collectible. The construction of the contract does not appear to have been an issue before the master in taking the account under the original bill, and no ruling was made upon it. That accounting was confined to the ascertainment of the amounts due the respective partners from the firm. The accounting had under the cross-bill took a wider range; and in that accounting the master found and reported that the debts due from the firm, including the amounts due to the several partners, as set forth in his report under the original bill, amounted, on the 1st day of June, 1878, to \$56,338.61, and that the whole amount of debts due the firm was on that date \$39,400.49; that, of that amount, only \$15,924.37 was good and collectible on said 1st day of June; leaving, of said debts that were not good and collectible, \$23,576.12. Johnson and Babbitt claimed, on that hearing, that, in ascertaining their liabilities to make up their proportions of the deficiency of assets to pay the firm debts, the whole amount of the debts due the firm should be credited, and that the contract required that construction; and the Flints claimed that the contract only required them to credit the amount of said debts that were collectible. The master found and reported the amounts that would be required under both constructions of the contract, and referred the question as to how it should be construed to the court.

It does not appear that an investigation was then made of the facts attending the execution of the contract, except as to the interlineation of the words "not including debts due said firm," and the addition of the last clause; or as to how the parties then understood it.

The decree that was appealed from was based upon that report; and the court had nothing to add them in making the mandate but the contract made on the 1st of July, 1878, and the report of the master.

The master appointed to hear and report the facts under the additional bill of complaint has found that, before the contract was executed, it was read over in the presence of the Flints and Johnson, and that the question was then made as to whether or not the debts due the firm, whether collectible or uncollectible, were to be considered in determining the amount to be paid by Johnson and Babbitt for their share of the indebtedness of the firm; and that Johnson had declined to make the agreement

on the basis of what the Flints might succeed in collecting of the debts due the firm; that the contract was executed by Johnson and Babbitt in the belief that the fourth clause in the agreement would include all the debts due the firm, collectible and uncollectible, and they were to be included in ascertaining the amount they were to pay of the indebtedness of the firm; and that they would not have executed it unless they had so believed; that the Flints knew and understood that Johnson and Babbitt had that understanding and belief, and neither of them suggested or intimated that the contract would bear any other construction than the one they supposed; that, relying upon the advice of counsel that their construction was right, they allowed the accounting to proceed without introducing testimony bearing upon the question of the diligence used by the Flints in collecting debts due the firm, which they would have done if they had not so believed.

It is evident, from the facts so found, that the contract, if it is construed as the Flints claim, does not express the contract and agreement as understood by Johnson and Babbitt at the time of its execution, and as the Flints knew they understood it.

To allow a different construction to be put upon the contract by the Flints for their benefit than the one that they, by their silence, induced Johnson and Babbitt to believe would be put upon it, would operate as a fraud upon Johnson and Babbitt; and a court of equity will not aid the accomplishment of such a purpose, but will estop the Flints from claiming any other construction of the agreement than the one they, by their conduct, allowed Johnson and Babbitt to understand would be put upon it, at the time it was executed. The facts found would justify the court in ordering a reformation of the contract; but inasmuch as we are not embarrassed by the mandate heretofore made, and the case is presented as it would have been if the contract had been reformed, there is no necessity for such an order; and we see no obstacle to a final disposition of the case, under the familiar principle of equity that compels parties to abide by and perform the agreements that they have entered into.

It was found, in the first accounting, that there was due from the firm to Johnson, on the 14th day of September, 1878, \$7,473.67, and to Babbitt \$18,543; and, in the accounting under the cross-bill, the debts of the firm, as before stated, were found to be \$56,338.61, and the debts due to the firm \$39,400.49, leaving a deficiency of assets with which to pay the debts, of \$16,938.12.

And it was agreed by article four of the contract that if the \$4,500, which was the agreed value of the interest of Johnson and Babbitt in the firm property conveyed by them to the Flints, should be insufficient to pay their proportions of the firm debts, they would contribute to their payment in the following proportions: Johnson should pay three sixteenths, and Babbitt one sixteenth. The four sixteenths of the debt which Johnson and Babbitt were under obligation to pay amounted to \$4,234.53; and they paid, by the conveyance of their interest in the firm property to the Flints, \$4,500, which exceeded the amount they were under

obligation to pay to liquidate the debts of the firm, thus leaving them to stand as creditors for the amounts found due them. And a decree should be entered that the original bill be dismissed without costs, and that Wyman and John G. Flint pay to George H. Babbitt the sum of \$185.45, and interest on the same since the 14th day of September, 1880, and to William H. Johnson the sum of \$7,345.11, the sum due after deducting \$129.66, which should have been charged to him, as found by the report under the cross-bill, and interest on the same since the 14th of September, 1880; and for Johnson and Babbitt to recover their costs.

George Hart, one of the copartners, was made a defendant to the cross-bill; and it was alleged in the cross-bill that the Flints had purchased of Hart all his interest in the property of the firm, and, as a part of the consideration therefor, had agreed with Hart to pay his share of the liabilities of the firm; and that allegation was admitted in the answer filed by the Flints.

No decree, then, should be passed charging Hart with the payment of any portion of the claims of Johnson and Babbitt; and no facts are found that would justify a decree in favor of the Flints against Hart.

The decree of the Court of Chancery is reversed, and cause remanded, with mandate in accordance with the views hereinbefore expressed.

Rowell, J., dissenting:

I respectfully dissent from the ground on which the case is put. Not undertaking to say whether this is a subject-matter concerning which an estoppel by silence is predicable, and with all due deference to the statement in the opinion to the contrary, I think it does not appear that Johnson and Babbitt, or either of them, relied upon the silence of the Flints, or were at all influenced or misled thereby; without which I do not see how there can be an estoppel.

But the court having held, as it does, that "the mandate is no obstacle to a full consideration of the case as it is now presented," I think the judgment can be upheld on the ground that the construction of the contract is as Johnson and Babbitt claim it.

STATE of Vermont

Charles STEWART *et al.*

1. The labor and skill of the workman, the plant of the manufacturer, and the equipment of the farmer, are, in equal sense, property. Every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy, whether the means employed are actual violence or a species of intimidation that works upon the mind.
2. A count is sufficient which charges that the respondents unlawfully combined, conspired, and agreed together to prevent and hinder, by violence,

threats, and intimidation, the Ryegate Granite Works from retaining and taking into its employ certain workmen.

3. A count is sufficient which charges that the respondents, with the malicious intent to control and injure said company, unlawfully conspired to terrify, intimidate, and drive away by threats its workmen.
4. A count is sufficient which merely charges a conspiracy to do an unlawful act; and, *a fortiori*, one that charges a conspiracy to do an unlawful act by unlawful means. Thus, the statute prescribes the punishment for using threats or intimidation to prevent a person accepting or continuing an employment in a mill, etc. The count charged that the respondents conspired with intent to prevent a prosecution of the business of said Granite Works, and threatened its workmen that they were "scab shops;" that the employees were "scabs;" that their names would be published in the "scab" list in the Granite Cutters' Journal; that they would be shunned and disgraced in the craft, etc.; and that thereby they were frightened and driven away. Held, to charge a conspiracy to do an act unlawful at common law, by means unlawful under the statute; and that an offense is sufficiently set out under the statute (Rev. Laws, § 4226).
5. It was unnecessary to aver that the respondents had knowledge of the wrongful character of the matters charged against them.
6. Felonies and misdemeanors, or different felonies, may be joined in the same indictment, if the counts cover the same transactions.
7. A motion to quash is addressed to the discretion of the court, and its refusal is not revisable.
8. The boycott is not the remedy to adjust the differences between capital and labor.

(Caledonia—Decided May 4, 1887.)

INDICTMENT for conspiracy. Heard on demurrer and motion to quash the indict-

NOTE.—Conspiracy: Definition. Conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end. The unlawfulness must either be such as would be indictable if performed by one alone, or of a nature particularly adapted to injure the public or some individual by reason of the combination. 2 Bish. Cr. L. § 171. See also 3 Greenl. Ev. § 89; State v. Mayberry, 48 Me. 218; State v. Rowley, 12 Conn. 101; Smith v. People, 25 Ill. 17; Com. v. Hunt, 4 Met. 111; Alderman v. People, 4 Mich. 44; State v. Burnham, 15 N. H. 396; Hinchman v. Ritchie, Bright, 143; Com. v. Bliss, 12 Phila. 590; U. S. v. Watson, 17 Fed. Rep. 145; State v. Murphy, 6 Ala. 765; Heaps v. Dunham, 95 Ill. 583; State v. Potter, 26 Iowa. 556; State v. Bartlett, 30 Me. 134; State v. Hewett, 31 Me. 398; Com. v. Ridgway, 2 Ashm. 27; Miffin v. Reg. v. Vincent, 9 Car. & P. 109; Reg. v. Bunn, 12 Cox. Cr. Cas. 316.

The gist of a conspiracy is the unlawful confederacy to do an unlawful act, or a lawful act for an unlawful purpose. Com. v. Judd, 2 Mass. 337; Com. v. Tibbets, 41 Mass. 538; Com. v. Warren, 6 Mass. 74; People v. Mather, 4 Wend. 259; State v. Cawood, 3 Stew. 890; State v. Rickey, 9 N. J. L. (4 Halst.) 298; State

ment, June Term, 1885, Caledonia County, Ross, J., presiding. Judgment *pro forma* that both be overruled. *Affirmed.*

The case is stated in the opinion.

Messrs. Bates & May, for respondents:

If the conspiracy is to do a lawful act by unlawful means, the means must be fully set out.

State v. Keach, 40 Vt. 113; 31 Me. 396; 43 N. H. 83.

The gist of the offense consisted in the unlawful acts of the prisoners, whereby O'Rourke

etc., were driven away and prevented from prosecuting their business of granite cutting. In omitting to charge knowledge, the several counts are fatally defective.

State v. Carpenter, 54 Vt. 551.

A person is not liable for enticing or harboring the servant of another, unless it is alleged and shown that he knew of such relationship.

1 Bl. Com. 429; Wood, Mast. & Serv. 256; Bailey, Onus Probandi, 207.

v. Buchanan, 5 Har. & J. 317; Collins v. Com. 8 Serg. & R. 220; *Republica v. Ross*, 2 Yeates, 8; Morgan v. Bliss, 2 Mass. 112; Com. v. Hunt, Thach. Cr. Cas. 609; People v. Richards, 1 Mich. 216; Reg. v. Button, 11 Q. B. 623; Rex v. Gill, 2 Barn. & Ald. 234; Reg. v. Best, 1 Saik. 174; U. S. v. Miller, 8 Hughes, 553; U. S. v. Donau, 11 Blatchf. 168; State v. Adams, 1 Houst. Cr. Cas. 361; State v. Rowley, 12 Conn. 112; State v. Bradley, 48 Conn. 549; State v. Sterling, 34 Iowa, 444; Com. v. Davis, 9 Mass. 415; Com. v. Wallace, 16 Gray, 223; State v. Pulte, 12 Minn. 164; State v. Burnham, 15 N. H. 306; State v. Christbury, Busb. L. 48; Com. v. McKisson, 8 Serg. & R. 420; Com. v. Corlies, 8 Phila. 450; Twitchell v. Com. 9 Pa. 211; People v. Saunders, 25 Mich. 124; State v. Potter, 28 Iowa, 554.

The above antithesis was invented by Lord Denman in *Rex v. Jones*, 4 Barn. & Ald. 345; and is now understood to contain a limitation, and not a definition of what combinations are criminal.

See Reg. v. Peck, 9 Ad. & El. 686; Reg. v. King, 7 Q. B. 782; Wright, Conspiracy, § 14; State v. Glidden (Conn.), 3 New Eng. Rep. 849.

No overt act is necessary to constitute the offense (*State v. Wilson*, 30 Conn. 507; *Alderman v. People*, 4 Mich. 414); and it is not necessary to allege that the purpose was carried into effect (*Com. v. Wallace*, 16 Gray, 222; *Bowen v. Matheon*, 14 Allen, 603). There must be combination of two or more persons to commit some act known as an offense at common law, or that has been declared such by statute. *Alderman v. People*, 4 Mich. 414; 8 C. 69 Am. Dec. 321; *State v. Glidden* (Conn.), 3 New Eng. Rep. 849; U. S. v. Johnson, 28 Fed. Rep. 682. Many acts are said to be unlawful which would not be the subject of criminal conspiracy. Other acts are unlawful because they are in violation of the criminal law or some penal statute. If the ends or the means are criminal in themselves, or contrary to some penal statute, the conspiracy is clearly an offense. *State v. Glidden* (Conn.), 3 New Eng. Rep. 849.

It must appear on the face of the indictment that the object of the conspiracy or the means to be employed are criminal. *State v. Jones*, 13 Iowa, 269. No action lies for simply conspiring to do an unlawful act; the act itself and the resulting damage to the plaintiff are the only ground of action. *Kimball v. Harman*, 34 Md. 407. Where defendants do nothing unlawful, it is immaterial whether they conspire or not. *McHenry v. Sner*, 56 Iowa, 649. Active participation in, not simply passive cognizance of, the illegal action must be shown. *Evans v. People*, 90 Ill. 384.

Separate trials may be had upon indictment for conspiracy. *Casper v. State*, 47 Wis. 535. *Contra*, Com. v. Manson, 2 Ashm. 31. An allegation that A and B conspired to do an act so that C should commit a felony is not a sufficient allegation that the purpose of the act was to induce him to commit it or abet him in its perpetration. Com. v. Barnes, 122 Mass. 242. Associations to bring criminals to punishment for the public good are not illegal. 2 Bish. Cr. L. § 220; Russ. Crimes, *677; *Floyd v. Barker*, 12 Coke, 23.

A joint offense.—Conspiracy is, in its nature, a joint offense, and cannot be committed by one alone; but the proof must show that two or more persons were engaged in the offense. *Pollard v. Evans*, 2 Shaw. 380; *Evans v. People*, 90 Ill. 384; *State v. Christbury*, Busb. L. 48; Com. v. Manson, 2 Ashm. 31; Com. v. Irwin, 8 Phila. 380. Consequently, an action for conspiracy will not lie against a husband and wife alone, because they are but one person (*Kirtley v. Deck*, 2 Munf. 15); although, if a man and woman marry in the name of another for the purpose of raising a specious title to the estate of the person whose name is assumed, it is a conspiracy (*Rex v. Robinson*, 1 Leach, Cr. Cas. 37).

Against personal and property rights.—It is a criminal offense for two or more persons corruptly or maliciously to confederate together, and agree

together to deprive another of his liberty or property. *State v. Glidden* (Conn.), 3 New Eng. Rep. 849; *State v. Ripley*, 31 Me. 386.

Impediments to trade.—Conspiracies to injure trade were indictable at common law. *Rex v. Cope*, 1 Strange, 144; *Rex v. De Berenger*, 3 Maule & S. 68; *Rex v. Norris*, 2 Ld. Ken. 300; Reg. v. Gurney, 11 Cox, Cr. Cas. 414; *Levi v. Levi*, 6 Car. & P. 239.

A "corner," when accomplished by confederation to raise or depress prices and operate on the market, is a conspiracy, if the means be unlawful. *Morris Run Coal Co. v. Barclay Coal Co.*, 83 Pa. 173; *People v. Melvin*, 2 Wheel. Cr. Cas. 262. An agreement by the proprietors of five lines of canal boats on the Erie and Oswego Canals to charge a uniform rate, and divide the earnings, being injurious to trade and commerce, is a conspiracy. *Hooker v. Vandewater*, 4 Denio, 349. A contract arising out of such agreement is illegal and void. Id.; *Stanton v. Allen*, 5 Denio, 434.

Interference with business.—The doctrine of criminal conspiracy rests upon the proposition that the power of many for mischief against one is so great that the State should protect him. 2 Bish. Cr. L. § 181; *State v. Rowley*, 12 Conn. 112; Reg. v. Duffield, 5 Cox, Cr. Cas. 432.

All confederacies wrongfully to injure another in any manner are misdemeanors. 3 Chit. Cr. L. 1163. This was the law until the decision of *Lambert v. People*, 9 Cow. 578, where the question whether an indictment lies for a conspiracy to produce a mere private injury by means which are not in themselves criminal, and which would not affect the public nor obstruct public justice, was left in doubt until put at rest by the Revised Statutes.

An individual invasion of another's right to freedom from unreasonable, intentional annoyance gives a right of action. *Parker v. Griswold*, 17 Conn. 302.

No one is authorized to unlawfully destroy or hinder the lawful business of another for the purpose of helping himself. *People v. Petheram* (Mich.), 7 West. Rep. 592.

The statute relating to conspiracies was ordained to protect the business interests of our citizens from such combinations. Id. It does not require malice to be shown against the owner of the business disturbed, or his property, in the same sense as does the common law in cases of malicious mischief. Id. An engagement and combination between the defendants, or some of them, and others, to interfere with the masters by molesting them so as to control their will, if the molestation was such as would be likely to deter them from carrying on their business according to their own will, is an illegal conspiracy, for which the defendants are liable. Reg. v. Bunn, 12 Cox, Cr. Cas. 316. A conspiracy to injure a man in his trade or profession is indictable ever since *Eccles's Case*. *Rex v. Eccles*, 1 Leach, 274; S. C. 3 Doug. 337, *aff'd*, in 1835; *Mogul Steamship Co. v. McGregor*, 15 Q. B. Div. 476, 482. See also Reg. v. Hewitt, 5 Cox, Cr. Cas. 162; *Carew v. Rutherford*, 106 Mass. 10-15; *Walker v. Cronin*, 107 Mass. 564; *Master Stevedores Assn. v. Walsh*, 2 Daly, 1; *Rex v. Bykerdike*, 1 Moody & R. 179; *State v. Donaldson*, 32 N. J. L. 151; *Walsh v. Anley*, 3 L. T. N. S. 668. An information charging a mere conspiracy to obstruct and impede the business of a manufacturing company, by combining unlawfully to do so by certain acts and means (describing them), but which nowhere alleges that any of these acts were actually committed by the defendants, but simply that they conspired to commit them, charges only the offense of conspiracy under Rev. Stat. § 9275. *People v. Petheram* (Mich.), 7 West. Rep. 592.

"If two or more persons in any State or Territory conspire * * * for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities, under the laws, * * *

An allegation of knowledge is material.

Reg. v. Bunn, 12 Cox, Cr. Cas. 316; *S. C. 4* Moak's Eng. Rep. 564; *Bish. Forms*, § 308; *Reg. v. Shepherd*, 11 Cox, Cr. Cas. 325.

It should have been stated that the workmen driven away were under contract to labor for said company.

Walker v. Cronin, 107 Mass. 555.

A valid contract for continued service must be shown.

Boston Glass Mfg. Co. v. Binney, 4 Pick. 425.

The same is laid down in *Wood, Mast. & Serv. § 238*; *Butterfield v. Ashley*, 2 Gray. 254; 6 Cush. 249; *Commonwealth v. Hunt*, 4 Met. 180.

There is no allegation that the acts were wilfully and maliciously done.

Walker v. Cronin, *supra*.

The statute has no application to acts like those set up in the third and fourth counts. The words charged do not mean threats.

28 Am. Dec. note, 512.

each of such persons shall be punished by a fine," etc. *Re Baldwin*, 27 Fed. Rep. 187.

Labor associations.—Every association is criminal whose object is to raise or depress the price of labor beyond what it would bring if it were left without artificial aid or stimulus. *Rex v. Bykerdike*, 1 Moody & R. 179; *Master Stevedores Assn. v. Walsh*, 2 Daly, 1; *State v. Donaldson*, 32 N. J. L. 151; *Rex v. Eccles*, 1 Leach, Cr. Cas. 274; *Reg. v. Hewitt*, 5 Cox, Cr. Cas. 162; *Reg. v. Shepherd*, 11 Cox, Cr. Cas. 325; *Reg. v. Bunn*, 12 Cox, Cr. Cas. 316; *Reg. v. Bauld*, 13 Cox, Cr. Cas. 232; *Re Perham*, 5 Hurl. & N. 80; *Rex v. Ferguson*, 2 Stark. 489; *Hilton v. Eckersley*, 6 El. & B. 47; *Reg. v. Rowland*, 5 Cox, Cr. Cas. 436; *Reg. v. Hibbert*, 13 Cox, Cr. Cas. 32; *Rex v. Bykerdike*, 1 Moody & R. 179. Quoted and commented upon in 2 Whart. § 1390. Associations of men may endeavor peaceably, and in a reasonable manner, to persuade others to cease or abstain from work; but if by force or intimidation they endeavor to control the free agency or overcome the free will of their fellow workmen, they become guilty of a penal offense. *Reg. v. Shepherd*, 11 Cox, Cr. Cas. 325; The law encourages combinations for good, and combinations of workmen to better their condition by legitimate and fair means are commendable and should be encouraged. But combinations for evil purposes, whether by one class of men or another, are detrimental to the public weal, and cannot be regarded with favor by the courts. *State v. Glidden* (Conn.), 3 New Eng. Rep. 849.

The influence of an act upon society determines whether it is criminal conspiracy to combine to accomplish such act, and not whether the act itself is criminally punishable. *Smith v. People*, 25 Ill. 24. When an association is formed for innocent purposes, and its power and authority are afterwards abused, only those so abusing them are liable. *Carew v. Rutherford*, 106 Mass. 10. See *Snow v. Wheeler*, 113 Mass. 186; *Bowen v. Matheson*, 14 Allen, 508.

The intention of one man, so long as he does nothing, is not a crime of which the law will take cognizance, and so, too, of any number of men acting separately; but when several men form the intent and come together, and agree to carry it into execution, the case is changed. The agreement is a step in the direction of accomplishing the purpose. The combination becomes dangerous and subversive of the rights of others, and the law wisely says it is a crime. *State v. Glidden* (Conn.), 3 New Eng. Rep. 849. Where the evidence against defendants simply showed their acts, and the acts of others in obedience to their orders, the action of each tending and looking toward a common object and purpose, and that they were working together with a determination of accomplishing the primary object aimed at, and there is nothing to show but that they were free moral agents in what they did,—their acts were unlawful, coupled with an intent to accomplish their purpose in an unlawful manner. *People v. Petheram* (Mich.), 7 West. Rep. 592.

Combinations of workmen.—The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand (*Reg. v. Rowlands*, 5 Cox, Cr. Cas. 436, 460); and while they are perfectly free from engagement, and have the option of entering into employ or not, they have a right to agree among themselves not to go into any employ unless they can get a certain rate of wages (*Reg. v. Duffield*, 5 Cox, Cr. Cas. 404, 431; and also *Reg. v. Hibbert*, 13 Cox, Cr. Cas. 32; *Com. v. Hunt*, 4 Metc. 111, 130; *State v. Donaldson*, 32 N. J. L. 151; *Carew v. Rutherford*, 106 Mass. 1; *Stevedores Assn. v. Walsh*, 2 Daly, 1; (2 Whart. Crim. L., § 1396). Where journeymen refuse to work for the wages offered, they are not indictable for the refusal, but for the conspiracy among themselves to refuse. *Rex v. Journeymen Tailors*, 8 Mod. 11.

A conspiracy must be a joint, wilful, and malicious common purpose, and men working under orders could not be held for such an offense on any presumption of an ulterior design. *People v. Petheram* (Mich.), 7 West. Rep. 592.

Strikes.—The effect of an agreement between employees to leave if the master does not comply with some demand next presents itself for consideration. Such was the fact in *Reg. v. Hewitt*, 5 Cox Cr. Cas. 162, where members of the Philanthropic Society of Coopers withdrew from the employment of their master until he discharged a fellow member and employee who had not paid a fine imposed by the society. The president, secretary, and employees withdrawing from service were adjudged guilty of conspiring to molest and obstruct the employer, under the provisions of 6 Geo. IV. c. 13. *Walsby v. Anley*, 3 L. T. N. S. 666. Combining to compel an employer to discharge certain workmen, and threatening to quit his employment unless he does so, is a conspiracy. *State v. Donaldson*, 32 N. J. L. 151; *Reg. v. Bunn*, 12 Cox, Cr. Cas. 316; *Reg. v. Banks*, Id. 398; *People v. Trequair*, 1 Wheel. Cr. Cas. 142; *Com. v. Hunt*, 4 Met. 111; *Collins v. Hayte*, 50 Ill. 355; *Hooker v. Vandewater*, 4 Denio, 349; *Rex v. Journeymen Tailors*, 8 Mod. 11, citing *Tubwomen v. Brewers of London*, *Reg. v. Rowlands*, 17 Q. B. 671.

Strikes are criminal if they are part of a combination for the purpose of injuring or molesting either masters or men. *Farrer v. Close*, L. R. 4 Q. B. 608; *Hilton v. Eckersley*, 6 El. & B. 47; 3 Russ. Cr. 9th ed. 134.

So it is indictable to molest or obstruct workmen to induce them to leave their employment. *Reg. v. Hibbert*, 13 Cox, Cr. Cas. 32. Shouting and hooting at them would be considered intimidation. *Reg. v. Shepherd*, 11 Cox, Cr. Cas. 325; *Reg. v. Rowlands*, 5 Cox, Cr. Cas. 437; *Reg. v. Duffield*, Id. 432.

If large bodies of men collected about the coal works, with the intention of intimidating the miners working, such combination would be unlawful, and all persons engaged therein would be guilty of conspiracy, whether actually present at the commission of any act of violence or not. *Newman v. Com. (Pa.)*, 5 Cent. Rep. 497.

An indictment is sufficient which charges defendants with conspiring to force workmen, hired and employed in a business, to depart from their employment, by unlawfully molesting them; using threats or intimidating them; by unlawfully molesting their employer, and obstructing him in his business, where the means by which the conspiracy was to be carried on were stated in the words of the statute. *Reg. v. Rowlands*, 17 Q. B. 671; 21 L. J. M. C. 81; 4 Cox, Cr. Cas. 436; *Hilton v. Eckersley*, 1 Jur. N. S. 875, 24 L. J. Q. B. 353; 6 El. & B. 47. If overt acts were charged in the indictment, and sustained by proof, such acts would be merely matter of aggravation (*State v. Noyes*, 25 Vt. 415; *Collins v. Commonwealth*, 3 Serg. & R. 220), or evidence of crime (*Commonwealth v. Corlies*, 6 Phil. 450).

Several employees notified their master that if he did not discharge two fellow workmen, they would leave; and they did refuse to work until their demand was complied with. They were then indicted for conspiracy, and convicted, and the language of Chief Justice Beasley embodies about all that can be said for that side of the question. *State v. Donaldson*, 32 N. J. L. 151. *Ideta* to the same effect may be found in *Morris Run Coal Co. v. Barclay Coal Co.* 63 Pa. 173; *Stevedores Assn. v. Walsh*, 2 Daly, 1, a very elaborately considered case, embracing a review of, and criticism upon many, if not all, the early decisions in this country and England.

An indictment against journeymen seeking to prevent employers from taking apprentices is proved by evidence of their having quitted their employment with intention to compel dismissal of any apprentice. *Rex v. Ferguson*, 2 Stark. 489.

If any offense existed at common law, the statute is now exclusive.

State v. Stokes, 54 Vt. 179.

The parliamentary legislation in England against the "combination of workmen" has not all been adopted in Vermont. A summary of these acts is found in Roscoe, Cr. Ev. 7th Am. ed. 425. In 1859 the English statutes were greatly modified. Actual violence to person or property must be shown.

Wood, Mast. & Serv. § 241; Mill, Polit. Econ. B. 2. c. 13.

We did not adopt the English statutes of 1775.

Le Barron v. Le Barron, 35 Vt. 367; Story, J., in *Levy v. McCuttee*, 6 Pet. 110 (31 U. S. bk. 8, L. ed. 837); *Sackett v. Sackett*, 8 Pick. 816.

As to conspiracy by workmen, see—Wright, Cr. Conspir. 43, 62; 2 Bish. Cr. L. § 231, note 2; Roscoe, Cr. Ev. p. 423.

The old arbitrary and cruel rules as to workmen are not now a part of the common law of this State. The leading cases of this country are—

An indictment lies where journeymen shoemakers entered into an agreement not to make coarse boots for less than \$1 a pair, and not to work for any master who paid any shoemaker less than \$1 a pair; pursuant to which agreement defendants forced a master to discharge from his employ one who had worked for less than that sum. *People v. Fisher*, 4 Wend. 9.

Picketing.—"Picketing," which means watching and speaking to the workmen, as they go to or return from their employment, to induce them to leave the service, is not necessarily unlawful; nor is it unlawful to use terms of persuasion towards them to accomplish that object, but if the besetting and watching is carried to such an extent that it occasions a dread of loss, it is unlawful. *Reg. v. Hibbert*, 13 Cox, Cr. Cas. 32; *Reg. v. Bauld*, 1d. 282.

"Boycotting," origin of term.—Conspiracy contemplates boycotting, as a means to the end sought. That word is not easily defined. It is frequently spoken of as passive, merely, a let-alone policy, a withdrawal of all business relations, intercourse, and fellowship. If that is its only meaning, it will be difficult to find anything in it criminal. We may gather some idea of its real meaning, however, by a reference to the circumstances in which the word originated. Those circumstances are thus narrated by Mr. Justin H. McCarthy, an Irish gentleman of learning and ability, who will be recognized as good authority. In his work entitled 'England under Gladstone,' he says: "The strike was supported by a form of action,—or rather inaction, which soon became historical. Captain Boycott was an Englishman, an agent of Lord Erne, and a farmer of Lough Mask, in the wild and beautiful district of Connemara. In his capacity as agent he had served notices upon Lord Erne's tenants, and the tenantry suddenly retaliated in a most unexpected way by—in the language of schools and society—sending Captain Boycott to Coventry in a very thorough manner. The population of the region for miles round resolved not to have anything to do with him, and, as far as they could prevent it, not to allow anyone else to have anything to do with him. His life appeared to be in danger; he had to claim police protection. His servants fled from him as servants flee from their masters in some plague-stricken Italian city. The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time; no one would work for him; no one would supply him with food. He and his wife had to work in their own fields themselves, in most unpleasant imitation of Theocritan shepherds and shepherdesses, and play out their grim eclogue in their deserted fields, with the shadows of the armed constabulary ever at their heels. The Orangemen of the north heard of Captain Boycott and his sufferings, and the way in which he was holding his ground, and they organized assistance and sent him down armed laborers from Ulster. To prevent civil war, the authorities had to send a force of soldiers and police to Lough Mask, and Captain Boycott's harvests were brought in, and his potatoes dug, by the armed Ulster laborers, guarded always by the little army." *State v. Glidden* (Conn.), 3 New Eng. Rep. 849.

Whenever courts of law have made use of the term "boycotting," they have applied it to some phase of conspiracy; so, a combination and agreement among defendants, owners of steamers, with intent to injure plaintiffs and prevent them from obtaining cargoes for their steamers between ports, agreeing to refuse, and refusing, to accept cargoes from shippers, except upon terms that shippers should not ship by plaintiffs' steamers, and threatening to stop shipment of homeward cargoes altogether, which threats they carried into effect, was boycotting. *Mogul S. S. Co. v. McGregor*, L. R. 15, Q. B. D. 476.

The acts of all the public meetings throughout the land looking to, and providing for, depriving Chinese subjects of the rights, privileges, immunities, and exemptions secured to them by our treaties with China, by means popularly known as "boycotting," or any other coercive means, no matter in what form, or through what channels applied, criminal, and all those participating in them must be subject to the very severe penalties denounced by the statute. *Re Baldwin*, 27 Fed. Rep. 193. To induce persons to prevent others from taking or occupying farms from which others have been evicted for nonpayment of rent is an offense at common law. *Reg. v. Parnell*, 14 Cox, Cr. Cas. 508. A combination to prevent persons buying goods taken in execution is an offense at common law, and is a crime, if the means to carry out these incitements were those commonly known as boycotting. *Id.*

The statute passed in 1878, declaring it an offense to threaten or intimidate any person, to compel such person, against his will, to do or abstain from doing any act which such person has a legal right to do, cannot be limited to subjects embraced in the Act of 1877, which was limited to railroad, gas, and telegraph companies. *State v. Glidden* (Conn.), 3 New Eng. Rep. 849. An information which alleges that the defendants conspired to threaten and use means (the boycott) to intimidate the Carrington Publishing Company, to compel it, against its will, to abstain from doing an act (to keep in its employ workmen of its own choice) which it had a legal right to do, and to do an act (employ the defendants and such persons as they should name) which it had a legal right to abstain from doing, charges acts clearly prohibited by the statute. *Id.* The fact that the threat is designed as a means to an end, and that end in itself considered a lawful one, does not devalue the transaction of its criminality. *Id.* They had not the right to say to the Carrington Publishing Company: "You shall do this, or we will ruin your business." *Id.* It is no answer to say that the conspiracy was for a lawful purpose; to better their own condition; to fix and advance their rate of wages, and further their own material interest. *Id.* The charge that this conspiracy contemplated the wholesale boycotting of the patrons of the Carrington Publishing Co. states an offense within the statute. *Prima facie* such conduct must be considered malicious and corrupt. *Id.* There was proof that the "boycott" was inaugurated and prosecuted by Typographical Union No. 47, of which the five or six persons in conversation, including the identified defendant, were members, and their declarations were therefore admissible. *Id.* Evidence was properly admitted of a conversation between five or six printers, members of the Union, among whom was one identified as a defendant, and others not identified. *Id.* Evidence was properly admitted after there had been proof introduced tending to show that a particular defendant had been active in attempting to induce the public not to patronize the paper published by the Carrington Publishing Company. *Id.* It was proper, on the trial, to admit the declarations of a conspirator, not a defendant, made in the presence of one of the defendants, to a workman of the company, for the purpose of inducing him to join the conspiracy, that he believed that the company would not fight, as another publishing company had done. *Id.* A circular as follows, in large letters, "A word to the wise is sufficient. Boycott the Journal and Courier," was admissible in evidence. *Id.* A notice to the "News" that it would be charged \$50 per week as its share of the expense of the "boycott" was admissible for the purpose of proving that defendants committed a similar offense, with the purpose to pursue the same general policy. *Id.*

Commonwealth v. Hunt, 4 Met. 111; *Master, etc. Assn. v. Walsh*, 2 Daly, 1. See *State v. Rickey*, 4 Halst. 298; *Wyatt v. Williams*, 43 N. H. 102.

The motion to quash should have prevailed. A felony and misdemeanor cannot be joined.

1 Bish. Cr. Proc. § 189; *Commonwealth v. McLaughlin*, 12 Cush. 612; 1 Bish. Cr. L. § 790, 814; *Kane v. People*, 8 Wend. 203.

Messrs. Marshall Montgomery, State's Attorney, *H. C. Ide*, and *Alex. Dunnett*, for the State—

Cited many of the cases and authorities cited by the court, and argued that the indictment was not demurrable; that it was properly drawn, and in it was set out a criminal conspiracy.

Powers, J., delivered the opinion of the court:

Although authorities can be found that lay down the rule that felonies and misdemeanors, or different felonies, cannot be joined in the same indictment, still, the rule in this and most of the States is otherwise.

It is always and everywhere permissible for the pleader to set forth the offense he seeks to prosecute, in all the various ways necessary to meet the possible phases of evidence that may appear at the trial. If the counts cover the same transaction, though involving offenses of different grade, the court has it in its power to preserve all rights of defense intact. *Commonwealth v. McLaughlin*, 12 Cush. 612; *State v. Lincoln*, 49 N. H. 464; *State v. Smalley*, 50 Vt. 736; *State v. Thornton*, 56 Vt. 35; *Rex v. Ferguson*, 2 Stark. 489. Moreover, the motion to quash is addressed to the discretion of the court, and its refusal is not the subject of revision here. *Commonwealth v. Eastman*, 1 Cush. 189; *Commonwealth v. Ryan*, 9 Gray, 137; 1 Whart. Crim. L. § 519.

The respondents' counsel argue that the first and second counts do not cover the offense of criminal conspiracy at common law. But we think, upon a careful examination of the English and American cases cited in argument—and we suspect that none have been overlooked on either side—that it is clear to a demonstration that a combination of the character set forth in these counts was a conspiracy at the common law; and, further, that the subject-matter of the offense being the same in this country as in England, namely, an interference with the property rights of third persons, and a restraint upon the lawful prosecution of their industries, as well as an unlawful control over the free use and employment by workmen of their own personal skill and labor, at such times, for such prices, and for such persons as they please,—the common law of England is "applicable to our local situation and circumstances" in this behalf, and is therefore the common law of Vermont.

In England and here it is lawful—and, it may be added, commendable—for any body of men to associate themselves together for the purpose of bettering their condition in any respect, financial or social. The very genius of free institutions invites them to higher levels and better fortunes. They may dictate their own wages, fraternize with their own associates, choose their own employers, and serve

man and mammon according to the dictates of their own conscience. But while the law accords this liberty to the one, it accords like liberty to every other one; and all are bound to so use and enjoy their own liberties and privileges as not to interfere with those of their neighbors.

All the legislation in England and America has been progressively in the direction of accord to laborers the enjoyment of equal rights with others. The early English statutes, beginning with the middle of the fourteenth century, are to be read in the light of the civilization of that day; and their provisions—to us, of the nineteenth century, harsh, illiberal and tyrannical—were but the reflex of the prevalent notions of class distinctions that shaped and guided the social and political policy of those days. At that time to time, however, down to 1875, legislation has been liberalized and Christianized; and to-day, in England or here, workmen stand upon the same broad level of equality before the law with all other professions, professions, or callings whatsoever, respecting the disposition of their labor and advancement of their associated interests. Here, as there, it is unlawful for employers wrongfully to coerce, intimidate, or hinder the free choice of workmen in the disposal of their time and talents. There, as here, it is unlawful for workmen wrongfully to coerce, intimidate, or hinder employers in the disposal of such workmen as they choose to employ. There, as here, no employer can compel a workman he must not work for another employer; nor can a workman say to an employer he cannot employ the service of another workman.

By the law of the land, these respondents have the most unqualified right to work for whom they please, and for such prices as they please. By the law of the land, O'Rourke and Goodfellow have the same right. By the law, the Ryegate Granite Company has the right to employ the respondents or O'Rourke on such terms as may be mutually agreed upon, without let, hinderance, or dictation from any man or body of men whatever.

Suppose the members of a bar association in Caledonia County should combine and declare that the respondents should employ no attorney not a member of such association, to assist them in their defense in this case, and the penalty of being dubbed a "scab," having his name paraded in the public press as unworthy of recognition among his brethren, and himself brought into hatred, and contempt,—would the respondents be upon this as an innocent intermeddling with their rights under the law? The proposition has only to be stated to discern its utter inconsistency with every principle of justice that permeates the law under which we live.

If such conspiracies are to be tolerated as innocent, then every farmer in Vermont resting in the confidence that he may employ such assistance in carrying on his farm as he thinks he can afford to hire, is exposed to the operation of some such code of law, the framing of which he had no voice, and the terms of which he has no veto; and the manufacturer is handicapped by a system that portends certain destruction to his ind-

If our agricultural and manufacturing industries are sleeping upon the fires of a volcano, liable to eruption at any moment, it is high time our people knew it. But happily such is not the law, and among English-speaking people never has been the law. The Reports, English and American, are full of illustrations of the doctrine that a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute; or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common-law conspiracy. Such combinations are equally illegal whether they promote objects or adopt means that are *per se* indictable, or promote objects or adopt means that are *per se* oppressive, immoral, or wrongfully prejudicial to the rights of others. If they seek to restrain trade, or tend to the destruction of the material prosperity of the country, they work injury to the whole public. These propositions are the clear deduction of the cases cited in argument, and breathe a spirit of equality and justice that must commend itself to every intelligent mind.

Counsel have cited to us no case in which it has been ruled that this crime of conspiracy does not exist at the common law. We are referred to Mr. Wright's clever monograph upon criminal conspiracies, wherein the author, though not denying that conspiracies to injure industries and against the free exercise of one's calling according to his own choice were held to be criminal at the common law, still attempts to throw doubt upon the basis upon which the doctrine rests.

But in 1 Hawkins, P. C., chap. 72, § 2 ("a book of great authority," 2 Russ. Cr. 674), it is laid down "that all confederacies, whatsoever, wrongfully to prejudice a third person, are highly criminal at common law;" and in 2 Whart. Cr. L. § 2822, it is said that "a combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief;" and the same proposition in one form of expression and another is laid down in 2 Bish. Cr. L. § 172; and in Deasy, Cr. L. § 11; and in 8 Chitty, Cr. L. 1188; and in Archb. Cr. Pr. Pl. 1880; and it was said by Denman, *Ch. J.*, in *Queen v. Kenrick*, 5 Q. B. 49: "It was contended, in the first place, that the third count was bad by reason of uncertainty, as giving no notice of the offense charged. The whole law of conspiracy, as it has been administered at least for the last hundred years, has been thus called in question; for we have sufficient proof that, during that period, any combination to prejudice another unlawfully has been considered as constituting the offense so called. The offense has been held to consist in the conspiracy, and not in the acts committed for carrying it into effect; and the charge has been held to be sufficiently made in general terms describing an unlawful conspiracy to effect a bad purpose;" and Baron Rolfe in *Reg. v. Selaby*, 5 Cox, Cr. Cas. 496, note; and Tindal, *Ch. J.*, in *Reg. v.*

Harris, 1 Car. & Marsh. 661; and Crompton, *J.*, in *Hilton v. Eckersley*, 6 E. & B. 47; and Grove, *J.*, in *Reg. v. Maubey*, 6 T. R. 619; and Lord Mansfield, in *Reg. v. Eccles*, 1 Leach, Cr. Cas. 274; and Hill, *J.*, in *Walsby v. Anley*, 3 E. & E. 516; and Campbell, *Ch. J.*, in *Reg. v. Rowlands*, 17 A. & E. N. S. 670; and Baron Bramwell in *Reg. v. Druiitt*, 10 Cox, Cr. Cas. 592; and Brett, *J.*, in *Reg. v. Bunn*, 12 Cox, Cr. Cas. 816; and Malins, *V. C.*, in *Springhead Co. v. Riley*, L. R. 6 Eq. 551; and Coleridge, *Ch. J.*, in *Mogul S. S. Co. v. M'Gregor*, L. R. 15 Q. B. Div. 476; and Shaw, *Ch. J.*, in *Commonwealth v. Hunt*, 4 Met. 111, 128; and Caton, *J.*, in *Smith v. People*, 25 Ill. 17; and Gibson, *Ch. J.*, in *Commonwealth v. Carlisle*, Journal Jurispr. 225; and Chapman, *Ch. J.*, in *Carew v. Rutherford*, 106 Mass. 1,—have all added their indorsement of the doctrine advanced as early as the work of Hawkins, *supra*; and it is manifest that we are compelled to forsake the literature of doubt and to cleave unto that of authority. See also *Reg. v. Ferguson*, 2 Stark. N. P. 489; *Reg. v. Bykerdike*, 1 Moo. & Rob. 179; *People v. Fisher*, 14 Wend. 9; *State v. Donaldson*, 32 N. J. L. 151; *Snow v. Wheeler*, 113 Mass. 186; *State v. Noyes*, 25 Vt. 415; *State v. Burnham*, 15 N. H. 396; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178.

Vice-Chancellor Malins, in the case cited *supra*, states the law of the subject in brief but intelligible words: "Every man is at liberty to enter into a combination to keep up the price of wages, but if he enters into a combination for the object of interfering with the perfect freedom of action of another man, it is an offense, not only at common law, but under Act 6 Geo. IV. chap. 129."

The principle upon which the cases, English and American, proceed, is that every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workman, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all, in equal sense, property. If men by overt acts of violence destroy either, they are guilty of crime. The anathemas of a secret organization of men combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind, rather than the body, are quite as dangerous, and generally altogether more effective than acts of actual violence. And while such conspiracies may give to the individual directly affected by them a private right of action for damages, they at the same time lay a basis for an indictment, on the ground that the State itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings. The good order, peace, and general prosperity of the State is directly involved in the question.

In the case at bar the third and fourth counts set forth more particularly the methods adopted by the respondents to interfere with the prosecution of its business by the Ryegate Granite Works. They charge the respondents

with an intent to prevent the prosecution of the work of that company by threatening O'Rourke, Goodfellow, and others that the Ryegate Granite Works were "scab shops" all workmen therein were "scabs," and their names would be published in the "scab" list in the Granite Cutters' Journal; and that they would be shunned and not allowed to work with other granite cutters, and would be disgraced in the craft, etc.; by all which O'Rourke Goodfellow, and others were frightened and driven away from said shop.

The exposure of a legitimate business to the control of an association that can order away its employees, and frighten away others that it may seek to employ, and thus be compelled to cease the further prosecution of its work, is a condition of things utterly at war with every principle of justice, and with every safeguard of protection that citizens under our system of government are entitled to enjoy. The direct tendency of such intimidation is to establish over labor and over all industries a control that is unknown to the law, and that is exerted by a secret association of conspirators, that is actuated solely by personal considerations, and whose plans, carried into execution, usually result in violence and the destruction of property.

That evils exist in the relations of capital and labor, and that workmen have grievances that oftentimes call for relief, are facts that observing men cannot deny. With such questions we, as a court, have no function to discharge, further than to say that the remedy cannot be found in the boycott.

But it is objected that the first and second counts are defective in form.

In the first count the pleader charges an unlawful combination, conspiracy, confederacy, and agreement to prevent, hinder, and deter, by violence, threats, and intimidation, the Ryegate Granite Works from retaining and taking into its employ O'Rourke, Goodfellow, and others. In the second count, after relating a malicious intent to control, injure, terrify, and impoverish the Granite Company, he charges an unlawful conspiracy, combination, confederacy, and agreement to terrify, frighten, alarm, intimidate, and drive away, by threats and intimidation, O'Rourke, etc., who were then and there workmen and laborers of the Granite Works. Both counts charge an unlawful conspiracy; and both set forth the means by which the conspiracy is to be carried into effect. The unlawful conspiracy is enough, without the statement of the means, to show an offense at the common law.

A conspiracy to hinder, prevent, and deter a man from retaining and taking into his employ an attorney to defend his cause is a clear violation of his as well as the attorney's personal rights; and equally so is a combination to terrify, alarm, and drive away his attorney already employed. The natural tendency and inevitable consequence of such combinations is to restrain the prosecution of legitimate callings and industries, and thereby injure the public as well as individuals. The coercive intent, emphasized and expanded by the aggregation of members and amounting to a show of force, gives to such combination its character of illegality. If, in fact, the respon-

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dents had prevented, hindered, and deterred the Granite Works from employing O'Rourke, the act would confessedly have been criminal. It logically follows that a conspiracy to do that thing would be equally so.

It is not necessary to aver that the Granite Works desired or intended to employ O'Rourke. An allegation that it was intended to prevent from employing him, *ex vi termini*, implies a purpose to employ him which has been met and thwarted. So an allegation that the respondents conspired to hinder and prevent such employment imports an intent to interfere with the execution of a purpose already resolved upon.

But the pleader has supplemented the charge of unlawful conspiracy by an allegation of the means by which it is to be accomplished, namely, by violence, threats, and intimidation. Our statute (Rev. Laws, §§ 4326, 4327) prescribes a punishment for using threats or intimidation to prevent a person from accepting or continuing an employment in a mill. These counts, then, charge a conspiracy to do an act, unlawful at common law, by means unlawful under the statute. In such cases it is not necessary to set out specifically the means or threats or methods of intimidation to be used. The words of the statute may be taken without setting forth their meaning. *Thompson v. Reg. v. Rowlands*, 17 A. & E. N. S. 671. An indictment, among other things, charges a conspiracy to force workmen to quit the employment of the Messrs. Perry, by threats and intimidation. The statute (6 Geo. IV. chap. 139, § 3) forbids the use of threats or intimidation. The court said: "It is objected that some counts do not disclose the nature of the offense, molestation or intimidation by which the conspiracy was to take effect; but this is quite unnecessary. The words of the Legislature are used; the terms in question have a meaning stamped upon them by the Act (6 Geo. IV. chap. 159, § 3), and we must take it that the words are used here in that sense. And they are not employed as describing the substance of the offense for which the indictment is preferred; that offense consists in the conspiracy, which is a conspiracy at common law."

In *Commonwealth v. Dyer*, 138 Mass. 70, the court held that a statute similar to ours, a like decision was made; and such is the general rule in criminal pleading, even where the statutory offense is to create the offense. 1 Whart. Cr. L. § 197. *State v. Cook*, 38 Vt. 437. Here the conspiracy is the complete criminal act. It was unnecessary to aver the means by which the conspiracy was to be carried out. *State v. Noyes*, 25 Vt. 415, 423. Herein lies the distinction between this case and *Commonwealth v. Hunt*, 4 Met. 111, relied upon by respondents. In that case the substantive offense was a conspiracy, but not to do an unlawful act, and the means laid for its accomplishment were laid as mere matters of aggravation, no crime whatever was charged in the indictment.

If the means to be used are not necessary to constitute the offense, either by statute or common law, and are laid as the *corpus delicti*, then the rule contended for by the respondents applies, and a particular statement of the means to be used must be set out, so that the court can

on the face of the indictment that a crime has been committed. In *State v. Keach*, 40 Vt. 113, this court laid down the rule as follows: "The adjudged cases uniformly recognize the rule that a general allegation that two or more persons conspired to effect an object criminal in itself—as, to commit a misdemeanor or felony—is sufficient, even though the indictment omits all charges of the particular means to be used; and the cases are now equally uniform in holding that if the agreement or combination be to do an act or to effect an object not criminal, by the use of unlawful means, a general charge of a conspiracy to effect the object is not sufficient; and the charge of such a conspiracy must be accompanied with a particular statement of the means by which the object of the conspiracy was to be effected, so that those means may appear to be criminal, or the indictment will be bad."

These counts are drawn in accordance with approved precedent (2 Whart. Prec. 675, 666; Bish. Forms. §§ 808, 804), and are, we think, sufficient without the supplementary averment of the means to be used; and a *fortiori*, a count charging a conspiracy to do an unlawful act by unlawful means must be held sufficient.

Much that has already been said applies to the third and fourth counts. We think they sufficiently set out an offense, under Rev. Laws, § 4227. The language of the statute is adopted, all the elements of the offense enumerated, and the whole charged to have been with the intent specified. This is sufficient. *Commonwealth v. Dyer*, and *Reg. v. Rowlands*, *supra*; *State v. Jones*, 33 Vt. 443; *State v. Cook*, 38 Vt. 439; 1 Whart. Cr. L. § 364.

It was unnecessary to aver knowledge in the respondents of the wrongful character of the matters and things charged against them. If an act in its natural characteristics and quality is unlawful, knowledge of its wrongful character is presumed. It is otherwise when it becomes wrongful by the presence of accidental or fortuitous features not ordinarily attendant upon it. Thus in *State v. Carpenter*, 54 Vt. 551, cited by respondents, the respondent was presumed to know that it was unlawful to assault Larose as an individual. So, for such assault, no averment was necessary to bring home to him knowledge of the wrongful quality of his act. But when the same act was enlarged to the grade of an offense for impeding Larose as a public officer, it took on a character so abnormal that knowledge of this artificial quality of his act in the respondent must be alleged in order to lay a basis for a guilty intent.

We do not deem it necessary to extend this discussion—already too long drawn out—in following *seriatim* the numerous objections taken in the able and elaborate brief of the respondents to the different counts of the indictment. The general scope of the views expressed covers the whole ground, we think; and the result is,—

The judgment of the County Court overruling the motion to quash, and overruling the demurrer, and adjudging the indictment to be sufficient, is affirmed; and the cause is remanded to be further proceeded with.

A. L. WRIGHT

v.
R. D. MARVIN.

In an action of *trover* for the conversion of property, an officer who has taken it by virtue of a writ of replevin **cannot justify** under the process, unless he return it to the court to which it is made returnable.

(Franklin—Decided June 6, 1887.)

TROVER for a certain mare. Trial by jury, April Term, 1886, Franklin County, Royce, Ch. J., presiding. Judgment on a special verdict for the defendant. *Reversed.*

The case appears in the opinion.

Messrs. C. G. Austin, and Farrington & Post, for plaintiff:

This is not a new question. It has been repeatedly held that if an officer would justify under returnable process he must show its return, else he is a trespasser *ab initio*.

Freeman v. Blewitt, 1 Salk. 409; *Middleton v. Price*, 2 Strange, 1184; 1 Wills. 17; Bac. 450, 451; *Wilder v. Holden*, 24 Pick. 8; *Williams v. Babbitt*, 14 Gray, 141; *Rues v. Butterfield*, 6 Oush. 242; *Munroe v. Merrill*, 6 Gray, 286; *Briggs v. Mason*, 31 Vt. 441; *Ellis v. Cleveland*, 54 Vt. 440; *Eaton v. Cooper*, 29 Vt. 444.

An officer in the service of process must follow strictly the requirements of the law.

Lamb v. Day, 8 Vt. 407; *Barnard v. Stevens*, 2 Aik. 429; *Evarts v. Burgess*, 48 Vt. 206; *Hall v. Ray*, 40 Vt. 576.

Messrs. Wilson & Hall, H. Burt, and George A. Ballard, for defendant:

The taking of the bond was sufficient protection to the defendant in the replevin suit, and the defendant's remedy is upon the bond, and not against the officer.

Driscoll v. Place, 44 Vt. 258; *Watson v. Watson*, 9 Conn. 140; *Cannon v. Sipples*, 39 Conn. 505.

The plaintiff had a complete remedy upon the bond. 97 Mass. 316.

The Massachusetts statute is almost identical with ours.

Mass. Gen. Stat. chap. 143, § 8; Rev. Laws, § 1219.

To the same effect is *Perese v. Watrous*, 30 Conn. 139; *Nichols v. Standish*, 48 Conn. 321.

One of the conditions of the bond was broken upon plaintiff's failure to enter a replevin suit.

Perese v. Watrous, *supra*.

A judgment of return is only necessary when the suit is entered and disposed of by non-suit or trial.

Rev. Laws, § 1238; *Collamer v. Page*, 35 Vt. 387.

At most, the failure of the defendant to return the bond to the clerk of the court was a mere nonfeasance, for which neither trespass nor *trover* will lie.

Stone v. Knapp, 29 Vt. 503; *Pierson v. Gale*, 8 Vt. 509; *Hale v. Huntley*, 21 Vt. 147.

Trespass on the case for any mere nonfeasance of the deputy will only lie against the sheriff.

Abbott v. Kimball, 19 Vt. 551; *Hale v. Huntley*, *supra*.

Powers, J., delivered the opinion of the court:

The defendant, as a deputy sheriff, seized

the plaintiff's mare by virtue of a writ of replevin in favor of Pease & Arsino. He took a proper bond, delivered the mare to Pease & Arsino, and returned the writ and bond to the attorney of the plaintiff in the replevin. Neither writ nor bond was returned to the court to which the process was made returnable, but the proceedings came to an end without any settlement between the parties, or any consent thereto by the now plaintiff.

In answer to the present action, the defendant attempts to justify the taking of the mare (which by the verdict then belonged to the plaintiff) under the replevin process.

There is some confusion in the cases, touching the proper applications of the rule that a subsequent abuse of an authority given by the law makes the abuser a trespasser *ab initio*. It is often said that a mere nonfeasance will not work such result; but just what acts or omissions are properly classed as nonfeasances is not quite clear from the cases. A sheriff is protected by his process, if issued by competent authority, so long as he follows its mandate. In the execution of it he is bound to observe the commands of the law, whether expressed in the process itself or in the general law applicable to its execution.

In this case the defendant was commanded in the process to serve and return it according to law. Rev. Laws, § 888, commanded him to return the process to the court to which it was made returnable. The command to serve and return is not divisible so that the officer may return without service, or serve without return, and be *pro tanto* protected. Unless the parties assume control of the process, the duty of the sheriff is, in legal significance, one single act, comprehending all the steps essential to a legal execution of the process to its final return into court. In the action of replevin this rule is peculiarly applicable, as the rights of the defendant cannot be fully preserved otherwise. If the property is wrongfully taken in replevin, the defendant is entitled to a judgment for its return. Such judgment is not within its reach unless the process is returned to court; and without such judgment no damages for the non-return of the property are recoverable in an action upon the replevin bond. *Collamer v. Page*, 35 Vt. 396. The recovery of the property *in specie* oftentimes is the only complete satisfaction the defendant can obtain. It is no answer to say that the practice of officers, sanctioned by long usage, to return writs to the attorney of the plaintiff, was followed by the defendant. He was commanded to return his process according to law, not according to the prevailing custom. If he saw fit to disregard the law and observe the custom, he took the risk of the return by the attorney to the court. The return to the court is an essential and vital element in the defendant's justification.

In Bacon's Abridgment, title *Trespass*, 450, it is said: "If a sheriff have not returned a writ which ought to have been returned, he becomes, although this be only a nonfeasance, a trespasser *ab initio* as to everything which has been done under the writ."

In Bull. N. P. 23, it is said that "whenever an officer justifies an imprisonment under a writ, he must show that the writ was returned."

To the same effect are the following: *Row-*

land v. Veale, Cowp. 18; 1 Ld. Raym. 632; *Pherson v. Pemberton*, 1 Jones, Law, 378; *ling's Case*, Cro. Car. 446; 2 Rolle, Abr. 563; 18; *Middleton v. Price*, 2 Strange, 1184.

In *Ellis v. Cleveland*, 54 Vt. 437, on demurrer to a plea justifying an arrest upon returnable process, which omitted to set up return of process, Rowell, J., said: "If an officer to whom returnable process is directed will justify under it, he must show its return; for he is a trespasser *ab initio*; for he is commanded to return the writ, and he shall not be protected by it unless he shows that he has paid and full obedience to its command." The same doctrine is recognized in *Briggs v. M*, 31 Vt. 433.

Chief Justice Shaw, in *Munroe v. Merriam*, Gray, 238, says that, if an officer would justify under legal process, "it is essential to his justification that he has returned his execution with his doings, by which they are made matter of record for the information and security of all parties interested;" and in *William Babbitt*, 14 Gray, 141, the Massachusetts court says: "The officer, by failing to return the writ, deprives himself of a defense which might otherwise have been made available." *Russ v. Butterfield*, 6 Cush. 242, the same doctrine is reiterated.

It may be that courts have made an unfortunate use of language in saying that the neglect to return the process makes the officer a trespasser *ab initio*. The Massachusetts courts seem to proceed upon the ground that the justification fails for want of the return; not the want of it, by relation, makes the preceding steps trespasses. In *Shortland v. Good*, B. & C. 485, the King's Bench questioned the correctness of the reason given in many of the English authorities, *supra*, for the failure in the justification under returnable process. Bailey, J., said: "In the cases cited in Rolle's Abr. and Cro. Car., where it is said that a sheriff is made a trespasser *ab initio* by neglect to return a writ, the expression is inaccurate. There, for want of the return, complete justification was ever shown. The distinction is this: Where there are facts alleged on the record making out a good defense, but something added in the replication destroys that defense, the party is made a trespasser *ab initio*. But if the sheriff seizes under a writ, where it is his duty to make return, he never has a justification unless he discharges that duty;" and Holroyd, J., "Instead of saying that the want of the return made the sheriff a trespasser *ab initio*, it would be more correct to say that the presence of the return was necessary in order to make his seizure lawful *ab initio*."

But whatever be the correct mode of reasoning, all the authorities agree that the failure to return the process is fatal to the justification, and in such case it is the same thing as if the officer had no process at all. If he has no process he is plainly a trespasser.

It is unnecessary to determine the question whether the failure to return the replevin standing alone, would destroy the justification.

The judgment of the County Court is reversed, and judgment is rendered upon the verdict for the plaintiff to recover \$175, and the interest thereon from April 1, 1883, damages, and his costs.

NEW HAMPSHIRE.

SUPREME COURT.

Frederick ECKSTEIN, Jr.,

v.

Alfred L. DOWNING.

1. **Equity** does not decree specific performance of a contract for the sale of shares in a manufacturing corporation, when it appears that the remedy furnished by an action at law for the breach of it is adequate.
2. **When** it appears that the plaintiff has an adequate remedy at law, equity does not always enforce specific performance of a contract in his favor, although the defendant might, at his election, be entitled to that remedy.

(Merrimack—Decided March 11, 1887.)

BILL in equity to enforce specific performance of a contract. *Bill dismissed.*

The contract in question was to transfer to the plaintiff 60 shares of the capital stock of the Abbott-Downing Company, in payment for the pleasure yacht "Una." Facts found by a referee:

August 14, 1884, a bargain was concluded, by a written correspondence, between the defendant and the plaintiff's agents, Rider & Cotton, whereby the defendant was to give the plaintiff 60 shares of the Abbott-Downing Company stock for his yacht Una, then lying at a wharf in Portsmouth. At that time the defendant was twenty-two years old, and neither the plaintiff nor his agents (who acted in entire good faith throughout) had any reason to question his competency to contract.

The Una was a well-known yacht, and had acquired considerable reputation as a fast sailer. Her value, with her tackle, apparel, and furniture, in August, 1884, is alleged in the bill to be \$6,000 and upwards. The answer admits that the value of the same to the plaintiff was \$6,000 and upwards. At the hearing the defendant admitted, for the purposes of this case only, that the market value of the yacht at the time of the alleged sale was \$6,000.

In July, 1884, the Abbott-Downing Company paid a semi-annual dividend of 3 per cent. The stock of this company is mainly held by the Abbott and Downing families; the only shares owned outside those families being a limited number held by some of the employees. It is not commonly offered for sale, and actual sales are very rare. The referee finds the value of this stock, in August, 1884, and at the present time, to be \$60 per share. There was no evidence tending to show that the plaintiff had any wish (or reason for wishing) to become the owner of the Abbott-Downing Company stock rather than any other stock of equal pecuniary value, or that he would not have agreed to take any other stock of equal value in payment for the yacht.

On or immediately after August 14, Alfred L. Downing, with his men, went on board the Una and began to clean the vessel. He

cut a porthole, gave away the boarding with which the yacht had been covered, and also gave away a discarded staysail then used to cover some of the bedding belonging to the yacht. Downing and his men slept on board the Una, and drank some of the wine which was among the yacht's stores. Both parties understood that the title to the yacht was not to pass until the stock should be transferred. So far as it is a question of fact, the referee finds that the title to the yacht has never passed from the plaintiff to Downing.

August 19, 1884, Mrs. Hannah E. Downing, mother of Alfred L. Downing, filed a petition in the probate office for Merrimack County, alleging Alfred to be a spendthrift, and praying for the appointment of a guardian over him. An attested copy of this petition was filed, on the same day, in the office of the city clerk of Concord, where Alfred resided. September 23, 1884, the probate court, upon the aforesaid petition, decreed Alfred L. Downing to be a spendthrift, and appointed Hannah E. Downing his guardian. The ward's assets, at the present time, consist of 95 shares in the Abbott-Downing Company, and other property not worth less than \$4,500.

On the day when the above-mentioned petition was filed, Hannah E. Downing also filed a bill in equity against Eckstein, Rider & Cotton, and other parties. Upon this bill a temporary injunction was granted August 20, 1884, restraining the payment or transfer of stock from Alfred to the plaintiff; and since that time nothing has been done to the yacht except, by mutual consent, for the purpose of protecting her. She is now at the wharf in Portsmouth, boarded up. On account of disuse she has depreciated in value.

Messrs. J. S. H. Frink and Calvin Page, for plaintiff:

The plaintiff has ever been in a condition to perform his part of the contract, and "has shown himself ready, desirous, prompt, and eager to perform it."

Pickering v. Pickering, 88 N. H. 400; 2 Story, Eq. § 776; *Seymour v. Delancey*, 6 Johns. Ch. 222.

After the service of the injunction, plaintiff had no occasion to do anything else in performance of this part of the contract, as it would have been wholly useless.

Jones v. Barkley, 2 Doug. 684; *Rawson v. Johnson*, 1 East, 208; *Haines v. Tucker*, 50 N. H. 307.

But the performance of a contract,—even an oral one,—partly executed, may be enforced.

Bennett v. Abrams, 41 Barb. 619; *Tilton v. Tilton*, 9 N. H. 890; *Woodbury v. Gardiner*, 1 East. Rep. 108.

It has been said, and it was possibly once so held, that courts of equity would not decree a specific performance of a contract relating to personal property unless the case was an exception to the rule, and that the parties should be left to seek redress for the breach of such a contract by a suit for damages. But the law is now clearly otherwise; and where justice requires it in any case, equity will interfere and decree a specific performance.

Somerby v. Buntin, 118 Mass. 279, 287; *Clark v. Flint*, 22 Pick. 281, 289; *Wendell v. Bank*, 9 N. H. 404, 421; *Carpenter v. Mutual*

S. Ins. Co. 4 Sand. Ch. 408; *Duke of Somerset v. Cookson*, 3 P. Wms. 890; *Lady Arundell v. Phipps*, 10 Ves. 148; *Nutbrown v. Thornton*, 10 Ves. 161; *Doloret v. Rothschild*, 1 Sim. & Stu. 590.

In *Story*, Eq. § 714, it is said that courts of equity "have not hesitated to interfere and require from the conscience of the offending party a strict performance of what he cannot, without manifest wrong or fraud, refuse."

In *Evins v. Gordon*, 49 N. H. 456, the court says that the decreeing of a specific performance "rests upon the simple principle that the covenantor or obligee has a moral right to the observance of the contract, to which right the courts of law, whose jurisdiction does not extend beyond damages, have not the means of giving effect."

In *Cushman v. Thayer Mfg. Co.* 76 N. Y. 365, the court says that the power to compel a transfer of specific property is a salutary one.

In *Greene v. West Cheshire R. Co.* 1 Moak, Eng. Rep. 546, the defendant claimed that plaintiff should resort to a suit for damages, and could recover the full amount thereof, and hence equity would not decree a specific performance. But in delivering the opinion, Sir James Bacon, V. C., used the following language: "I do not understand that the law, as administered in this court, countenances any such defense."

Especially is the remedy by specific performance applicable in cases of shares of stock in a corporation which are limited in number, or not always to be had in the market.

Duncuft v. Albrecht, 12 Sim. 189; *Leach v. Fobes*, 11 Gray, 510; *Todd v. Taft*, 7 Allen, 371; *Forrest v. Eluces*, 4 Ves. 497.

It is now settled law that, in case of such stocks, equity will decree a specific performance.

Cheale v. Kenward, 3 De G. & J. 27; 1 *Story*, Eq. § 724 a.

The decree we ask is a plain, certain, and convenient remedy, is just to the defendant, and as adequate to the plaintiff as anything he can now obtain.

Buxton v. Lister, 3 Atk. 385; *Adderley v. Dixon*, 1 Sim. & Stu. 607.

One of the tests by which the question of enforcing a specific performance is determined, is whether the agreement sought to be enforced is mutual and the tie reciprocal.

Evins v. Gordon, 49 N. H. 444; *Pickering v. Pickering*, 38 N. H. 406; *Hall v. Warren*, 9 Ves. 605; *Cabene v. Gordon*, 1 Hill, Ch. 51; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Cooper v. Pena*, 21 Cal. 403.

Messrs. Wm. M. Ramsey and Elliott H. Pendleton, Jr., also for plaintiff:

When the right of possession be joined with the right of property, and to this double right the actual possession is also united, then, and then only, is the title completely legal.

2 Bl. Com. chap. 13.

The rule in England is that, by a contract for the sale of specific ascertained goods, the right of property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties.

Shep. Touch. p. 224.

Gilmour v. Supple, 11 Moore, R. C. 566; *Cal-*

cutta Co. v. De Mattos, L. J. 82 Q. B. 322; 2 Kent, Com. 492, 493; 1 Chitty, Cont. 520.

In Noy's Maxims the rules are given "If I say the price of a cow is £4 and say you will give me £4 and do not presently, you cannot have her after without I will, for it is no contract; but I begin directly to tell your money, if I sell to another, you shall have your action of case against me."

The consideration of the sale may have and probably was, in early days, the payment of the price; but it has since been held to be the purchaser's obligation to the price, where nothing shows a contra-tention.

Benj. Sales, § 315.

Generally, where a bargain is made for purchase of goods, and nothing is said of payment or delivery, the property passes immediately, so as to cast upon the purchaser future risk, if nothing remains to be done to the goods; although he cannot take them without paying the price."

Simmons v. Swift, 5 B. & C. 862.

I take it to be clear that, by the law of land, the sale of a specific chattel passes property in it to the vendee without delivery.

Dixon v. Yates, 5 B. & Ad. 318-340.

The fact that the seller is to do some to the goods sold on his own behalf or for the benefit of the buyer, or that an act remains to be done by or on behalf of both parties is important, as it indicates an intention that title shall not pass until those acts have been performed. But this is a mere presumption and may be rebutted and overcome by strong evidence of an intention to pass the property.

Marble v. Moore, 102 Mass. 443; *Thompson v. Bath*, 114 Mass. 116.

The contract in this case is mutual. The requisite of mutuality includes both a mutuality of legal right and a mutuality in the equitable remedy. As to the mutuality of right in this case there is no controversy; we think that, upon principle and authority, there can be no question as to the mutuality of the equitable remedy.

The text-books and authorities state above rule in the following simple and language: "If the right to the equitable remedy of specific performance exists at all, it must be mutual."

Where the specific performance of a contract respecting chattels will be decreed upon application of one party, courts of equity maintain the like suit at the instance of the other party, although the relief sought is merely in the nature of a compensation for damages or value; for in all such cases the court acts upon the ground that the remedy exists at all, ought to be mutual and reciprocal, as well for the vendor as for the purchaser.

Story, Eq. Jur. § 723.

So, where a bill is brought by a vendor against the vendee for the specific performance of the contract of sale, and of a payment of the purchase money, if the decree is for specific performance, equity will decree the payment of the purchase money also, as incident to the general relief, and to prevent a multiplicity of suits, although the vendor might

many cases, have a good remedy at law for the purchase money.

These rules are sustained by the following cases:

Pom. Spec. Perf. §§ 12, 14, 165; *Walker v. Eastern Counties R. Co.* 6 Hare, 602; *Brown v. Haff*, 5 Paige, 240; *Cathcart v. Robinson*, 5 Pet. 278 (80 U. S. bk. 8, L. ed. 120); *Old Colony R. R. Co. v. Evans*, 72 Mass. 30; *Kenney v. Weeham*, 6 Mad. 357; *Withy v. Cottle*, 1 Sim. & Stu. 174; *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Cogent v. Gibson*, 33 Beav. 557; *Peer v. Kean*, 14 Mich. 354; *Clark v. Flint*, 22 Pick. 238; *Mortlock v. Buller*, 10 Ves. 815; *Ewins v. Gordon*, 49 N. H. 444; *Hill v. Rockingham Bank*, 44 N. H. 567.

Messrs. Chase & Streeter, for defendant:

It is a well-settled principle of equity jurisprudence that the court will not ordinarily interfere by injunction, and will not take jurisdiction where the party has a plain and adequate remedy at law.

B. & M. R. R. v. P. & D. R. R. 57 N. H. 202, citing *Coe v. Winnepiessie Lake C. & W. Mfg. Co.* 37 N. H. 254, and other cases.

"Want of equity is not only a good ground of demurrer to a bill, but is a good ground of defense where no case is established upon the merits, and this includes cases where the plaintiff's right proves to be one at law and not in equity."

Burnham v. Kempton, 44 N. H. 78; *Miller v. Scammon*, 52 N. H. 609; *Brown v. Concord*, 56 N. H. 375; *Rockingham Sav. Bank v. Portsmouth*, 52 N. H. 17; *Lyme v. Allen*, 51 N. H. 242.

Equity will not interfere to restrain the breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction.

Pom. Eq. Jur. § 1338.

"The remedy of the specific performance of contracts is purely equitable, given as a substitute for the legal remedy of compensation whenever the legal remedy is inadequate or impracticable."

Id. § 1401.

The equitable remedy does not proceed, as is sometimes erroneously supposed, upon any distinction between real and personal estate, but upon the ground that damages at law may not, in the particular case, afford a complete remedy.

Story, Eq. Jur. § 717.

Contracts concerning goods, wares, and merchandise, and other ordinary chattels, or public and other stocks or securities which have a market value and sale, are not specifically executed.

Pom. Eq. Jur. § 1402; Pom. Spec. Perf. § 47.

Equity will not interfere to specifically enforce a contract concerning a special chattel, or to compel its delivery, when its pecuniary value has already been fixed by the parties, or can be readily ascertained, so that an adequate compensation in the form of debt or damages can be recovered in a legal action.

Pom. Spec. Perf. 17, § 12, citing *Dowling v. Betjemann*, 2 J. & H. 544, 8 Jur. N. S. 588.

A party may by his own acts put a certain value upon a special chattel, which can be recovered at law, and which, being his own estimate, will be taken as a sufficient compensation.

Pom. Spec. Perf. 17, 18, note; *Miller v. Scammon*, 52 N. H. 610.

Smith, J., delivered the opinion of the court:

The plaintiff agreed to sell his yacht, claimed and admitted, for the purpose of the question of jurisdiction, to be worth \$6,000, for 60 shares of stock in the Abbott-Downing Company, found to be worth \$3,600. This executory contract, entered into August 14, 1884, was rescinded six days afterwards by the defendant's guardian. The plaintiff seeks to enforce, and the defendant resists, specific performance of the contract. Equity does not ordinarily interpose to enforce specific performance of a contract respecting personal property, unless an adequate remedy at law cannot be had. *Hill v. Rockingham Sav. Bank*, 44 N. H. 567, 568. If, in this case, the contract had been that the defendant should pay for the yacht in money, the plaintiff could not maintain a bill for specific performance without showing that his remedy by an action at law was inadequate. *Noyes v. Marsh*, 123 Mass. 286, and cases cited. His measure of damages would be the difference between the value of the property at the time of the breach of the contract and the price fixed by the contract. We do not see that the result is different because payment was stipulated to be made in shares of a corporation. If the value of the stock be regarded as the contract price of the yacht, the question still is: How much are the plaintiff's damages by reason of the defendant's refusal to purchase his yacht?

It is not shown that an award of damages for the breach of the contract will not do exact justice between the parties. The general rule in regard to contracts for the sale of stocks may be stated to be, that specific performance will not be decreed, because such contracts are capable of exact compensation in damages. 2 Story, Eq. Jur. § 724. This rule is especially true of contracts for the sale of government stocks or bonds, which are always readily purchasable at their market value. Specific performance of contracts for the sale of stocks in purely private corporations, such as banking, mining, manufacturing, and commercial companies, has sometimes been decreed, upon the ground that damages at law do not furnish an adequate remedy for the breach. In *Cushman v. Thayer Mfg. Co.* 76 N. Y. 868, stress was put upon the fact that the controlling motive of the purchaser may have been that the real worth of the stock may consist in the prospective rise which he anticipates might follow, or that his desire was to hold the stock as a permanent investment. See also *White v. Schuyler*, 1 Abb. Pr. N. S. 300. The criterion whether there is an adequate remedy at law has been said to depend upon the fact of the purchasability in the market of the stock contracted for. 22 Am. Law Reg. N. S. 499, 500. The authorities, however, are conflicting. In *Foll's App.* 91 Pa. 434, decided in 1879. Payson, J., said: "I know of no instance in this State

in which a court of equity has decreed specific performance of a sale of stock." In *Todd v. Taft*, 7 Allen, 371, the point that the plaintiff had an adequate remedy at law was not raised. In *Cud v. Rutter*, 1 P. Wms. 570, a decree for specific performance of a contract to deliver South Sea stock was denied, because the plaintiff might buy of any other person, and be no more out of pocket than if the stock were delivered to him according to the agreement. In *Cappur v. Harris*, Bunbury, 135, the plaintiff was left to his remedy at law. But in *Nutbrown v. Thornton*, 10 Ves. 161, and in *Mason v. Armitage*, 13 Ves. 37, specific performance was decreed. In *Ross v. Union P. R. R. Co.* 1 Woolw. 26, Miller, J., said he saw no sound reason for any distinction between shares of the defendant company and government stocks, and that the rule in regard to them should be the same. In *Ashe v. Johnson*, 2 Jones, Eq. 149, specific performance was decreed. And see 2 Story, Eq. Jur. 13th ed. § 767 a, note a.

There are many other cases bearing more or less directly upon the question, which it is unnecessary to speak of in detail. We do not hold that specific performance of a contract for the sale of stock or shares in a manufacturing corporation cannot be decreed under any circumstances; but this case comes within the general rule that equity jurisdiction for enforcing such performance is based on a want of adequate remedy at law. The stock of the Abbott-Downing Company is not commonly offered for sale, and actual sales are very rare. The plaintiff may be unable to purchase an equal number of shares for the same price. But there is no evidence tending to show that he had any wish, or reason for wishing, to become the owner of the Abbott-Downing Company stock rather than any other stock of equal pecuniary value, or that he would not have agreed to take any other stock of equal value in payment of the yacht, or a sum of money equal to that value. 3 Pars. Cont. 370, 371.

The plaintiff contends that the defendant can maintain a bill for specific performance of the contract in regard to the sale of the yacht, and may therefore be compelled to specifically perform the same contract; in other words, he invokes the aid of the rule of mutuality of remedy. It is said in some of the text-books that equity interferes to decree specific performance of a contract where the remedy is mutual. 2 Story, Eq. Jur. § 723; Pom. Spec. Perf. § 165; Adams, Eq. 80; Batten, Spec. Perf. 66. Parsons says the meaning of the rule is not very clear, nor is it easy to make a satisfactory classification of the cases in which it has been announced as the ground of decision. 3 Pars. Cont. 6th ed. 409, note t. It has been held in England that an infant cannot maintain a suit for specific performance of a contract, because the remedy is not mutual. *Flight v. Bolland*, 4 Russ. 298. The same reason might not exist in this State. *Hall v. Butterfield*, 59 N. H. 354; *Bartlett v. Bailey*, 59 N. H. 408. So where the plaintiff is insolvent, or is a servant employed to perform services of trust, it has been held he cannot maintain such a bill. 3 Pars. Cont. 409, note t. But these are cases where the

remedy is not mutual, because the party does not stand on an equal footing.

Equity will decree performance of a contract for land because the damages recoverable at law may not be a complete remedy to the purchaser, to whom the land may have peculiar value. 2 Story, Eq. Jur. § 717. The cases are numerous where the vendor maintained a bill for the specific performance of a contract for land, and to compel payment of the purchase money. *Hwins v. Gordon*, N. H. 444. Equity compels specific performance in favor of the vendor, not on the ground of mutuality of remedy, but because compensation in damages, measured by the difference in price, as ascertained by the market value, and by the contract, is not regarded as adequate indemnity for the nonfulfillment of the contract. *Jones v. Newhall*, 115 Mass. 248; *Old Colony R. R. v. Evans*, 6 Gray, 20. The English courts the doctrine of equity conversion is held to be an additional ground for exercising chancery jurisdiction to compel specific performance of contracts for the sale or purchase of land. Fry, Spec. Perf.

The rule of mutuality of remedy is of English origin. 1 Spence, Eq. Jur. 220, note 8 Pars. Cont. 350, note a. In that country there is no limitation upon the jurisdiction of their chancery courts, except so far as is fixed and defined by usage. For no reason apparently than the arbitrary one that the remedy should be mutual, the rule has been established that either party might maintain a bill for specific performance if the other could, although the party bringing the bill could have no other relief than the recovery of the same amount of money or damages which would be recovered in a suit at law. *H. Warren*, 9 Ves. 605; *Walker v. Eastern Counties R. Co.* 6 Hare, 594; *Kenney v. Wezham*, 6 Mad. 355. In Massachusetts the jurisdiction of their court to decree specific performance of a contract is limited to cases where the parties have not a plain, adequate, and complete remedy at the common law." Neither that Statutor in Pennsylvania does the English rule of mutuality of remedy seem to be followed in its fullest extent. *Jones v. Newhall*, 115 Mass. 244, 251; *Kouffman's App.* 5 Ves. 388. It may be found upon examination that much of the obscurity in the cases upon this subject may be due to the failure to recognize the difference in the chancery powers of the courts of the different States. One legal writer says the arguments in support of the rule "are often mere repetitions of time-worn verbal formulas which, when clearly analyzed, are found to have no real force or meaning." Pom. Spec. Perf. § 169. See *Walker v. Eastern Counties R. Co.* 6 Hare, 594; *Kenney v. Wezham*, 6 Mad. 355; *Withy v. Cottle*, 1 Sim. & Stu. 174; *Adams v. Dixon*, 1 Sim. & Stu. 607; *Cogent v. G. 33 Beav. 557*. Equity, as a branch of the law, has always existed as a part of the common law, in its broadest sense, in New Hampshire. *Wells v. Pierce*, 27 N. H. 503, 512; *Penn v. Kimball*, 63 N. H. But it has never been held in this State, so far as we are aware, that our reports do not show that a party is entitled to a decree for specific performance

without regard to the fact whether his remedy at law is plain, adequate, and complete, merely because the other party would be entitled to it if he should ask for it. We do not say, however, that cases may not arise where equity, upon the principle of an even-handed dealing, may not afford the relief of specific performance under such circumstances. The rule appears to have been applied with greater strictness in the older than in the later decisions. "Indeed, the rule so far as it relates to the mutuality of the remedy alone is evidently based upon no principles of abstract right and justice, but, at most, upon notions of expediency." Pom. Spec. Perf. § 169. A technical rule is, or should be, subordinate to the general inquiry whether a party requires other and better relief than a suit at law can give.

The rule, however, as stated in the cases, is far from being universal. Specific performance of contracts in regard to personal property is decreed only when the vendor stands in need of the specific relief which a court of equity only can give. *Kauffman's App.* 55 Pa. 383; *Memphis v. Brown*, 20 Wall. 289 [87 U. S. bk. 22, L. ed. 264]. Indeed, in this respect there is no distinction between real estate and personal estate. 2 Story, Eq. Jur. § 717. Hence it is a well-established rule that relief by a decree for specific performance of a contract is not a matter of right in either party, but rests in the discretion of the court. *Pickering v. Pickering*, 38 N. H. 400; *Eastman v. Plumer*, 46 N. H. 464; *Willard v. Tayloe*, 8 Wall. 557 [75 U. S. bk. 19, L. ed. 501]. The discretion to be exercised, however, is not of an arbitrary and capricious character, but, in the language of Story, "that sound and reasonable discretion which governs itself, so far as it may, by general rules and principles, and at the same time grants or withholds relief according to the circumstances of each particular case, when those rules and principles will not furnish any exact measure of justice between the parties. On this account, it is not possible to lay down rules or principles which are of absolute obligation and authority in all cases." 2 Story, Eq. Jur. § 742. The question of discretion is a question of fact; and the question of fact often is the adequacy of the remedy at law under the circumstances of a particular case.

Equity enforces specific performance when there is no adequate remedy at law. This is the ground of this branch of equity jurisdiction; and it is not consistent with the test of mutuality of remedy. When payment is to be made in money, mutuality of remedy is not the test for the right to this remedy; and when the exchange on one side differs neither in purpose nor reason from a sale for money, the remedy of specific performance need not be mutual. The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner (*Evins v. Gordon*, 49 N. H. 444, 457), but not necessarily enforceable on both sides by specific performance. In this case the exchange, on the side of the defendant, differs neither in purpose nor reason from a sale for money. The plaintiff was benefited, not injured, by the defendant's breach of the contract. Specific performance is a remedy decreed only in case

of want of adequate relief at law. Here there is no such want, and equity does not require a remedy by which the plaintiff would be injured to the amount of \$2,400. But if the plaintiff was injured by the breach, it is not found as a fact, nor can it be inferred as matter of law from the facts that the plaintiff's remedy at law is not convenient and complete; and for this reason the bill cannot be maintained.

Bill dismissed.

Carpenter, J., did not sit; the others concurred.

John GAGE

v.

George E. BARNES.

1. Where the owner of water-rights conveyed the right to take the entire water from a dam and convey it over his land to a mill site below, to be there used for mill purposes, except a single use in a certain time, which, by reference, was fully defined in the reserving clause of the deed,—*Held*, that the reference in the exception to the language in the reservation, stating when and to what extent the grantor might use the water excepted, made it a part of the exception; and it has the same effect as if it had been stated in full in the part of the deed describing the right and uses conveyed.
2. Where a deed conveys the right to erect a dam, as to the location of which as described in the deed there is no dispute, evidence offered to prove a different location from the one described, as having been agreed upon prior to the execution of the deed, and not referred to in it, is inadmissible.

(Merrimack—Decided March 11, 1887.)

CASE for diverting the water of Pond Brook from the plaintiff's mill, against the provisions of a deed from the defendant to the plaintiff. Report of a referee for the plaintiff. *Judgment for plaintiff.*

The deed from Barnes to Gage, after describing the premises by boundaries, proceeded as follows:

"Together with the right to erect and maintain in the rear of the said Barnes' mill a dam across said Pond Brook; the top of said dam not to be higher than a drill hole in a rock upon the easterly side of said brook, at or near the easterly end of said dam; to be erected by said Gage as aforesaid; and the said Gage may carry the water from said dam, on the westerly side of said brook, in a penstock or canal, across the land of said Barnes to any point within the premises herein conveyed; and for the purpose of constructing and keeping in repair said penstock or canal, the said Gage, his heirs and assigns, may enter the said premises of the said Barnes, in a reasonably careful way, and said Gage may use said water for any mill purposes upon the premises herein conveyed, except it be for a grist mill, cider mill, or shingle mill, while the said Barnes,

his heirs or assigns, may be operating a grist mill, cider mill or shingle mill, as hereinafter provided; and we hereby reserve to ourselves, our heirs and assigns, the right to draw water from said Pond Brook, above the dam to be constructed by said Gage, sufficient to carry a grist mill, cider mill, bench saw or shingle mill, whenever the same can be done without diminishing or impairing the head or power which the said Gage may obtain by the erection of his dam as aforesaid; and the same is not to be run or operated by us, our heirs or assigns, whenever it cannot be done without permitting any water to run to waste; and we hereby bind ourselves, our heirs and assigns, not to permit or suffer any shavings or waste material to escape into the said Gage's penstock or canal."

The case is stated in the opinion.

Mr. Charles P. Sanborn, for defendant:

The deed of May 7, 1877, conveys by metes and bounds a certain tract of land lower on the brook than the defendant's premises. The right to erect and maintain a dam and penstock or canal upon the land of the defendant, under certain conditions, is also granted; and here the grant ends.

The report finds that a second dam was to be built above the premises of the defendant, by the plaintiff, on land of one Rice, for the purposes of a reservoir; and that the defendant claimed that the dam mentioned in the deed was this reservoir dam. The evidence offered by the defendant as to monuments on the ground pointed out at the time of the making and execution of the deed, under the circumstances of the case, seems to us material.

The construction of the deed should be considered with regard to principles of justice and equity between the parties, mindful of their situation; and to say that the defendant gave away his land, a valuable mill privilege, and practically all rights he had in his own land for his own mill privilege, for no compensation, seems both unjust and inequitable. The undoubted meaning was that the defendant should have the right to draw water from the reservoir dam, under the restrictions named; and testimony offered tending to show that such was the understanding and agreement was, we think, improperly excluded.

Messrs. Albin & Martin, for plaintiff:

The referee, after thoroughly stating the case and finding everything for the plaintiff, thus sums up his conclusions: "The referee found that the defendant had run his mill in such a way as to diminish and impair said head or power [meaning the head or power at the plaintiff's mill], and also in such a way as to permit water to run to waste." For these injuries he assessed damages at \$600.

In his deed to the plaintiff, the defendant covenanted that he would not do the very things which the referee has found that he did do. To quote from his deed: "And the same [meaning the defendant's mill] is not to be run or operated by us, our heirs or assigns, whenever it cannot be done without permitting any water to run to waste." This was one of his covenants, solemnly set out in his deed, which the referee's report shows him to have broken. From the way in which the premises were situated, and from the character of the stream,

as disclosed in the case, it is plain that permitting water to run to waste would diminish and impair the plaintiff's head or power. It is patent from the deed itself that the parties understood that the defendant, in the maintenance of his own mill, was to so conduct as to diminish or impair the power obtained by the plaintiff "by the erection of his dam as aforesaid." The dam referred to was the one in the rear of the defendant's mill. That was the only dam mentioned in the deed, and hence it could not have been the one at the Rice reservoir. The defendant's counsel attempted to vary the terms of the deed by putting the question to the defendant as to a location pointed out. The question was therefore rightly excluded.

To say that the plaintiff is not entitled to judgment of \$650 is, in effect, setting aside the covenants which induced the plaintiff to take the deed and make the large expenditure required in building his mill and developing water-power, which has largely enhanced the value of the defendant's mill property.

Bingham, J., delivered the opinion of the court:

The claim of the defendant is that his deed only gave the right to erect and maintain a dam and penstock on his land, and that, on other respects, the right of upper and lower riparian proprietors were created by it. An examination of the deed does not sustain the claim. The deed conveyed the right to use the entire water from the dam and conveyed over the defendant's land to the mill site below, to be there used for mill purposes, except a single use in a certain time, which, by reference, is fully defined in the reserving clause of the deed. The reference in the exception to the language in the reservation, stating what and to what extent the defendant might use the water excepted, made it a part of the exception; and it has the same effect as if it had been stated in full in the part of the deed describing the right and uses conveyed. Such was the intention of the parties; and the deed conveyed a water-right which the defendant has infringed.

There was no dispute as to the location of the dam described in the deed. The evidence offered to prove a different location from one described, as having been agreed upon prior to the execution of the deed, and not referred to in it, was properly rejected. *W. v. Jackson Iron Mfg. Co.* 47 N. H. 236.

Judgment for the plaintiff.

Carpenter, J., did not sit; the others concurred.

C. F. HOLT *et al.*

v.

Town of ANTRIM *et al.*

1. In the case of a tax for building a schoolhouse to be leased to an academy corporation for school purposes, as in the case of turnpikes, tollbridges and railroads, the test of the public character of the use is not a right of enjoying the property wholly at the pleasure

expense, but a common and equal right, free from unreasonable discrimination.

2. The corporation accepting the lease accepts it with the legal construction, and subject to all implied conditions, necessary to give validity to the tax and the lease.

(Hillsborough—Filed March 11, 1887.)

ON defendants' demurrer. *Sustained.*

Bill in equity by taxpayers in the town of Antrim against the town and the Antrim Academy, for an injunction to restrain the defendants from carrying into effect certain votes of the town, passed at the annual meeting, 1884, recited in the bill substantially as follows:

"1. That the town build an academy building upon land donated to the Antrim Academy Association by D. M. Weston, to cost not exceeding \$10,000, whenever \$15,000 is given to this association as a permanent fund, and when the trustees of said Academy Association shall have contracted with responsible parties with ample sureties to build and complete said building according to plans and specifications furnished by said trustees.

"2. To instruct the selectmen to hire a sum not to exceed \$10,000 to build an academy building. When the conditions of the foregoing vote are complied with, said sum to be paid to the trustees.

"3. That the committee be chosen by the trustees of the academy, and that they shall have the same powers as though chosen by the town."

These votes were passed under the supposed authority of the Laws of 1888, chap. 202, § 5, and the Antrim Academy corporation was organized under the charter granted by said Act.

The plaintiffs claim that § 5 of the Act is unconstitutional, and that said votes are illegal and unauthorized by any law of the State. The defendants demurred to the bill.

Mr. C. H. Burns, for defendants.

Mr. George B. French, for plaintiffs:

The votes of the town of Antrim, set forth in the reserved case, are not warranted by the authority and powers granted to towns by the general provisions of the laws of this State.

Batchelder v. Epping, 28 N. H. 354; *Stetson v. Kempton*, 13 Mass. 272; *Parsons v. Goshen*, 11 Pick. 396; *Norton v. Mansfield*, 16 Mass. 48; *Minot v. West Roxbury*, 112 Mass. 1, 3, 4; *Spaulding v. Lovell*, 23 Pick. 71, 79; *Cushing v. Newburyport*, 10 Met. 508, 513, 520, 521.

Quite a full discussion of the extent and limitation of the authority and powers granted towns is found in the last two cases cited, and it is clear that neither the usage alluded to in the one case (23 Pick. 79) can be relied on to sustain the legality of these votes, nor the propriety of providing for town schools illustrated in the other.

If we gather together the various provisions in our General Laws providing for schools, the following will be found to approach the nearest to authorizing such votes.

Chap. 90, §§ 11, 15; chap. 87, § 4; chap. 86, §§ 3, 14-16; chap. 88, §§ 1, 14, 15.

But chap. 90, § 15, evidently contemplates contracts for tuition, and not the erection of

buildings. The other provisions, chapters, and sections relate to town schools and the general school fund. The buildings to be erected are to belong to the district, districts, or town, as the case may be.

Concord v. Boscawen, 17 N. H. 465-468.

Shall the establishment of a private institution of learning in any town, by an individual or corporation, be taken to be a matter of such public nature and interest that the Legislature can authorize a town to appropriate the property of its citizens for its encouragement and support, independent of any tuition guaranteed to its citizens, or any compensation or recompense assured? We are content to ask this question and cite the authorities without comment:

Concord R. R. v. Greely, 17 N. H. 47, 55-57; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444, 456; *East Kingston v. Towle*, 48 N. H. 57, 59-61; *Orr v. Quimby*, 54 N. H. 606, 607; *Perry v. Keene*, 58 N. H. 514, 520, 525, 531, 532, 534; *Bowles v. Landaff*, 59 N. H. 164-166, 169, 174, 190; *Cooley*, Const. Lim. 129; *Lowell v. Boston*, 111 Mass. 454.

The votes of the town do not carry out the intent of the Act of the Legislature (Laws 1888, chap. 202, § 5), to wit, that the town, after it shall have raised and expended this large sum for a small town, shall own something which it can preserve and control perpetually on the spot where it is first located.

The use being by the association, and that use intended to be "perpetual," the title would be in the association.

Manning v. Fifth Parish in Gloucester, 6 Pick. 6, 19; *Bean v. Brackett*, 34 N. H. 118.

Bingham, J., delivered the opinion of the court:

Section 5, chap. 202, Laws of 1888, authorizing the town of Antrim to raise \$10,000 by loan or taxation "for the purpose of erecting a school building," and to give a perpetual lease of the same to a corporation called Antrim Academy, "for school purposes, without payment of rent," is to be so construed, if it reasonably may be, as to be consistent with a presumed legislative intent not to give an unconstitutional and void sanction to taxation for a private purpose. 41 N. H. 555; *Cooley*, Const. Lim. 184, 185; 2 Dill. Mun. Corp. 3d ed. § 736; *Cooley*, Tax. 2d ed. 55, 103; *Parkersburg v. Brown*, 106 U. S. 487 [Bk. 27, L. ed. 238]; *Weismer v. Douglas*, 64 N. Y. 91, 101, 103.

Local education is a local purpose for which legislative power may be delegated to towns. *State v. Hayes*, 61 N. H. 264. The amount of money to be raised for schoolhouses and other educational purposes is determined, under some restrictions, by municipal corporations. *Sargent v. School District*, 63 N. H. 528, 532, 533, 2 New Eng. Rep. 290. A tax raised for a free public school and a free public school-house is raised for a public purpose; and the purpose is not made private by a mere exaction of tuition. The Legislature could require the payment of tuition in the common schools. Land taken for a highway is taken for a public use, whether the use is free, as in ordinary roads and bridges built by towns, or subject to tolls, as in other highways (turn-

pikes, tollbridges, ferries, railroads, and canals) constructed by other corporations. Land may be taken for public gristmills, though toll is to be paid; and for public aqueducts, gas pipes, and telegraphs, though the water and gas are to be sold, and the transportation of messages is not to be free. In these instances, the legal test of the public character of the use is not a right of enjoying the use of the land wholly at the public expense, but a common and equal right, free from unreasonable discrimination. *Perry v. Keene*, 56 N. H. 514, 535, 539, 543; *Cooley*, Tax. 2d ed. 119-124.

When not controlled by the exercise of judicial and executive power, the municipal and official management of free roads, as well as the corporate management of toll roads, may infringe public rights of use. But as the possibility of such remediable wrong does not prohibit the legislative exercise of the power of eminent domain for laying out, or the power of taxation for buying and building, such ways; so a possible violation of a public right of using the proposed public schoolhouse in Antrim does not prohibit an appropriation of public money for the acquisition of the right. The common and equal privilege of use will be enforceable by adequate remedies. *McDuffee v. Portland & R. R. R.* 52 N. H. 430, 451. A schoolhouse tax or a highway tax is not invalidated by the possibility that an injunction or other appropriate process of law will be necessary to prevent an illegal use of the house or way, or to maintain the public right of legal use.

The lessee of the proposed schoolhouse will hold it in trust for the public service to which it will be devoted by the statute and the Constitution; and the court cannot assume that the trustee's duty will not be promptly, constantly, and thoroughly performed. In the Act authorizing the lease, there is no evidence of an unconstitutional purpose; and there is no legal presumption of such a purpose on the part of the Legislature, the town, or the academy corporation.

A reservation of all rights necessary to make this Antrim appropriation a constitutional expenditure of public money is naturally and reasonably implied. The corporation accepting the lease will accept it with the legal construction, and subject to all the conditions necessary to give validity to the statute and the lease. They will voluntarily assume every fiduciary obligation required to sustain the enjoyment of the common and equal right essential to the public character of the use for which they, as public servants, will be entrusted with the possession of the building. They will be as firmly bound by the restrictions imposed by the proviso of article 83, and all other constitutional requirements applicable to their trust, as if every item of their duty established by the paramount law were expressly and fully set forth in the lease. Under their supervision, the use of the property, conformed to all express and implied conditions, will be public and legal in every sense demanded by the property rights of taxpayers, and the educational rights of all entitled to the direct and indirect advantages of the tax.

In *Evergreen Cemetery Association v. Beecher*, 53 Conn. 551, 2 New Eng. Rep. 308, a petition

for leave to take land for a cemetery power of eminent domain was held bad murrer because it did not show there be a public right of burial in the land. The question of statutory construction was considered. In an Act authorizing a right to be taken for the road of a turnpike company, the public right of using the road was not expressly asserted. Laws 1833, 1486; Laws 1859, chap. 2314; Laws 1870, 62, 63. The legal construction of such a statute is not that some public benefit indirectly flowing from a private use of the land is a use of it; but that, by the exercise of power of eminent domain, the public has a right of way subject to the payment to the company who bear the expense, would be borne by the public if the road were free. An Act authorizing an abatement of the tax of an inhabitant who maintains a watering-trough beside a highway (Laws 1833, chap. 2122; Gen. Laws, chap. 57, § 13) is not negative, in direct terms, his power to include from the trough such portion of the traveling public as he chooses. The apportionment of his tax by the public to the maintenance of a watering-trough beside the highway, and the element of public purpose essential to the validity of taxation, sufficient to indicate the public character of the appropriation, and the equal right of those for whom the water is supplied. The public right of using a schoolhouse built by taxation rests on this case, on the same natural inference of legislative intention as that which sustains the turnpike or watering-trough Act in which the public right is not expressly declared.

Our Constitution does not contain a prohibition of taxation for the support of other public schools than those under the exclusive superintendence of town authorities. It was enforced in *Jenkins v. Andover*, 103 N. H. 94. School money of a town or school district may be applied to the payment of taxes at an academy in the town not under the superintendence of the town or district. Laws, chap. 90, § 15; and boards of education may contract with academies for instruction. Laws 1885, chap. 80, § 2; *Page v. Berhill Academy*, 63 N. H. 216; *Sargent v. School District*, 63 N. H. 528, 538, 2 New Eng. Rep. 290.

Private contributions added to a public appropriation for building a highway cannot make the way private (*Kelley v. Kennett*, 53 N. H. 1; *Cooley*, Tax. 139), and private contributions of fuel, board of a teacher, or money lengthening the term of a school, do not change the character of a school. *Allen v. School District*, 15 Pic. 381; *Chapin v. School District*, 35 N. H. 445. Laws, chap. 86, § 28; Laws 1885, chap. 4. As the public have the exclusive use of a fund increased by such contributions, a right of way taken for a turnpike sustained by a corporation whom they are not to displace, instead of the municipal surveyor of ways; so they will have the exclusive use of this Antrim Academy building and the land kept therein, though the building and the school will be superintended by an educational corporation created and selected by the town board of education.

use of the building the lessee will have no more private beneficial interest than the municipal school board would have if it were committed to their official care. This construction of the statute, by implication of law made a controlling stipulation of the lease, establishes the absolute and definite personal responsibility of the trustee, and the direct and exclusive nature of the public interest, the want of which was the ground of the decision in *Curtis v. Whipple*, 24 Wis. 850; *S. C.* 1 Am. Rep. 187.

The public use contemplated by the Legislature was not a mere public benefit incidentally or directly derived from a private school. Whether the doctrine of *Merrick v. Amherst*, 12 Allen, 500, 505-507, and other cases of that class (*Gordon v. Cornes*, 47 N. Y. 608; *Marks v. Trustees*, 87 Ind. 155; *Burr v. Carbondale*, 76 Ill. 455; *People v. McAdams*, 82 Ill. 856; *Hensley v. People*, 84 Ill. 544; *Livingston v. Darlington*, 101 U. S. 407, Bk. 25, L. ed. 1015), is consistent with the law of this State (*Bowles v. Landaff*, 59 N. H. 164, 192; *Berlin Mills Co. v. Wentworth*, 60 N. H. 156; *Cooley*, Tax. 2d ed. chap. 5), is a question not raised by the case. Nothing need be added to what was said in *Amoskeag Mfg. Co. v. Head*, 56 N. H. 386, 400; *Same v. Same*, 50 N. H. 332, 563; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522, of *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444.

Demurrer sustained.

Blodgett, J., did not sit; the others concurred.

WINNEPISIOGEE PAPER CO.

v.

EATON *et al.*

A deed cannot be reformed in an action at law.

(Merrimac—Decided March 11, 1887.)

CASE reserved. Discharged.

Covenant on the warranty of a deed made by the defendants to the plaintiff July 28, 1875. The plaintiff moved to reject a brief statement in which the defendants, after certain averments of fact, "request the court to so reform the deed executed by the defendants on July 28, 1875, that it will in all respects fully accord with the agreement, undertaking, and intention of the parties to it as above set forth; and that such judgment or decree be made by the court as will protect the rights of the defendants."

Mr. Daniel Barnard, for plaintiff:

The rule is that several persons contracting together with the same party, for one and the same act, shall be regarded as jointly, and not individually or separately, liable, in the absence of any express words to show that a distinct as well as entire liability was intended to fasten upon the promisors.

1 Chitty, Pl. 41; 1 Pars. Cont. chap. 11, § 1, and cases cited; Dicey, Parties, marg. pp. 112, 284, 229; 128 Mass. 466.

Messrs. Bingham & Mitchell, for defendants.

N. H.

Doe, Ch. J., delivered the opinion of the court:

The deed cannot be reformed in an action at law. The defendants can move at the trial term for leave to amend the pleading by filing a bill in equity. The question of the form of action is not considered when time spent upon it would be wasted (*Peaslee v. Dudley*, 63 N. H. 220, *Joyce v. O'Neal*, 64 N. H. 91, 2 New Eng. Rep. 907); but the reserved case shows no reason why the question of the defendants' right to relief in equity should be tried in the action at law; and convenience ordinarily requires that such a point should be tried and decided in an appropriate action, and upon an issue that will not invite a controversy on the question whether the parties are bound by the decision. *Parker v. Moore*, 63 N. H. 196, 197.

Case discharged.

Bingham, J., did not sit; the others concurred.

NELSON

v.

SANBORN and Trustee; BEDEL, Claimant.

In foreign attachment the trustee's acceptance of service of the writ is not an attachment upon which he can be charged against the defendant's objection.

(Grafton—Decided March 11, 1887.)

CASE reserved. Judgment for claimant.

Foreign attachment. Issue between the plaintiff and the claimant. The trustee wrote upon the back of the plaintiff's writ and signed an acceptance of service, as follows: "I hereby accept service of this writ and waive all rights to service by copy;" and no other service of the writ was made upon him. Shortly afterwards the defendant assigned the debt due to him from the trustee, to the claimant, who objects that there was no legal service of the writ upon the trustee, and that therefore he cannot be charged.

Mr. Samuel B. Page, for claimant:

An employer cannot assign the wages of an employee to a creditor by admitting service of a trustee writ. The statute prescribes the mode of attaching funds of a debtor in the hands of another. The provisions thereof have not been complied with.

Messrs. Smith & Sloane, for plaintiff:

The service of the writ in this case upon the trustee was sufficient. Gen. Laws, chap. 249, § 3, provides that "the writ shall be served upon the trustee like a writ of summons;" and chap. 223, § 2, provides that "a writ of summons shall be served by reading," the object of which is to get a person legally into court, which in this case was done. The trustee's indorsement upon the writ, with his appearance in court generally, is conclusive upon that point, so that the statutory requirements were complied with. The trustee had a right to waive any other service; and there was no legal objection to it; and no one has a right to

question his exercising such right, as it was a mere personal right.

Hanover v. Wearre, 2 N. H. 182; *Page v. Pendergast*, 2 N. H. 285.

No one could be injured thereby, but, on the contrary, it was a benefit to the defendant. All that is required to make a valid lien against the debt in the hands of the trustee is a notice to him—a mere summons. This express point was raised and decided in Vermont under a statute that is narrower than ours.

Cahoon v. Morgan, 38 Vt. 284.

The court, in the above case, distinguishes between an attachment of property and securing a lien upon a debt by trustee process.

The fact that the trustee duly appeared in court is also a complete answer to the objection that the trustee was not summoned; for we claim that when a party is not served with process, or the service is defective, and he appears generally, as was done in this case, it covers all defects of service, and it has relation back to the time of service; and if there was an appearance, no one could take advantage of the insufficiency of service except by plea in abatement.

Foster v. Haddock, 6 N. H. 218; *State v. Richmond*, 26 N. H. 245; *Lyman v. Littleton*, 50 N. H. 45; *White v. White*, 60 N. H. 210.

Carpenter, J., delivered the opinion of the court:

Service of the writ upon the trustee in the manner prescribed by the statute (Gen. Laws, chap. 249, § 3) is an attachment of the funds in his possession belonging to the defendant (*Blaisdell v. Ladd*, 14 N. H. 129, 130), and an essential step in the proceedings by which the property is appropriated, without the defendant's consent, to the payment of his debts. *Russell v. Dyer*, 40 N. H. 173; 43 N. H. 396; *Cahoon v. Coe*, 57 N. H. 556. The trustee's acceptance of service was not an attachment.

It was not in his power to create a lien upon the defendant's property. Compulsory payment under process of law, by the trustee to the plaintiff, will bar a recovery of the same debt by the defendant (*Woods v. Milford F. C. Sav. Inst.* 58 N. H. 184; *Palmer v. Woodward*, 28 Conn. 248), but his indebtedness will not be discharged by payment to the plaintiff, made

upon a judgment, after the attachment is dissolved (*Burnap v. Campbell*, 6 Gray, 241), or if the judgment was obtained through collusion with him, or by his willful default (*Wilkinson v. Hall*, 6 Gray, 568; *Whipple v. Robbins*, 97 Mass. 107; *Page v. Thompson*, 43 N. H. 373, 376).

In *Redington v. Dunn*, 24 N. H. 162, it was held that a trustee cannot, to the defendant's prejudice and without his consent, accept a discharge of service of the writ, and that a second service after such a discharge is invalid. The late *Chief Justice* Bellows, then of counsel for the plaintiff, conceded in argument that a trustee cannot accept service of the plaintiff's writ, and stated that he understood it had been so decided. In *Pratt v. Saborn*, 63 N. H. 115, a trustee was discharged on the motion of a subsequent attaching creditor, because, at the time of the service upon him, his name had not been inserted in the writ, although (as stated in the reserved case but omitted in the report) the trustee "appeared personally in court, and waived any defect in the writ or service."

The debt sought to be attached belonged to the defendant. He had a right to insist that if it was to be taken from him against his will, and applied to satisfy his indebtedness to the plaintiff, it should be done in the mode pointed out by the statute. The trustee could waive his own, but not the defendant's rights. He could no more waive an attachment than he could the exemptions from attachment (Gen. Laws, chap. 249, §§ 40, 42), or the defendant's right that his property shall not be taken by this process in an action of slander (Gen. Laws, chap. 249, § 1; *Raymond v. Rockland Co.* 40 Conn. 401).

It is unnecessary to consider the question whether an erroneous but unreversed judgment, charging a trustee who has accepted service of the writ, and payment of the judgment, would discharge him from liability to the defendant for the same debt. Gen. Laws, chap. 249, § 43; *Webster v. Lowell*, 2 Allen, 128; *Barker v. Garland*, 22 N. H. 103, 106; *Fowler v. Brooks*,—

Judgment for the claimant.

Allen, J., did not sit; the others concurred.

MAINE.

SUPREME JUDICIAL COURT.

STATE of Maine

v.

John HOWLEY.

An allegation of prior conviction, in a complaint for search and seizure, is sufficient when it alleges that the respondent had been convicted "of unlawfully keeping and depositing intoxicating liquors with intent * * * that said liquors should be sold in this State in violation of law."

(Cumberland—Decided March 8, 1887.)

ON exceptions by defendant. *Overruled.*

The headnote states the question raised.

Mr. D. A. Meagher, for defendant.

Mr. George M. Seiders, County Attorney, for the State:

The allegation of a prior conviction is sufficiently definite. It is not necessary to set out particularly the record in alleging a prior conviction.

Rev. Stat. chap. 27, § 57; 65 Me. 248; 39 Me. 150; 69 Me. 573.

Per Curiam: There is no point raised on these exceptions which has not been determined adversely to the respondent in previous decisions, unless it be the objection that it was not alleged, in that part of the complaint covering previous convictions, that the liquors were intended for sale by the respondent himself, the allegation being that the intent was "that said liquors should be sold in this State in violation of law." But by Rev. Stat. chap. 27, § 40, it is declared that a respondent shall be adjudged guilty, under the search and seizure clause, if it be found that the liquor was kept for unlawful sale by the respondent, "or by any other person with his knowledge or consent." If the respondent keeps the goods for another to sell unlawfully, the offense is made out.

Exceptions overruled.

John R. HORNE

v.

C. P. STEVENS, and Lewiston Steam Mill Co., Trustee. Charlotte Rowell, Claimant.

The assignee of a part of a fund in the possession of an alleged trustee may claim and hold the same in the trustee process.

(Androscoggin—Decided March 8, 1887.)

ON exceptions by claimant. *Sustained.*

Trustee process in which Charlotte Rowell appeared, by leave of court, and claimed a part of the fund in the possession of the alleged trustee, by virtue of an assignment of the same to her by the principal defendant before the commencement of the suit. The trustee had no notice of this assignment until after the commencement of the suit.

Messrs. W. & H. Heywood, for claimant:

ME.

That the assignment in this case would make a valid transfer if it had been of the whole fund, and at least gave the claimant an equitable right to the fund, which court will protect, see—

Bartlett v. Pearson, 29 Me. 9; *Hardy v. Colby*, 42 Me. 381; *Pollard v. Somerset Mut. F. Ins. Co.* 42 Me. 221.

An assignment of a debt may be made by parol, or may be inferred from the conduct and acts of the parties.

Garnsey v. Gardner, 49 Me. 167.

In the case of *Nat. Exchange Bank v. McLoon*, 73 Me. 498, trustee and claimant, it was held that an assignment of a part only of an entire demand is valid so as to be upheld in equity against the assent of the debtor.

Rev. Stat. chap. 86, § 82, distinctly provides that notice of an assignment to the trustee before his disclosure is in time to protect the interest of the person claiming under the assignment, and makes it necessary that such claimant should become a party to the trustee suit.

Rev. Stat. 1883, p. 735, § 32.

That such is the effect of the statute of Maine just cited has always been held by the court.

Milliken v. Loring, 37 Me. 408; *Bunker v. Gilmore*, 40 Me. 88; *Larrabee v. Knight*, 69 Me. 320.

Mr. R. N. Chamberlain, for plaintiff:

This court has decided that an assignment of part of an entire chose in action cannot be upheld in a court of law against the consent of the person owing the demand assigned (*Mandeville v. Welch*, 5 Wheat. 277 (18 U. S. bk. 5, L. ed. 87); *Tiernan v. Jackson*, 5 Pet. 580 (80 U. S. bk. 8, L. ed. 234); *Gibson v. Cooke*, 20 Pick. 15; *Robbins v. Bacon*, 3 Me. 346); and that an assignment of part of an entire chose in action will be upheld in a court of equity (*Nat. Exchange Bank v. McLoon*, 73 Me. 498).

In *Bartlett v. Pearson*, 29 Me. 15, the case finds that the debtor had notice of the assignment. The court say: "The assignment made by Lawrence to his creditor conveyed the equitable title to the balance due from defendant to Lawrence at the time when defendant had notice of the assignment."

In *Hardy v. Colby*, 42 Me. 382, the administratrix had notice of the assignment before the service of the trustee process upon her.

In *Pollard v. Somerset Mut. F. Ins. Co.* 42 Me. 224, the defendant had notice and assented to the assignment.

Garnsey v. Gardner, 49 Me. 167, is not in point, as it was an action between assignor and assignee.

There are some cases that hold that an equitable assignment of a fund is good against the assent of the debtor; and as we read the case of *Nat. Exchange Bank v. McLoon*, *supra* (the case relied upon by claimant's counsel), that is all the court decides. There are many cases in the different States that support our view.

Conway v. Cutting, 51 N. H. 407; *Garland v. Harrington*, 51 N. H. 409; *Farmers & Mechanics Bank v. Drury*, 35 Vt. 469; *Peck v. Walton*, 25 Vt. 33; *Webster v. Moranville*, 30 Vt. 701; *Dale v. Kimpton*, 46 Vt. 76; *Holmes v. Clark*, Id. 22; *Austin v. Ryan*, 61 Vt. 118; *Vanbushkirk v. Hartford F. Ins. Co.* 14 Conn. 144. See also *Hawley v. Bristol*, 39 Conn. 27; *Foster v. Miz*,

20 Conn. 400; *Peters v. Goodrich*, 8 Conn. 146; *Woodbridge v. Perkins*, 8 Day, 364; *Manwaring v. Griffing*, 5 Day, 561; *Judah v. Judd*, Id. 534; *St. John v. Smith*, 1 Root, 157.

We think the court must have had this distinction in mind when considering the case of *Nat. Exchange Bank v. McLoon*, *supra*, as in all the cases cited in support of the doctrine in *Nat. Exchange Bank v. McLoon*, both English and American, which we have had an opportunity to examine, notice of assignment was given, although the debtor in some refused to be bound by the assignment.

See *Brice v. Bannister*, 3 Q. B. Div. 569.

Milliken v. Loring, 37 Me. 408, simply decides that if the trustee have notice of any claim by third parties, it is his duty to disclose it to the court to protect himself.

Messrs. Twitchell & Abbott, also for plaintiff.

Peters, Ch. J., delivered the opinion of the court:

This case is governed by the case of *Nat. Exchange Bank v. McLoon*, 78 Me. 498. The judge who heard the evidence decided, as matter of fact, that the principal defendant had assigned a part of his debt against the trustee to the claimant. Precisely that fact existed in the case referred to. Notice of the assignment was given to the trustee before his disclosure, which in our practice was seasonable.

Exceptions sustained.

Walton, Virgin, Libbey, Emery, and Haskell, JJ., concurred.

Albion S. BURGESS

v.

DENISON PAPER MANUFACTURING CO.

The defense of **accord and satisfaction** is not made out by showing that the plaintiff agreed to take the deed of a third party in settlement, and the defendant had procured the deed and notified the plaintiff to call for it. **The deed must be delivered or tendered.**

(Oxford—Decided March 8, 1887.)

ON exceptions and motion by the defendant.

Overruled.

The point is stated in the opinion.

Mr. J. P. Swasey, for defendant.

Mr. H. A. Randall, for plaintiff.

Peters, Ch. J., delivered the opinion of the court:

The plaintiff has a claim against the defendant for labor. The defendant relies on an alleged accord and satisfaction, contending that the plaintiff agreed to take a deed from a third party in satisfaction of his claim. The defendant obtained the deed, but did not deliver it, relying on the plaintiff to call for it. "The accord is the agreement for the reception of the thing in discharge of the debt; the satisfaction is the actual reception of the thing." *Whart. Cont. § 996; Bragg v. Pierce*, 58 Me. 65. Here there was accord but not satisfaction. The deed

was not received. Nothing short of an actual reception of the deed would constitute a fence.

Exceptions overruled.

Walton, Virgin, Libbey, Emery, Haskell, JJ., concurred.

John HEALD

v.

Hiram MOORE *et al.*

1. The statutory rule that a way shall be considered discontinued unless opened within six years from the time allowed therefor does not apply to a new way laid out over an old way, adding a half rod in width to each side.
2. Traveling on the old way is traveling on the new; it accepts the additional width, and secures it to the public, although the fences of the adjoining landowners remain on the line of the old road.
3. The rule that a fence which has continued by the side of a way for forty years shall conclusively indicate the line of the road is interrupted by laying out a new way; and the forty years begin to run from the time of laying out the new way.

(Somerset—Decided March 8, 1887.)

ON exceptions by the plaintiff. *Overruled.* Trespass against certain of the municipal officers of the town of Madison and their employes, for removing plaintiff's fence from the limits of a way in that town.

The facts appear from the opinion.

Messrs. Walton & Walton, for plaintiff.

We claim that if there be nothing done in the town for six years to indicate a purpose to take that additional rod, it cannot be done afterwards.

Rev. Stat. chap. 18, § 86.

The landowner is to have damages if the land is taken, and not till then.

Rev. Stat. chap. 18, § 7.

We ask, then, how there is any taking if a road as used is exactly as before the localities and the landowners still occupying up to fences which mark the bounds of the three-rod road.

So far as the opening of the four-rod road is concerned, we say, in the language of *Taney, Ch. J.*, in *State v. Inhabitants of Cornwall*, 48 Me. 428: "It cannot be said, with propriety, that the road has been opened as a whole, when nothing at all has been done to that portion which constitutes three fourths of it [in case one fourth], and the remainder was already open and used before as such."

The same rule applies to land taken at the side of a road as that taken at the end of a road. There is no difference in principle. The only question is one of fact. Has the old road been abandoned? The mere use of the old road, continued as before, does not necessarily constitute an opening,—such an entering upon and taking possession of that outside the old road for the purpose of constructing a new road.

and use,—so far as the new portion is concerned, whether that new portion lies alongside or either end of the old road.

Petition of Mt. Vernon, 87 N. H. 515.

Such a construction should be given the statute as will protect the rights of owners of real estate who have purchased property by the side of the highways, the bounds of which are so uncertain that they have actually bought and paid for land which is really within the limits of the highway.

Inhab. of Danvers v. Essex County, 6 Pick. 20.

Messrs. Merrill & Coffin, for defendants:

It is well settled that a town way laid out by the selectmen is substantially different from a highway or county road (*Inhab. of Waterford v. Oxford County*, 59 Me. 450; *State v. Bigelow*, 34 Me. 246); highways are laid by county commissioners (Rev. Stat. chap. 18, § 1), town ways by selectmen (Rev. Stat. chap. 18, § 14).

The removal, by the duly authorized officers of the town, of the incumbrances, violated no right of possession of the plaintiff; and trespass therefore cannot be maintained against them or their servants acting under their authority.

Whittier v. McIntyre, 59 Me. 145.

When the county commissioners have, by due course of proceedings, located a highway in conformity with the statutes, and have closed such proceedings, the right of eminent domain has been fully exercised, "and the public thereby acquire a right to the easement, to be exercised as long as they please."

Kimball v. Rockland, 71 Me. 140; *Perley v. Chandler*, 6 Mass. 454; Ang. High. 898, § 803. See also *State v. Inhab. of Kittery*, 5 Me. 259.

Indeed, until changed by a recent statute, the law in this State was that the landowner's right to his compensation, as ascertained by the proper tribunal, was complete when the proceedings for the location of the way were closed, before any act was done towards fitting the land thereby appropriated for use as a way.

Kimball v. Rockland, *supra*.

The accuracy of a ruling upon a point of law will not be examined on exceptions, when the special findings of the jury upon the facts are such as to render the ruling immaterial.

Webber v. Read, 65 Me. 565.

To authorize a court to sustain exceptions it must affirmatively appear that the party excepting was aggrieved by the rulings to which exceptions were taken.

State v. Pike, 65 Me. 111; *Soule v. Winslow*, 66 Me. 451; *Kilpatrick v. Hall*, 67 Me. 543; *Boothby v. Woodman*, 66 Me. 387; *Decker v. Somerset Mut. F. Ins. Co.* 66 Me. 406.

Mr. C. A. Harrington, also for defendants.

Peters, Ch. J., delivered the opinion of the court:

Only one question in this case needs to be discussed, the findings of the jury having disposed of all others. And that question must be determined against the plaintiff, even accepting the interpretation of the facts as claimed by him. Let it be admitted that the case finds that in 1804 a town road was laid

out three rods wide, the centre line of which was the southerly boundary of plaintiff's land; that he built a fence on his side of the road and on his line; that there was also, at the same time, a fence on the other side of the road, the located road being three rods in width between fences; that the same fences have been continued on the same lines ever since they were built; that in 1846 the county commissioners laid out the road anew over the old location, but widening it on each side a half rod, thereby making it a four-rods road instead of three; and that a half rod in width of the located road on each side has been within the fences of the coterminous proprietors for thirty-seven years, the fences having existed more than forty years.

The plaintiff invokes certain statutory provisions as sustaining his claim. Rev. Stat. chap. 18, §§ 86, 95. One section provides that a highway which has been duly laid out shall be considered as discontinued unless actually opened within six years from the time allowed therefor. The other provides that a fence which has continued in the same place on a road for forty years will be justified in remaining thereon,—shall indicate conclusively the true line of the road.

It would seem to be a strange result if a forty-years continuance of a fence is to dictate the line of a road laid out less than forty years ago. Such cannot be the policy or the implication of the statute. The widened road became a new road. Plaintiff's fence did not exist on this road before 1846, because that was the beginning of this road's existence. Prior to that time the fence was upon another road,—a road of other dimensions. It is to be presumed that, when the road was widened in 1846, the plaintiff received damages for so much of his land as was taken, including compensation for the expense which a removal of his fence would impose upon him. Suppose the fence had been maintained for a full forty years prior to the proceedings of 1846. Would that fact have prevented the widening? Or suppose the forty years had expired in a week after the latter proceedings. Would the public right be lost if the fence were allowed to continue for a week? The principle would be the same whether the time be a week or many years.

But the new road or new part of it has never been opened, it is argued. The statutory requirement about opening a road, from the nature of things, would not literally apply to a case like this,—would have an application different from what it has where an entirely new road is to be constructed. There was no need of any opening more than to use the general road. There was no occasion for making the traveled path wider than it was. Using any part of the three rods was in effect using the four rods. Opening a part opened all; using a part was using all. The principal road was already opened; the incident went with it. The public took the plaintiff's land, paid for it, and the moment the traveler passed over the usual traveled track afterwards, the new road—all of the road—became dedicated to the public use. But the fences were not removed within the six years, it is replied. The town neither builds nor maintains fences. The owner

should have removed them. The officers of the town attempt to remove them to prevent a forty-years user, and are sued for it in this action. The case relied on by the plaintiff, *State v. Inhab. of Cornville*, 43 Me. 427, does not aid his argument. In that case the addition was in length, and not in width, of road,—was an extension of new road. The case of *Baker v. Runnels*, 3 Fairf. 285, is much more like the case at bar, and strongly opposes the plaintiff's propositions.

Exceptions overruled.

Danforth, Virgin, Libbey, Foster,
and **Haskell, JJ.**, concurred.

James W. TUFTS

v.

Alonzo SYLVESTER.

The seller's right of stoppage *in transitu* could not be defeated, after the insolvent purchaser had himself refused to receive the goods in order that the seller might reclaim them, by the acceptance of the goods from the carrier by the insolvent messenger, before the appointment of the assignee.

(Franklin—Decided March 1, 1887.)

TROVER by the seller of merchandise against the messenger in insolvency. *Defendant defaulted.*

The opinion states the facts.

Mr. S. Clifford Belcher, for plaintiff:

An insolvent consignee may, before he receives the goods, disagree to the consignment; and the assent of the consignor shall be presumed, unless in a reasonable time he declares his dissent or neglect to give notice of his assent.

1 Benj. Sales, 4th Am. ed. §§ 490, 500, 501, and notes; 1 Benj. Sales, Corbin's Notes, §§ 782-785, and notes *w. x*; *Lane v. Jackson*, 5 Mass. 156, 162; *Grout v. Hill*, 70 Mass. 361, 366, 367; *Scholfield v. Bell*, 14 Mass. 39.

The interest and act of vendor are sufficient proof of his concurrence.

Seed v. Lord, 66 Me. 680; 29 Am. Dec. 392, note.

If the contract was not rescinded, there was a seasonable exercise of the right of stoppage *in transitu*; for delivery to messenger in insolvency does not end the transit.

Harris v. Pratt, 17 N. Y. 249; *Sutro v. Hoile*, 2 Neb. 186.

Mr. H. L. Whitcomb, for defendant:

Inasmuch as the right of stoppage *in transitu* can be exercised only in case of the insolvency of the vendee, it follows that the vendee can never exercise that right, because such an act would amount to an unwarrantable preference in favor of the vendor over the other creditors of the insolvent, who have an equal right to the goods as assets.

Neate v. Bull, 2 East, 117; *Barnes v. Free-land*, 6 T. R. 81; *Bartnam v. Farebrother*, 4 Bing. 579; Story, Sales, § 824.

The right of stoppage must be exercised before the rights of any third parties intervene (Story, Sales, § 324, and cases cited in note; Benj. Sales, Bennett's ed. § 500); and notice

must be given to the party who actually has the goods in possession at the time (Benj. Sales, § 1279; Story, Sales, § 825).

The purchaser having become an insolvent, and the messenger being vested with the rights, the delivery to the messenger, on the store of Wards, put an end to the transit, and determined the right of stoppage.

Benj. Sales, § 1275.

The case of *Grout v. Hill*, 4 Gray, 361, no parallel to this. But in the note to *Hill v. Judson*, 29 Am. Dec. 377, 392, the report speaking of *Grout v. Hill*, and other kindred cases, says: "Perhaps, however, this is, properly speaking, rescission of the contract, the vendor assents to the refusal by retaining the goods;" and cites *Sturtevant v. Orser*, Y. 538.

Peters, Ch. J., delivered the opinion of the court:

The plaintiff sold a bill of goods shipped at Boston to the buyer at Farmington in this State. The buyer, becoming insolvent after the purchase, countermanded the order, but not in season to stop the goods. Before the goods came, he had gone into insolvency, and a messenger had taken possession of the property. An express company bringing the goods tendered them to the buyer, who refused to receive them; but the messenger accepted the goods from the carrier, paying his charges thereon. After this, but before an assignee was appointed, the seller made a demand on both the carrier and the messenger, attempting to reclaim his goods. The question, on these facts, is whether the goods were severably stopped *in transitu* to preserve the plaintiff's lien thereon. We think they were. Right of stoppage *in transitu* is favored by law.

It is clear that the goods did not go into the buyer's possession. He refused to receive them. He had a moral and a legal right to do so. Such an act is commended by jurists and judges. He in this way makes reparation to the confiding vendor. "He may refuse to take possession," says Mr. Benjamin, "and leave unimpaired the right of stoppage *in transitu*, unless the vendor be anticipated in taking possession by the assignees of the buyer." Benj. Sales, § 858. In *Grout v. Hill*, 4 Gray, 361, Shaw, Ch. J., says: "Where a purchaser of goods on credit finds that he shall not be able to pay for them, and gives notice thereof to the vendor, and leaves the goods in the possession of any person when they arrive, the use of the vendor, and the vendor, on notice, expressly or tacitly assents to it, the goods are stopped *in transitu*, although the insolvency of the vendee intervene." See case at p. 369; 1 Pars. Cont. *596, and cases cited.

The decision of the case, then, turns on the question whether the messenger could accept the goods and terminate the lien of the vendor. We do not find any authority for it. A bankruptcy messenger acts in a passive capacity; is entrusted with no discretionary powers; acts under mandate of court, or does certain things particularly prescribed by the law, which creates the office; is mostly a keeper and defender of property; a custodian until a assignee comes; and he can neither add to nor

from the bankrupt's estate. He is to take possession of the "estate" of the insolvent. These goods had not become a part of the estate. He was not at liberty to affirm or to disaffirm any act of the insolvent. The law imposes on him no such responsibility. *Chancellor Kent* says that the transit is not ended while the goods are in the hands of the carrier or middleman. A messenger has no greater authority, *ex officio*, than a middleman, excepting as the insolvent law expressly prescribes. In *Hilliard's Bankruptcy*, p. 101, the office of a messenger is likened to that of sheriff under a writ; he becomes merely the recipient of property. The title of the assignee, when appointed, dates back of the appointment of a messenger. Until appointment of assignee, the bankrupt himself is a proper person to tender money for the redemption of lands sold for taxes. *Hampton v. Rouse*, 22 Wall. 263 [89 U. S. bk. 22, L. ed. 755]; *Stevens v. Palmer*, 12 Met. 464. The case cited by the plaintiff, *Gates v. Hoile*, 2 Neb. 186, supports his contention.

Defendant defaulted.

Walton, Virgin, Libbey, Emery, and Haskell, Jr., concurred.

BIDDEFORD SAVINGS BANK

v.

Mary E. M. MOSHER, and Mutual Life Ins. Co., Trustee.

1. A plea in abatement to a trustee writ, based upon the fact that the alleged trustee was not a resident of the county, is bad if it does not allege the nonresidence at the time of the commencement of the action.
2. It is not sufficient in such plea to allege that the trustee was not a resident at the time of the service of the writ.

(York—Decided March 5, 1887.)

ON exceptions by the plaintiff to the overruling of the plaintiff's demurrer to defendant's plea in abatement. *Sustained.*

The plea in abatement alleged that the Mutual Life Insurance Company "at the time of the service of said writ * * * had no established or usual place of business at Biddeford, within the county of York, as alleged in said writ," etc.

The case is stated in the opinion.

Mr. R. P. Tapley, for plaintiff:

The plea should be such as to preclude all presumption, inference, or argument against the party pleading; and should contain such accuracy as is not liable to the most subtle and scrupulous objection, and which excludes all such supposable matter as, if alleged on the other side, would defeat the plea.

Burnham v. Howard, 31 Me. 569; *Adams v. Hodsdon*, 33 Me. 225; *Twiss v. Libbey*, 37 Me. 49; *Getchell v. Boyd*, 44 Me. 483; *Bellamy v. Oliver*, 65 Me. 108.

It will be noted that the plea is a plea in abatement, and is subject to the critical examination and exactness in form and allegation that requires it to be certain to every intent.

1 Chitty, Pl. 457; *Severy v. Nye*, 58 Me. 246; *Burnham v. Howard*, *supra*.

These cases also hold that defects, whether of form or of substance, are reached by general demurrer.

Adams v. Hodsdon; *Severy v. Nye*; and *Bellamy v. Oliver*, *supra*.

This action was commenced April 14, 1886. A suit is commenced when the writ is actually made with intention of service.

Rev. Stat. chap. 81, § 95.

A writ is presumed to be made when it purports to be dated.

Sargent v. Hampden, 38 Me. 581.

It is nowhere alleged that on April 14, 1886,—the time when the action was commenced,—the trustee did not have an established or usual place of business at Biddeford, in the county of York.

Mr. Edwin Stone, also for plaintiff.

Messrs. H. & W. J. Knowlton, for defendant:

The question raised by the pleadings is the sufficiency of the plea in abatement.

Rev. Stat. chap. 86, § 5, provides that when a foreign corporation is summoned as trustee, the suit shall be brought and the writ made returnable in a county where the corporation "has an established or usual place of business, held its last annual meeting, or usually holds its meetings."

The statute prescribes in what county the writ shall be returned; if returned elsewhere it is abatable.

Greenwood v. Fales, 6 Greenl. 405; *Scudder v. Davis*, 33 Me. 576; *Jacobs v. Mellon*, 14 Mass. 188.

The plea is proper in form; free from duplicity; contains but one matter sufficient to answer plaintiff's writ, being to the jurisdiction; shows what court has jurisdiction; and contains the proper affidavit.

Hooper v. Jellison, 22 Pick. 250; *Atwood v. Higgins*, 76 Me. 423.

By demurring, plaintiff admits the statement in the plea that trustee has no residence—as defined in Rev. Stat. chap. 86, § 5—in York County.

The plea is filed by the proper party. Any defendant may file a plea in abatement in such suits.

Scudder v. Davis, *supra*; *Mansur v. Coffin*, 54 Me. 314.

The plea filed is not a plea to the jurisdiction, but a plea in abatement to the writ. Pleas to the jurisdiction are not pleas in abatement at all, but constitute a class of pleas which must be pleaded in order of time before pleas in abatement, properly so called, can be pleaded; exactly the same as pleas in abatement must be pleaded in order of time before pleas in bar.

1 Chitty, Pl. 441, 9th Am. ed. *Plea to the jurisdiction*; 446, *Abatement*; *Carlisle v. Weston*, 21 Pick. 587; 3 Chitty, Pl. 894, *Plea to jurisdiction*; 896, *Plea in abatement*.

Pleas to the jurisdiction are dilatory pleas; not technically pleas in abatement.

Gould, Pl. 211, 215, chap. 5; 216; Stephens, Pl. 46.

The objection is that the writ is sued out in the wrong county. This is an objection to the writ, and not to the jurisdiction, and must

be pleaded in abatement to the writ; therefore the plea may be signed by attorney.

Hastings v. Bolton, 1 Allen, 529; *Webb v. Goddard*, 46 Me. 507-509; *Cleveland v. Welsh*, 4 Mass. 591; *Demuth v. Cutler*, 50 Me. 398.

The old common law required coverture, the same as jurisdiction, to be pleaded by the person; it could not be pleaded by attorney. The court sustained the plea in *Atwood v. Higgins*, 76 Me. 423.

Haskell, J., delivered the opinion of the court:

The writ describes the plaintiff and defendant to be residents of York County, where the writ is returnable, and the only trustee as a corporation doing business by its agents in York and Cumberland counties respectively.

The defendant seasonably interposed a plea in abatement of the writ, because the only trustee, at the time of the service of the writ upon its alleged agent, was not a resident of the county of York, but was then a resident of the county of Cumberland.

Pleas in abatement must be certain to every intent. *Bellamy v. Oliver*, 65 Me. 103; *Getchell v. Boyd*, 44 Me. 482; *Tweed v. Libbey*, 37 Me. 49; *Adams v. Hodsdon*, 33 Me. 225; *Burnham v. Howard*, 31 Me. 569. Rev. Stat. chap. 86, § 5, provides that "if all the trustees live in the same county, the action shall be brought there; and an action not so brought is abatable (*Scudder v. Davis*, 33 Me. 576), even though plaintiff discontinues as to trustee upon the entry of the action in court. *Greenwood v. Fales*, 6 Me. 405. "When a court once acquires jurisdiction over a cause, it cannot be divested of it by a change in residence of any of the parties." *Dorr v. Davis*, 76 Me. 801.

The plea interposed does not aver that the only trustee was not a resident of York County when the action was "brought." For all that is said in the plea, the trustee may have resided in York County when the action was brought, and removed before the writ was served; and in such case the action would not be abatable for that cause. An action is brought when the writ is sued out with an intention of service. Rev. Stat. chap. 81, § 95; *Johnson v. Farwell*, 7 Me. 370; *Haskell v. Brewer*, 11 Me. 258. The date of writ is presumed to be the time when the action is brought. *Johnson v. Smith*, 2 Burr. 950; *Bronson v. Earl*, 17 Johns. 65; *Johnson v. Farwell*, *supra*. "A writ may be considered as purchased at any moment of the day of its date which will most accord with the truth and justice of case." *Badger v. Phinney*, 15 Mass. 359; *O'Neil v. Bailey*, 68 Me. 429.

Exceptions and demurrer sustained. Plea adjudged bad. Defendant to answer over.

Peters, Ch. J., Walton, Virgin, Libbey, and Foster, JJ., concurred.

Frank LORD

v.

Charles F. COLLINS.

When animals are sold by an officer on a judgment to enforce a lien claim for 396

keeping, and the proceeds in execution of the judgment are paid into court, the judgment creditor cannot, by process in equity, recover from that pay for keeping the animals from date of his original petition to enforce his lien to the time of sale.

(Somerset—Decided March 3, 1887.)

ON exceptions by plaintiff to the ruling of the court in sustaining a demurrer to a bill. *Overruled.*

The bill sets out that the complainant covered a lien judgment against three of defendant for \$198.40; that the animals were sold by the officer, and the excess received from the sale, over and above the judgment, was \$116.30, which the officer deposited in court according to the provisions of the statute; that the complainant has a further claim upon the animals for their keeping from date of his former petition to date of the sale, amounting to \$95, and he prays that he be paid this latter sum and costs from the fund of \$116.30.

Mr. Thomas H. B. Pierce, for plaintiff. Our bill is brought under Rev. Stat. 77, art. 10, § 6. The point urged by counsel in the court below was that the lien proceedings were illegal because the remedy had been repealed. Hence the money was not in the hands of the court, but in the hands of the clerk as a private individual, and he cannot have been made a party; conceding in equity terms, as I understood his words, that the law or remedy was not repealed by the act of 1876, then it was lawfully in the hands of the court, and the bill was a proper remedy. I understood the reason upon which the demurrer was sustained to be that, in proceeding under this statute, a third person must be made a party, under the decision in *Dorr v. Portland & O. R. R. Co.* 73 Me. 567, in order to maintain a bill;—that the clerk who made a party, hence the bill was demurred to.

I assume, for the purpose of argument, that the lien proceedings were legal;—that the money claimed was legally in the hands of the court and subject to its order. It is property not exempt from attachment or seizure, but so situated in the possession of the court that it cannot be come at to be attached or seized. Defendant is out of the jurisdiction of the court, and as there is no other person who can have no remedy against the complainant personally or *in rem*, because of the sale of the thing. His sole remedy is in equity to have the fund applied to the payment of his debt. The court has it,—not the clerk personally. The court cannot or need not do so before itself. It can protect its rights by direct disposition of what it holds in its possession. Now, to say, in a case of this kind, when there can reasonably be no third person but the court itself,—which is the equity trustee,—that, because the court is not a party, the complainant is without any remedy, the use of the power of the court in his behalf is, to say the least, unjust.

Mr. D. D. Stewart, for defendant: "Courts of equity," said Shepley, *J.*, in *Stewart v. Clark*, 25 Me. 314, "are not tri-

for the collection of debts, and yet they

aid to enable creditors to obtain payment of their legal remedies have proved to be adequate. It is only by the exhibition of facts as show that these have been extended that their jurisdiction attaches." No lien is given and none is perceived why the plaintiff cannot bring his action at common law upon the contract which he says was an express one,—the price of keeping the colts being expressly agreed upon between the parties, and he recover his judgment therefor, exactly the same as if he held a written agreement or the defendant's note of hand for the amount. When he obtains such judgment, *non constat* he may not be able to collect his judgment on other property of the defendant.

Green v. Green, 1 Wall. 830 (68 U. S. bk. 17, p. 553).

And it would seem that the recovery of a judgment at common law, and a return of *bona* upon an execution issued upon such judgment, are indispensable prerequisites, according to all the authorities, for the foundation of a bill in equity to reach property not otherwise attachable.

Baker v. Wilkey, 25 Me. 326; *Cassell v. Cassell*, 28 Me. 232.

His court has already substantially refused to sustain any such bill.

Ed v. Collins, 76 Me. 443.

Peters, Ch. J., delivered the opinion of the court.

His view that can be taken of this case on its merits makes the bill maintainable.

The bill is professedly a bill in the nature of an equitable trustee process, brought under Rev. Stat. chap. 77, art. 10, § 6. It has been decided that, in such a proceeding, there must be a third party summoned in,—an equitable trustee. If it were not for this necessity, creditors might too much embarrass debtors by obtaining execution against them, without the policy of the law. *Donnell v. Portland & O. R. Co.* 73 Me. 567.

In this case there is no third party,—no equitable trustee; and from the facts alleged it does not see how there can be any. If the plaintiff were made such party, evidently he could not be holden. He has been acting only as the hand of the court, and not for himself. He should not be subjected to the expense of a litigation. Nor does it follow that he would be holden even if acting in his individual capacity merely. We have had notice, from another case before us, of a person other than the respondent claims to be a mortgage owner of the animals which were sold. Even if the respondent's possession of the property might have invested him with the authority to create a lien on the animals for their keeping, that lien cannot subvert the funds in question. *Lord v. Colburn*, 76 Me. 443.

It is impossible to make the court itself a party by its being an official depository of the funds. The statute relied on as furnishing a remedy could not possibly accomplish such a result, and was never intended to.

The result of the matter simply is, that the plaintiff has in its official possession an amount of money which can be surrendered only when the court is satisfied, upon proper process af-

fecting proper parties, who the true owner may be. Upon no facts indicated in the case can this complainant obtain it. The complainant probably missed his own interests in procuring a sale of the property before its full value was absorbed by the lien; or in selling more of it than was necessary to protect himself at the time of the sale,—more in value than the amount of his lien.

Exceptions overruled.

Walton, Danforth, Emery, Foster, and Haskell, JJ., concurred.

Benjamin M. ROYAL

Cyrus CHANDLER.

The declarations of a deceased grantor in relation to his title are not made admissible in favor of the grantee by the fact that his declarations on a prior occasion in disparagement of his title were given in evidence against the grantee.

(*Androscoggin*—Decided March 8, 1887.)

ON exceptions by the defendant. *Sustained.* The opinion states the case.

Messrs. N. & J. A. Morrill, for defendant.

Messrs. John P. Swasey, and Richard Dresser, for plaintiff.

Peters, Ch. J., delivered the opinion of the court:

This, a real action, involves the location of the line between the plaintiff's and defendant's premises.

A person now deceased, who was once an owner in plaintiff's land, while an owner and upon the land, made declarations respecting the line, favorable to the defendant's claim. These admissions in disparagement of his own title were properly proved at the trial by the defendant. To detract from the force of this evidence, the plaintiff was allowed to prove later and contradictory statements made by the same person under other circumstances, when he was not upon the land. The last declarations were not admitted as original, primary evidence, but to contradict the first declarations. What the former owner said for himself was admitted to impeach what he had previously said against himself. The last declarations were not admissible. It was not a legal contradiction. It was unsworn evidence.

The fallacy of the idea of allowing the testimony to be received consists in looking upon the former owner as a witness in the cause. The first declarations were made by him while standing in a condition the same as if a party to the present suit. His admissions against his own title were of the same quality of evidence as if spoken by the plaintiff himself. If a man's conversation in his favor be admitted against what he has said against his interest, then he would certainly be allowed to corroborate one statement by consistent statements made at other times, and no limit could be fixed in respect to such evidence. Opening the door so widely would lead to mischievous results.

The question involved in the ruling does not appear to have received attention in our own State. It has been several times considered in Massachusetts, and is there, in each instance, disposed of unfavorably to the plaintiff here. The case of *Baxter v. Knowles*, 12 Allen, 114, meets the point exactly, where it is said: "The declarations of the defendant's testator from whom he claimed title were not made admissible in his favor by the fact that his declarations at other times were given in evidence by the plaintiff as admissions." *Pickering v. Reynolds*, 119 Mass. 111, is also precisely in point.

Exceptions sustained.

Walton, Virgin, Libbey, and Emery, JJ., concurred.

Henry F. FARNHAM

v.

Horace F. DAVIS and Dwelling-house.

1. Under the statute of Maine the lien of a materialman on buildings and lot can only be enforced by suit against the contracting party.
2. Where a portion of the material is furnished on the promise of one person, and the remainder on the promise of another, the lien for the first portion can not be enforced by a suit against the latter person.

(Cumberland—Decided March 10, 1887.)

ON report. *Judgment for defendant.*

The case and material facts are stated in the opinion.

Messrs. Symonds & Libby, for plaintiff:

This is a case of a definite lien and "for a particular work," within the decision of *Baker v. Fessenden*, 71 Me. 292.

Under the Act of 1879, which enlarges materially the rights of lien claimants, "judgment may be rendered against the defendant and the property covered by the lien, or against either, for so much as is found due by virtue of the lien." The intent of the statute is clear, and it should be liberally construed.

It authorizes a judgment against the property alone, unsupported by a judgment *in personam* against anyone, and the contractor need not be a party. If the contractor was a necessary party, a judgment *in personam* would always be obtained.

A lien judgment need not be strictly a judgment *in rem* against the whole world. It must respect prior mortgagees' rights, if such exist, as has been held by the court in *Morse v. Dole*, 73 Me. 351.

An action to enforce a mechanics' lien is "essentially a suit in equity," as declared by Mr. Justice Field in *Davis v. Alford*, 94 U. S. 546 (Bk. 24, L. ed. 283), and he further says that statutes giving such liens are "to be liberally construed."

It is well known, as it is apparent upon examination, that the Act of 1879, chap. 186 (Rev. Stat. chap. 91, §§ 44, 45), was passed to remedy the defects which previous decisions, especially *Byard v. Parker*, 65 Me. 577, had shown to exist in the process for enforcing liens on buildings.

Rev. Stat. chap. 91, § 44, provides for not to the owner, and the mode in which he may be made a party, where he is not the defendant in the action, or does not voluntarily appear.

Section 45 of the same chapter manifests from its terms, refers to cases in which the owner is the defendant, as well as to the class of cases mentioned in the previous section.

If the defendant is not holden personally for the whole debt, we are entitled to a personal judgment against him to the extent of his personal liability, and a lien judgment against his property, which will be valid against all interest in the property, and against all other interest therein, which is not such as by law to take precedence over plaintiff's lien.

Phill. Mech. Liens, §§ 320, 395, 397, 447, 449, 458.

If the court, however, still holds, in favor of the statute, that it is not sufficient to make the "owner" a party to the suit, but that a general notice must be given, then we ask that the case may be remitted to the court at nisi pro to give such notice, as was done in *Sheridan v. Ireland*, 61 Me. 486.

Messrs. Woodman & Thompson, for defendant:

The two claims for liens are wholly separate and distinct; each must stand on its own merits,—neither can derive life or validity from the other. They call for two distinct separate suits, one against Chase as defendant, and the other against the present defendant, Davis.

The latter claim—that for materials furnished Davis on his own order—is cut off by the tender.

Rev. Stat. chap. 91, § 43.

The former—that for materials sold Chase in December, 1884—has been lost by nonperformance. The last item was purchased December 29, 1884, and consequently the last day on which the plaintiff could record his lien in the town clerk's office was January 28, 1885, the last day for him to bring suit was March 29, 1885. But plaintiff did not record his lien until August 6, 1885, and did not bring suit until September 15, 1885. Consequently plaintiff's claim for a lien became wholly lost and forfeited January 29, 1885; and, having been once lost, cannot be revived, being a statute *right strictis juris*.

Frost v. Halsey, 54 Me. 345.

The case falls within the rule laid down in *Hayford v. Cunningham*, 72 Me. 128, where the "four days after the work is completed," in the case of lien claims against a vessel, is held to run from the date of the cessation of labor consequent upon the failure of the owner of the vessel, and not from the final completion of the repairs over a year later.

See, too, *dictum* of Peters, J., in *Sheridan v. Ireland*, 66 Me. 65, 70.

This point has been the subject of adjudication in this court in the case of log drivers' lien on logs,—*Oliver v. Woodman*, 66 Me. 5, where it was held that the person employing the laborer was a necessary party to the suit, and that it could not be maintained against the owner of the logs directly.

So, too, in the case of a suit to enforce a lien against a vessel.

Ames v. Sweett, 83 Me. 479.

Emery, J., delivered the opinion of the court:

The evidence and the admissions establish the following facts: One Chase made a contract with the defendant to furnish the labor and materials in the construction of defendant's house. Chase procured of the plaintiff certain material, which he put into the construction of the house under his contract. This material was sold to Chase upon his credit, with knowledge of whose house it was intended for. It was so furnished Chase for said construction December 16, 1884. The contract between Chase and the defendant was afterward cancelled, and subsequently, in May and June, 1885, the defendant, upon his own credit, purchased of the plaintiff other material for the construction of the house. The plaintiff made the proper lien claim August 6, 1885, and began his suit by attachment September 15, 1885, to recover of the defendant, and to enforce a lien for all the material.

There was a sufficient tender for the second bill of material,—that purchased by the defendant in person,—followed by the timely payment of the money into the court; hence we are only to consider the first bill of material, that purchased by Chase, the contractor, December 16, 1884.

The evidence does not satisfy us that the defendant was an original promisor for the first bill. That material was not furnished on his credit. If he did afterward promise to see it paid, it was a collateral verbal promise, not enforceable. We think the evidence does not warrant any personal judgment against the defendant.

2. Should there be a judgment against the defendant? To obtain such a judgment for material so furnished, the plaintiff should have made his lien claim within thirty days after he ceased to furnish material, and have attached the house within ninety days after the last material furnished by him. Rev. Stat. chap. 91, § 32, 34. If this bill of December 16, 1884, were the only material furnished by the plaintiff for this house, then of course his lien was not long before he moved to enforce it. In May following, however, he began again to furnish material for the house, and this time his last furnishing was within thirty days before filing the lien claim, and within ninety days before the attachment.

Here were two distinct periods of furnishing material; one began and ended in December; the other began in May and ended in July. They were distinct transactions under distinct and different contracts. The first was under contract with Chase. The last was under a contract with the defendant. Each bill was a separate cause of action, to be enforced in a separate suit against a different person. The lien for each was a separate lien, to be separately enforced. Our statute, so far as liens on buildings are concerned, does not provide for process *in rem*, regardless of any personal defendant or any contract. There must be a suit against the party promising, upon which the property benefited may be attached. The contract, whether express or implied, is the principal. The lien is the incident. The lien must be enforced along with the contract. When a lien arising from one contract has been

dissolved, it cannot be restored by tacking on a new lien arising under a new contract. Phill. Mech. Liens, § 324, and cases cited; *Ames v. Swett*, 38 Me. 479; *Prost v. Haley*, 54 Me. 345; *Oliver v. Woodman*, 66 Me. 59.

The plaintiff urges that, however it may have been under former statutes, there may now, under chap. 91, § 45, be a judgment against the property alone, without any against the defendant. There may be cases where judgment should not be rendered against the defendant personally, for the reason of his discharge in insolvency, or for some other reason, although his promise is established. In such case the judgment may be against the property alone. This statute, however, does not change the nature of the lien as an incident of the contract. It does not dispense with a suit against the contracting party. It does not authorize a suit directly against the owner of the property, if he was not the contracting party. If no contract, express or implied, is proved against the defendant, the suit must fail, and the annexed lien falls with it.

Judgment for defendant.

Peters, Ch. J., **Walton, Virgin, Libbey, and Haskell, JJ.**, concurred.

Aaron B. CHAPMAN *et al.*

v.

COUNTY COMMISSIONERS.

1. While the county commissioners must make their report of laying out a way at their next regular term after the hearing, they are not required to do so on the first day of the term. Their report may be filed on any day of the term.
2. The county commissioners are a court which is not dissolved by one member going out and a new member coming in.
3. The proceedings of the county commissioners in laying out a way are not rendered invalid by the fact that an outgoing commissioner acted, up to the time of an adjudication, in favor of laying out the road, and his successor acted in completing the proceedings to a finality.
4. On the hearing of a petition for certiorari against the county commissioners, the oath of the respondents in matters officially known to them is as good as a record to supply mere deficiencies.

(York—Decided March 8, 1887.)

PETITION for certiorari to review proceedings laying out a public road. *Denied.*

The opinion states the material facts.

Mr. E. P. Tapley, for plaintiffs:

The action of the new commissioner infuses into the judgment an illegal and foreign element: viz., the judgment of a stranger; and this vitiates the whole judgment.

The introduction of this foreign element is not unlike a stranger acting with a grand jury.

In such case it is held the indictment found is void, although twelve and more of the persons legally qualified concurred in the finding. *Commonwealth v. Parker*, 2 Pick. 560, and cases cited.

The petitioners were in fact cut off from appealing at the October session, by the suspension of action; and as soon as the certificate was filed the proceedings were closed; so they have been prevented from making an appeal, and compelled to submit to the action and judgment of a person who did not hear them. In the case of *Inhabs. of Windham*, 82 Me. 452, Shepley, Ch. J., persons injured have a right to the same available length of time to make their applications as if no appeal had been taken.

The case of *Inhabs. of Levant v. Penobscot County*, 67 Me. 429, does not, it seems to me, hold that matters which should appear of record can be proved by evidence *aliunde*. It specifically declares that "if the original record be defective it may be amended by the tribunal, in accordance with the facts, at any regular session."

No evidence *aliunde* is received except upon the question of discretionary action, and when necessary to show what certain rulings complained of were founded upon.

Mr. L. S. Moore, for respondents:

"*Certiorari* can only be issued for the relief of some injured party. It lies only to correct errors in law; and when the record contains no error the writ cannot be issued."

80 Me. 351; 81 Me. 578; 82 Me. 450; 86 Me. 74; 65 Me. 160; 67 Me. 429.

The record and answer of the commissioners are before the court, and from the record and answer alone must the question of issuing the writ be determined.

Inhabs. of Levant v. Penobscot County, 67 Me. 429.

Would the death or resignation of Boody the day after the adjudication have affected the judgment? Could the termination of his term by operation of law do more? The functions of the court are full, complete, and continuous. The same law that retired Boody installed Pease, not as an individual, but as a member, an integral part of the tribunal itself, whose judgments previously rendered he must carry into effect; there can be no interruption, no interregnum.

Peters, Ch. J., delivered the opinion of the court:

Can a county commissioner act with his associates in receiving a petition, ordering notice upon it, taking a view under it, adjudicating in favor of a road asked for by the petition, and his successor in the office act afterwards in his place in completing the proceedings to a finality, and the record be legal? This inquiry might perhaps be avoided in the case before us, by force of the fact that two other commissioners, a quorum of the board, concurred in the steps taken throughout, thus rendering their action valid. But as the same question may occur at most any time again, from the present election law requiring commissioners to be chosen singly in consecutive years, instead of all of them in the same year, we are disposed to put the question at rest at

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this opportunity. We see no irregularity in such proceedings.

The board is a court; and the court is dissolved by one commissioner going out and another coming in. It continues to be the same court, though its personality be changed. One commissioner participates in the evidence, questions arising in the proceedings, and decides them. Those questions are then proposed. We see no need of going over the ground again, any more than in any other court where one judge at one term settles a preliminary question, and another judge at another term tries the case in its subsequent stages. Of course, the first action must be of its nature separable from the later acts.

Counsel for the petitioners contend that the record does not show specifically what part of the proceedings each commissioner participated in, and that it must appear from the record and cannot be supplied by the answer of the respondents. His point is that the adjudication that the road is demanded by public convenience and necessity is merely a legal conclusion,—not a fact,—and that legal conclusions can appear only of record. We think to be a fact that an adjudication was made, and that what the adjudication was was another fact. Its legal effect would be another fact.

But we also think the doctrine of the case of *Inhabs. of Levant v. Penobscot County*, 67 Me. 429, does not admit of so illiberal an interpretation as counsel puts on it. On the hearing of a petition, the oath of the respondents is taken, and matters officially known to them, is as a record, to supply mere deficiencies. The inference is that they would amend their record, which they could do, in accordance with their sworn statement; and, as that is regarded as certain which can be made certain, the record, for the purposes of the hearing, is regarded with the same effect as if it were amended accordingly. If the court should suspect error or prevarication, it could no doubt require further answer, or that an amended record be produced for its examination. Commissioners do not keep exact journals of minor and preliminary proceedings, and rely upon covering all necessary points in their reports. It would be expedient to view county commissioners' records with as much circumspection as we view criminal records and even in some matters. The rules prescribed in *Inhabs. of Levant v. Penobscot County*, *supra*, have a very excellent practical influence in preventing undue and wearisome litigations.

It is contended that the commissioners' record was not filed at the next regular term after the view was had, because dated in June, while the court commenced its session in April. The record produced declares it to have been returned at the regular April Term, and the commissioners swear to the fact. Counsel for the present petitioners conceives the answer to be equivocal in that respect. He could have required a more certain answer, if needed. Objection cannot avail.

It is further objected that a report cannot be filed at so late a day of a regular term as the report was. That is a matter to be regulated by the rules of procedure of that court. It is hardly pretended that the filing must

first day of their meeting, and no rule of court can determine on what day it shall or shall not be done.

Did the commissioners make any mistake in making their report to the April Term, the regular session after the hearing. Other statutes may have been susceptible of uncertainty on this point; the present one is clear.

There are no merits in the case requiring our discretionary intervention to defeat the contemplated road. The question has run the circuit of the commissioners, of a committee of appeal, and of this court at nisi prius. All able means of opposition have been exhausted to prevent the road.

Petition denied.

Alton, Virgin, Libbey, Emery, and McKell, Jr., concurred.

MASONIC TEMPLE ASSOCIATION v.

Arnold HARRIS.

The right to pollute a stream may be acquired by prescription.

Where one has acquired a right to use a natural stream as a covered drain, that right is not taken away, though it may be curtailed, by the act of the municipal authorities in diverting the main.

The burdens or inconveniences of the owner through whose land the drain runs cannot be increased by any diversion or change; and the prescriptive right is to be exercised only so far as will not affect more injuriously the owner of the servient estate.

The abuse of a prescriptive right does not create a forfeiture of the right. A person aggrieved by such use may sue for damages; or proceed by indictment; or—the most fitting remedy—move in equity for an injunction.

Aggrieved persons would not be justified in entirely cutting off a drain which the encroaching party had some right to use; and an attempt to do so is actionable by injunction.

(Waldo—Decided March 7, 1887.)

Equity to restrain the defendant from obstructing a drain. *Bill sustained.* The facts are stated in the opinion.

Wm. H. Fogler, and R. F. Dunbar, for complainant:

To maintain the right to a watercourse or drain it must be made to appear that the water usually flows in a certain direction, and by a regular channel with banks or sides. It need not flow continuously; it may be dry at times." *Ashley v. Wolcott*, 11 Cush. 195.

To constitute a watercourse, the size of the stream is not important; it may be very small, the flow of water need not be constant." *Wether v. Winnisimmet Co.* 9 Cush. 174.

Also *Morrison v. Bucksport & B. R. R. Co.* 1 Me. 356.

The riparian owners upon a natural stream are entitled to the natural flow of the stream, and to use the water of the stream for all reasonable purposes, including that of drainage.

Gould, Waters, §§ 204, 210; *Ashley v. Ashley*, 6 Cush. 70.

Such rights of riparian owners do not depend upon user or presumed grant, but exist *jure natura* as part of the land; they are rights incident to the ownership of the land. They are not mere easements.

Gould, Waters, § 204; Ang. Watercourses, § 123.

One may acquire an easement to discharge water upon the land of another, whether in a pure or noxious state, by an artificial channel or by a pipe (Washb. Real Prop. 67; *Murchie v. Gates*, 78 Me. 300); and such easement may be acquired by prescription (Ang. Watercourses, § 200 *et seq.*; *Murchie v. Gates*, *supra*).

If it has no longer the character of a stream, and is to be regarded as a sewer, the city would have a qualified right to abandon it or discontinue. To avail itself of the right to abandon or discontinue, it must leave the adjoining owners in no worse condition than they would be in if no sewer or drain had been built.

Gould, Waters, § 270.

It is true that the workmen, in order to lay the foundation of the temple, temporarily stopped the flow of water. They had the right so to do.

Ang. Watercourses, § 115.

An estoppel *in pais* may be defined as an indisputable admission arising from the circumstance that the party claiming the benefit of it has, in good faith on his part, been induced by the voluntary, intelligent action of the party against whom it is alleged, to change his position.

Bigelow, Estop. 369.

It is because a party stands silently by and sees an injurious and unwarrantable act done to his property, that he is regarded as tacitly acquiescing in the propriety of such act.

Id. § 509.

If the owner of an estate stand by and see another expend money upon an adjoining estate, the latter relying upon an existing right of easement in the other estate, without which such expenditure would be useless, and does not interpose to prevent the work, he will not be permitted to interrupt the enjoyment of such easement.

Id. § 512.

The authority of the court to grant the relief prayed for is well settled.

Story, Eq. Jur. § 927.

Riparian owners of a private stream will be protected by injunction from violation of their rights.

High, Inj. § 556. See Ang. Watercourses, § 444 *et seq.*

It may be stated, as a general rule, that where an easement or servitude is annexed or pertains to a private estate, either by grant, covenant, or prescription, any encroachment upon its quiet enjoyment and exercise will be prevented by injunction.

High, Inj. 545.

Mr. George E. Johnson, for respondent: When the object for which an easement is

created no longer exists, the easement is at an end.

Washb. Easem. 700; 1 Add. Torts, 160, 161.

The same rule applies in this case as to a right of way. A way by necessity is commensurate only with the existence of such necessity; so that when the necessity ceases the right of way also ceases.

Id. 165; Ang. Watercourses, 5th ed §§ 165, 166.

If the act which prevents the servitude be incompatible with the nature or exercise of it, and be by the party to whom the servitude is due, it is sufficient to extinguish it; and if it be extinguished for a moment, it is gone forever.

Id. § 247.

Where a right is suspended by the act of God, as by the drying up of the spring, it will revive again if the spring chance to flow; but if it be suspended by the act of the party, as by building a house or wall, it would not be restored, even though the obstacle should be removed by a stroke from heaven.

Id. § 248.

If the owner of an easement, by permanent erections, obstruct and render it useless, the easement is extinguished, especially in favor of a *bona fide* purchaser.

16 Wend. 531.

This watercourse was built for the purpose of carrying off the surplus water which accumulated above High Street, and was so used until complainant stopped the flow of water in 1878, and connected eight waterclosets and several sinkpipes therewith, thus increasing the burden upon the servient estate. Either of these acts of complainant would destroy its right to the use of this sewer. First, it destroyed the sewer itself; secondly, it has appropriated that part remaining for a radically different purpose from that for which it was originally designed.

Washb. Easem. 641, 75, 176, 700; 2 Washb. Real Prop. 3d ed. 342.

In *Seere v. Tiffany*, 18 R. I. 568, "where a way had been laid out for the common use of lots bounded on it, and A, the owner of one of these lots, had appropriated to his own use the part of the way opposite his lot, it was held that A had abandoned his easement, and could not maintain an action against the owner of another of the lots for obstructing the way."

To authorize an injunction there should be not only a clear and palpable violation of the plaintiff's rights, but the rights themselves should be certain, and such as are capable of being ascertained and measured.

Olsted v. Loomis, 6 Barb. 152.

Complainant had no legal right to connect its pipes with this sewer, even if it should be held that it is a public sewer.

Rev. Stat. chap. 16.

The sewer extending down Spring Street has been substituted by the city for this old one; and that is the one which complainant should connect pipes with.

Dolliff v. Boston & M. R. R. 68 Me. 177.

Peters, Ch. J., delivered the opinion of the court:

The respondent threatened to obstruct a drain running through his land from the complainant's premises downward into Belfast Bay.

The evidence shows that the route traveled by the drain was an ancient natural brook, in former times carrying a considerable volume of water, during the wet seasons of the year, through the city of Belfast into the sea; that for many years the city has supported an underground or covered drain in place of the brook, extending through the brook its whole length from an upper part of the city to the bay; and that this drain has served to carry off waste and foul materials from shops, stores, and houses situated upon it. The complainant owns a large block, lately erected, containing stores, offices, and halls fitted with waterclosets, the contributions from which, together with a large volume of water collected in cisterns for flashing purposes, are emptied into this drain.

The respondent justifies his threatened violence upon the drain, upon the ground, as he alleges, that, while the complainant's building was in process of erection, the municipal officers of the city diverted the drain at a point immediately above the building, carrying it around the land of both the complainant and the respondent, and connecting the new link with the old drain below them; the effect being to lessen the water-power of the watercourse, although increasing its burdens; and in consequence thereof bringing upon the respondent's premises odors which render such altered and increased use of the drain a nuisance to him.

The complainant denies such assertions. While admitting the diversion, it disclaims all responsibility of it, and contends that, as matter of fact, more water goes into the drain, in proportion to the waste and filth passing through it, than before the diversion. It further claims that, besides a natural right of using the original watercourse, it has acquired, in common with others, an easement for a more extended enjoyment, by long-continued user. Its position is that, as a part of the public, it was entitled to have maintained over the respondent's land an underground closely-covered drain, from which no odors would be emitted, and no annoyance felt by the respondent, if he had not wrongfully, in an improper manner, opened the drain on his land for his own purposes. The complainant does not regard the proof as establishing much of a nuisance, if any.

The evidence of the case is not of a very definite character, in all respects. It is enough, for present purposes, upon which to predicate some legal propositions for the guidance of the parties, if the legal controversy be continued between them. It does not with certainty appear when and how the drain became a covered drain on respondent's premises, nor how tightly it has been heretofore maintained there and elsewhere. It does not appear that any drain has been laid out under statutory authority, though it seems that the city has for a long period exercised care over it, and perhaps built it. Evidently the waters of the brook for more than half a century have only been useful for carrying off waste of various kinds.

Whether the complainant is to be affected by the act of the city in causing a diversion, and if so, to what extent, depends on circumstances. It is not directly answerable for the act. It is not to be cut off below because cut off above. Its own hand has not done it. It has

al right to use the original brook—the
watercourse. No one can prevent the
use of that right. *Ashley v. Ashley*, 6
70. Nor can the complainant's greater
than the natural right be thus taken
it; and it is evident enough that it had an
ment in the brook or drain, acquired by

ll, it is our opinion that the respondent
d not suffer any injury by the change.
burdens and inconveniences should not be
ased thereby, any more than the com-
ant's should. The complainant is entitled
e the drain, in its changed condition, pre-
to an extent which will not inflict more
vance or injury upon the defendant than
as legally obliged to endure before the
ge. The respondent is not to be a loser,
gainer, by the change. The change can-
dd to the burdens of easement upon his
or lessen the legal burdens already rest-
pon it. The respondent's burdens should
e augmented, to his injury, either by the
quences of the act of the city, or of the
lainant, or of the acts of the city and
lainant combined.

are using the drain to no greater extent
says the complainant, than we were be-
—than we ever did. The answer is, But
former use and enjoyment of the drain
only relative, dependent, conditional.
s a right to send down your share of the
tomed pollution, provided water came
above interfused with it. Suppose the
ad blocked up the drain just below the
ndent's land,—could the complainant be
tted to fill the watercourse with foulings
its buildings, to the injury of the respon-

In principle, where is the difference
er the obstruction is made above or be-
if it renders the drain a nuisance? It
arily follows that, if the city has cut off
aral watercourse or an acquired easement
the complainant, the city would be an-
able to it for any hurtful consequences, un-
ne change was assented to by it; and then
t as affecting it would be *damnum abe-*
juria; and there is evidence in the case
did assent to the change, and that it
nduced the city to make the change.

on the facts presented certain proposi-
are derivable, in addition to those already
and growing out of them, which may
er explain the relative rights of the
s.

There is no doubt that the right to pollute a
to a greater extent than is permissible
mon right may be acquired by prescrip-
Gould, Waters, § 345, and cases in note.
need not define a prescriptive easement,
plain how one may be acquired.

ne complainant has a prescriptive right
tain, or to have maintained for its bene-
close underground drain across the re-
ent's land, it may continue using it to any
which will not affect the respondent
injuriously than when heretofore used as
e and covered drain. In such case we
perceive that it would make any differ-
to the respondent whether the amount of
ion passing through and under his land
re or less. We all know that in the large
and cities drains are laid under houses,

stores, and along the streets, and are unobjec-
tionable as long as properly constructed and
properly maintained. In such case, if the re-
spondent uncovers the drain in order to locate
privies upon it, thereby creating a nuisance in
the neighborhood, he must submit to the con-
sequences of his own act. Few drains will ad-
mit such openings without the presence of nu-
isance. Filth may be carried into the channels
provided for it in a manner more recommend-
able. Of course, if there be a covered drain,
those who maintain it should keep it in good
repair.

If, on the other hand, the complainant is not
entitled to maintain a close drain over the re-
spondent's land, but only a drain subject to
openings such as the respondent made in it for
private uses of his own, then the complainant
would be entitled, as before described, to no
use of the drain that will inflict greater annoy-
ance or injury than was imposed on him by
such prescriptive easement as existed before
the diversion. Gould, Waters, §§ 342, 344,
346, and cases. And in such case it might
make a difference to the respondent whether
the amount of foulings contributed by the oc-
cupation of complainant's buildings be one
quantity or another.

Under the evidence this bill must be sustained
whatever the rights of the parties may be
in any future litigation. In any view, the com-
plainant had a right to use the drain for some
purposes, to some extent. It has never lost or
abandoned such right. Even an abuse of the
right does not deprive it of it. Gould, Waters,
§ 348; *Prop. of Locks & Canals v. Nashua & L.*
R. 104 Mass. 8. The respondent was in-
tent upon a total destruction of the water-pas-
sage, preventing any use whatever of the drain
by complainant. The result, had he been un-
opposed, would have been a wanton blow
against both individual and public privilege.
The respondent's lot through which the drain
runs is not of much value, and, from its situ-
ation, never can be, costing him \$50 to obtain
title to it some years ago.

The respondent mistook the remedy. If
aggrieved, he can sue the complainant for dam-
ages; or procure an indictment against it;
or,—the most fitting remedy,—can move for an
injunction in equity,—a jurisdiction whose
door is always open for the reception of com-
plaints and early action on them. The respon-
dent was bent on a swifter remedy than equity
would accord; for equity, acting by injunction,
withholds the blow in such case until those in-
terested can make preparation for both private
and the public needs. *Boston Rolling Mills v.*
Cambridge, 117 Mass. 401, and citations there.
Bill sustained, with costs.

Walton, Danforth, Emery, Foster,
and Haskell, JJ., concurred.

Lemuel Q. TYLER
v.

J. Herbert CARLISLE.

1. When a lender of money intends that
it shall be used by the borrower in
gambling, and it is so used, he can-
not recover it of the borrower; but
mere knowledge of the borrower's pur-

- pose will not prevent recovery, if the lender did not participate in the illegal act.
2. If the lender participates in the purposes of the borrower, even then he may recover the money of the borrower if demanded before it has been actually used.
 3. In minor offenses the locus pœnitentiæ continues until the execution of the illegal act.

(Penobscot—Decided March 1, 1887.)

ON exceptions by the plaintiff. *Overruled.*
The facts are stated in the opinion.

Mr. C. E. Littlefield, for plaintiff:

Rev. Stat. chap. 125, § 10, furnishes no justification for the ruling complained of. The necessary implication arising from this statute is that money loaned at the time and place may be recovered. The statutes are not to be extended by construction. They are to be strictly construed.

Abbott v. Wood, 22 Me. 546; *Commonwealth v. Worcester & N. R.* 124 Mass. 563; *Cleveland v. Norton*, 6 Cush. 383.

It has therefore been held that a similar statute did not affect the loan itself, but that the money might be recovered.

Peck v. Briggs, 3 Den. 107.

We say that the last clause of the instruction, or the last proposition, is clearly erroneous; that it not only misled the jury, but that a careful analysis demonstrates that it has no legal foundation upon which it can stand. We think we are able to show that the origin of this language was such as does not justify its application to the case at bar, and has been carried down through the authorities by reason of an incorrect apprehension of the original precedent. The case in 68 Maine relies for authority upon *Cannan v. Bryce*, 3 Barn. & Ald. 179; *McKinnell v. Robinson*, 3 Mees. & W. 484, and *Tracy v. Talmage*, 14 N. Y. 162.

An examination of the Maine case discloses the fact that the proposition in that case was nothing but a *dictum*, as the court there said: "There is no claim in this case for money lent." The same is true of the 14 N. Y. case, *Cannan v. Bryce*, and *McKinnell v. Robinson*, which were there cited as authority for the language. *McKinnell v. Robinson* cites and expressly relies upon *Cannan v. Bryce*, and a statute of Geo. III., which goes much farther than our own case. Now the case of *Cannan v. Bryce*, instead of being against the case at bar, makes a distinction that is decisive against the second proposition.

Mr. J. E. Hanly, for defendant:

Whoever gambles or bets on any person gambling shall be fined not less than \$1, nor more than \$20, to be recovered, by complaint or indictment, to the use of the prosecutor.

Me. Rev. Stat. chap. 125, § 2.

All notes, bills, bonds, mortgages, securities, or conveyances given in whole or in part for money or goods won by gambling, or betting on persons gambling, or given to repay money lent or advanced for gambling or betting, or lent or advanced at the time and place thereof, are utterly void, etc.

Me. Rev. Stat. chap. 125, § 10.

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When money is lent, and the borrower left free to use it as he pleases, mere knowledge on the part of the lender that the borrower intends to use it for an illegal purpose will not bar a recovery. But it is well settled that if the money is lent for the express purpose of enabling the borrower to gamble with it, a recovery cannot be had.

Franklin Co. v. Lewiston Sav. Bank, 68 Me. 47.

A contract for money advanced or loaned for speculating in stocks upon margins is not illegal. *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Rep. 308; *Whitesides v. Hunt*, 97 Ind. 18; 19 Am. Rep. 441; *Cunningham v. Nat. Bank of Augusta*, 71 Ga. 400; 51 Am. Rep. 266.

Peters, Ch. J., delivered the opinion of the court:

The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling at the trial was that, if the plaintiff lent the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt could not be recovered; but otherwise, if the plaintiff had merely knowledge that the money was to be so used. Upon authority the principle the ruling was correct.

Any different doctrine would, in most instances, be impracticable and unjust. It would not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so, men would have great responsibilities for the motives and acts of others. A person may loan money to his friend—to the man whose interest is not to his purpose. He may at the same time disapprove his purpose. He may not be willing to deny his friend, however much disapproving his acts.

In order to find the lender in fault, he must himself have an intention that the money be illegally used. There must be a combination of intention between lender and borrower—a union of purposes. The lender must in some manner be a confederate or participant in the borrower's act; be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve and accommodate the man. In support of this view many cases might be adduced. A few prominent ones will suffice: *Green v. Green*, 3 Cliff. 494; *Gaylord v. Soragen*, 32 Vt. 117; *Hill v. Spear*, 50 N. H. 252; *Peck v. Briggs*, 3 Den. 107; *M'Intyre v. Parks*, 3 Met. 58; *Anchor v. Mansel*, 47 Me. 58. See 68 Me. 47.

Nor was the branch of the ruling which the plaintiff, even though a participant, cannot recover his money back if it had not been actually used for illegal purposes. In minor offenses the locus pœnitentiæ continues until the money has been actually converted to the illegal use. The law encourages a repudiation of the illegal contract, even by a guilty participant, as long as it remains an executory contract or the illegal purpose has not been in operation. The lender can cease his criminal design and reclaim his money. The reason is," says Wharton, "the plaintiff

is not to enforce, but to repudiate an contract." Whart. Cont. § 354, and there cited. The object of the law is to protect the public—not the parties. "It best accords with public policy to arrest the ill-transaction before it is consummated," the court in *Stacy v. Foss*, 19 Me. 335. *White v. Franklin Bank*, 22 Pick. 181.

The rule allowing a recovery back does not apply where the lender knows that some in-justice crime is to be committed with the money which he furnishes. It applies only where the minor offenses are involved.

Exceptions overruled.

Unforth, Virgin, Libbey, Foster, and Bell, JJ., concurred.

Joseph TITCOMB

v.

KENNEBUNK MUTUAL FIRE INSURANCE CO.

On the dissolution of a mutual insurance company, its personal property remaining after the payment of legal liabilities vests in the State.

(York—Decided March 14, 1887.)

Report.

Bill in equity to dissolve the defendant corporation and distribute its assets.

The case is stated in the opinion.

Walter L. Dane, for plaintiff.

R. P. Tapley, for surviving corpora-

tion. The provisions of the charter, the contract of insurance, the by-laws, and the statutes relating to mutual insurance companies and corporations, furnish all the law of the case. The case is like this arose in Georgia in 1884.

Reporter, 75.

Bourne & Son, for policy-holders: *Carlton v. Southern Mut. Ins. Co.* 72 Ga. The court holds "that a mutual insurance company is based on the idea that each of the members becomes one of the assurers, and by becoming interested in the profits and losses for the losses; that such an organization without a charter would be governed by the common law regulating partnerships; and, except as governed by the charter, equity will govern the law of partnership in respect to the division of profits."

Alton, J., delivered the opinion of the court:

The Kennebunk Mutual Fire Insurance Company was incorporated in 1856. It has no policies since 1877. In 1884, its last policy having expired, the company voted to wind up its affairs, and to do no more business.

A decree has been obtained *ad nisi prius* dissolving the corporation, from which no appeal has been taken or claimed; and the only question before the law court is to determine what shall be done with the assets of the company. Our statutes contain ample provisions for the disposition of the assets of stock companies. Rev. Stat. chap. 46, §§ 25-27, 54. This is a mutual company, and has no

stockholders; and the provisions cited do not apply. According to the old settled law of the land, says *Chancellor Kent*, upon the civil death of a corporation, when there is no special statute to the contrary, all its real estate reverts to the grantors and their heirs, and all its personal estate vests in the People. 2 Kent, 10th ed. 385, 386. To the same effect is *Angell & Ames on Corporations*, 2d ed. chap. 22, § 6.

But it is said that in this class of cases, the incorporators named in the Act of Incorporation should be regarded as stockholders. They are not stockholders; and to hold that they are would be a fiction; and fictions are not favored, and are never resorted to except to work out some strong and inherent equity; and there is no such equity in favor of the incorporators of a mutual insurance company. They contribute nothing towards its assets, and we think it would be against public policy to allow them to have a pecuniary interest in them. Such an interest would inevitably tend to create a temptation to fix the rates of insurance higher than would be necessary to meet losses; and then, when a surplus had been thus obtained, to divide it among themselves, and thus reap a profit from a business in which they had invested no capital and had taken no risks; and this at the expense of the policy-holders. We think there is a much stronger equity in favor of the former policy-holders, whose money has contributed to produce the assets. But we do not think they can be regarded as stockholders after their policies have expired and their premium notes have been cancelled or given up to them. They have then received in full the benefits for which they contracted, and are no longer members of the company; and to distribute among them a small amount of assets, and to determine what each former policy-holder's share ought in equity to be, would be attended with difficulties and an amount of labor which the end would not justify. When a man dies leaving no wife or kindred, his property descends to the State. And when a corporation, which, like a mutual insurance company, has no stockholders, ceases to exist, we are not prepared to say that the rule of the common law, which gives its surplus assets to the State, is not a wise one.

But it is said that, unless the incorporators can be regarded as stockholders, the court has no authority to decree a dissolution of the corporation. It is a sufficient answer to this argument to say that the question of dissolution is not before the law court. The court at *nisi prius* decreed a dissolution in May, 1885. From that decree no appeal was taken or claimed. It was made at the request of the incorporators; and, so far as appears, no objection was made by anyone. Thereupon a receiver was appointed, and the case was sent to a master; and it was upon the coming in of the master's report that the question,—and the only question now before the law court,—was first raised. It is now too late to object to the dissolution of the corporation. The only question is, What shall be done with the small amount of assets now in the possession of the receiver? They amount to only \$1,403.23 and a safe.

It is the opinion of the court, and it is accordingly ordered and decreed, *that the receiver pay the costs of this suit, including reasonable counsel fees, and that he pay the balance, if any shall remain, to the State Treasurer for the use of the State.*

Peters, Ch. J., Virgin, Libbey, Emery, and Haskell, JJ., concurred.

Samuel F. GIBSON

v.

Roxanna BENNETT.

1. **Marriage is a good consideration for a deed.**
2. **Any fraud intended by the grantor upon his creditors would not avoid the deed, if the grantee was innocent.**

(Oxford—Decided March 10, 1887.)

ON motion of plaintiff to set aside the verdict and for new trial. *Overruled.*

Real action to recover 150 acres of land in Bethel.

The case is stated in the opinion.

Mr. S. F. Gibson, for plaintiff:

A valuable consideration "is either money or something that is money's worth."

2 Washb. Real Prop. 2d ed. 103. Also see

4 Kent, Com. 8th ed. 518.

Messrs. R. A. Frye and A. E. Herrick, for defendant:

The burden is upon the plaintiff to establish the fraud.

Nichols v. Patten, 18 Me. 231; *Best, Ev.* § 349; *Brown v. Lunt*, 37 Me. 435; *Jordan v. Dobson*, 2 Abb. U. S. 398; *Thompson v. Wharton*, 7 Bush, 563; *Klein v. Horne*, 47 Ill. 430; *Beatty v. Fishel*, 100 Mass. 448.

And especially is the burden upon creditors attempting to deprive a wife of her estate.

Ewing v. Gray, 12 Ind. 64; 2 Add. Cont. 768, note 1.

The fraud which invalidates such conveyances consists in the intent acted upon,—to prevent creditors from collecting their just debts.

Rollins v. Mooers, 25 Me. 192; *Webster v. Wilkey*, 25 Me. 326; *Hall v. Sands*, 52 Me. 355; *Stevens v. Robinson*, 72 Me. 381; *Chandler v. Von Roeder*, 24 How. 224 (65 U. S. bk. 16, L. ed. 633); *French v. Holmes*, 67 Me. 189.

To make a conveyance for a consideration fraudulent as to creditors, the fraudulent purpose must be known and participated in by the grantee. Neither inadequacy of consideration, indebtedness, nor insolvency is sufficient to avoid a conveyance. The question depends upon the *bona fides* of the transaction.

Randall v. Vroom, 30 N. J. Eq. 353.

Marriage is not only a good, but a valuable consideration; and a married woman is regarded as a purchaser for value of all property which accrues to her by virtue of the marriage contract, or of an antenuptial agreement.

Derry v. Derry, 74 Ind. 560; *Magniac v. Thompson*, 7 Pet. 348 (32 U. S. bk. 8, L. ed. 709); 4 Kent, Com. 463; 1 Add. Cont. 15, note 1; *Vance v. Vance*, 21 Me. 364; *Stevens v. Moore*, 73 Me. 564.

A conveyance of land to an intended wife in

consideration of marriage, or made in performance of a promise given to induce marriage, or on the faith of which it was contracted, is upon a valuable consideration.

Anderson v. Green, 7 J. J. Marsh. 448; *ters v. Howard*, 8 Gill, 222; *Whelan v. Whelan*, Cow. 537; *Wood v. Jackson*, 8 Wend. 9; *G v. Cromartie*, 11 Ind. 174; *Chichester v. V. Mumf.* 98; *Rainbolt v. East*, 56 Ind. 538; *Cole v. Loehr*, 9 Cent. L. J. 436; *Verpla Sterry*, 12 Johns. 536; *Smith v. Allen*, 5 A. 454.

And the consideration of marriage will support a marriage settlement against creditors even prior ones; this, too, though the parties both knew of the husband's indebtedness.

Herring v. Wickham, 29 Gratt. 623; *Pres Wilson*, 108 U. S. 22 (Bk. 26, L. ed. 363); *van v. Crawford*, 6 Ch. D. 29.

The plaintiff alleges fraud and covin practiced by defendant and her husband, D. P. Bennett, to cheat and defraud him of his supposed claim against Bennett, and attempt to prove the allegation by Bennett. The defendant denies the charge, and states she knew her husband owed plaintiff, or plaintiff claimed that her husband owed her until after she and her husband had threatened them: then her husband uttered threats, and told her that he was owing son.

Where a grantee is in possession of a claim, the delivery and acceptance are always presumed.

Patterson v. Snell, 67 Me. 559; *Cutts v. Mfg. Co.* 18 Me. 190.

It is the province of the jury to weigh evidence and all the facts and circumstances before them; and to whichever side the facts and circumstances incline the scale, to render the verdict accordingly.

Sweetser v. Lovell, 33 Me. 451; *Downing Freeman*, 13 Me. 92.

When conflicting testimony upon the question at issue is submitted to the jury, the court has no authority to set aside the verdict unless it manifestly was found from prejudice, bias, or improper influence, or by a mistake in the law or facts of the case (*West Gardiner Farmingdale*, 36 Me. 252); and a new trial is not to be granted on motion, when the court is satisfied that the verdict is wrong, by a careful examination of the evidence reported (*Gray*, 4 East. Rep. 944).

Emery, J., delivered the opinion of the court:

The tenant was a witness, and told substantially the following story: While she was a widow, Mr. Bennett proposed marriage to her, and offered to give her, in consideration of such marriage, a deed of the demanded land. After some reflection she accepted the offer, and promised marriage to Mr. Bennett as proposed by him. Thereupon Mr. Bennett delivered to her the deed under which she claimed. Soon afterward she married him in pursuance of the agreement, and to fulfill her part. She was not aware that Mr. Bennett was in debt at the time of the deed to the marriage. She was not aware that the deed would hinder or delay any creditors of Mr. Bennett.

is clear that, upon such a state of facts, creditor of the husband can take the land by subsequent attachment and levy. Marriage valuable consideration for a deed; and if marriage afterward take place, the deed is so far as consideration is concerned. No fraud intended by the grantor upon his creditors would not avoid the deed, if the estate was innocent. Wait, Fr. Conv. 199, *Verplank v. Sterry*, 12 Johns. 536; *Prewitt v. Wilson*, 103 U. S. 23 [Bk. 26, L. ed. 368]; *Th v. Allen*, 5 Allen, 454; *Vance v. Vance*, 21 870; *Wentworth v. Wentworth*, 69 Me. 253. Mrs. Bennett's story is contradicted by her husband. They had separated, and there was no feeling. The truth of either story was for the jury to ascertain and declare. It has appeared the wife's story to be the true one. We think we should leave the case upon the jury's finding of the truth.

Verdict overruled. Judgment on the verdict.
Justices, Ch. J., Walton, Virgin, Lib-
erty, and Haskell, JJ., concurred.

Emerson W. BRYANT

v.

MAINE CENTRAL R. R. CO.

When one accepts a deed bounding him by another's land, the land referred to in the deed becomes a monument, whether the conveyance of it is on record or not, and will control distances.

(Franklin—Decided March 14, 1887.)

Report of facts agreed. *Judgment for defendant.*

Right of entry to recover possession of a strip of land in Jay, a half rod wide, running along the railroad location of the defendant company.

The facts are stated in the opinion.

Justices, J. C. Holman and S. C. Belcher, for plaintiff:

The deed to defendant from plaintiff's grantor was not acknowledged, and therefore recording was not authorized, and is a nullity and the case finds that plaintiff had no actual knowledge of the existence or contents of this deed, and it is therefore not binding on him.

This case is to be distinguished from *Bonney v. Morrill*, 52 Me. 252. In that case the grantor made his grantee by "land now or formerly owned by Isaac Bonney," without in any way indicating or suggesting where said Bonney's boundary line was. The grantee was put on guard, by the language used, to inquire and learn for himself where "the land now or formerly owned by Isaac Bonney" was situated. The court have good reason to say that we cannot presume the grantor intended a deed upon his grantee.

In this case, however, the grantor expressly sets out the line of the defendant's land by establishing a monument which he says is 12 rods from the easterly line of defendant's land. Plaintiff had no occasion to make further inquiries. He relied, and had a right to rely, on the statement of his grantor, who had full knowledge of the boundaries.

In *Bonney v. Morrill* there was some ambiguity in the description. There were two monuments, either of which would answer the call in the deed. In this case there is no ambiguity. The plaintiff's deed embraces without question—in fact the case so finds—the land in controversy. The only question is, whether or not he can hold all the land described in his deed.

Messrs. Frye, Cotton, & White, for defendant:

The east bound of the railroad is made the limit of the plaintiff's land, and there is no pretense that the parties desired or expected to make anything else the bound in this direction; for while, at other corners, they placed stone bounds,—as will appear by the deed,—they placed no such monuments on this line. The line itself is made the limit, although the event shows that the parties may have been mistaken as to the true location of that line on the face of the earth.

The case comes within the rule laid down in *White v. Jones*, 67 Me. 20, and *Winnell v. Marston*, 54 Me. 270.

The exact question is: Where the call in the deed is "10 feet to the east bound of the railroad," and the railroad holds land, but by an unrecorded deed from the same grantor, does the call stop when the east bound is reached, or does it extend the full 10 feet?

The case of *Bonney v. Morrill*, 52 Me. 256, covers this point.

The description in the deed to the plaintiff bounds him by land of the defendant. If so, it was not intended to include it.

Wellington v. Fuller, 88 Me. 68.

Knowledge of the plaintiff that he was bounded by the defendant's land, contained in the plaintiff's own deed from a common grantor, was sufficient to put the plaintiff upon inquiry, and amount to actual notice, under the circumstances of this case.

See 2 Pom. Eq. Jur. § 600, p. 30.

Walton, J., delivered the opinion of the court:

We think judgment must be rendered for the railroad company. It appears that in 1856 Lorenzo Keyes conveyed a strip of land 5 rods wide, for a railroad. That strip of land is now held by the Maine Central Railroad. In 1879 he conveyed another parcel of land to the plaintiff, bounding him on the west by the "east bound of the Maine Central Railroad." Two stone monuments are mentioned in his deed. One of them is described as standing 10 feet, and the other 12 feet, from the east bound of the railroad. And if these distances are adhered to, the plaintiff's land will overlap the land of the railroad just half a rod; for the land of the railroad is just half a rod nearer to these stone monuments than the distances named in the plaintiff's deed. And this half rod is the land in dispute. The plaintiff had no actual notice of the location of the side lines of the railroad, and he says that he supposed the east bound to be where his deed indicated. And he says that he is not chargeable with constructive notice, because the deed to the railroad, although actually recorded, was not legally recorded, it not having been acknowledged. And for these reasons he insists that

he should be allowed to hold to the full extent of the distances named in his deed. To this the defendant replies that, when one accepts a deed bounding him by another's land, the land referred to becomes a monument which controls distances, and that the law will not allow him to overlap and hold any portion of the other's land, whether the latter's deed of it is or is not recorded. We think the defendant's position is correct. It is sustained by the decision in *Bonney v. Morrill*, 52 Me. 256; and upon principle we think such ought to be the law.

Judgment for the defendant.

Peters, Ch. J., Virgin, Libbey, Emery, and Haskell, JJ., concurred.

Luther HEMMENWAY

v.

George A. LYNDE.

Mortgages held by a decedent in Maine are assets in the hands of the administrator, to be administered and distributed as personal estate. The title remains in the administrator and his successor till redeemed, sold, or distributed.

ON report. *Demandant nonsuit.*

The case is stated in the opinion.

Mr. Lindley M. Staples, for demandant:

The real estate of a person intestate descends, being subject to payment of debts, in equal shares, to his children, and to the lawful issue of a deceased child, by right of representation.

Rev. Stat. chap. 75, § 1; *Kimball v. Sumner*, 62 Me. 805; *Heald v. Heald*, 5 Me. 387.

Rev. Stat. chap. 1, § 6, is as follows: "Land or lands, and the words 'real estate,' include lands and all tenements and hereditaments connected therewith, and rights thereto, and interests therein."

Mr. A. P. Gould, for defendant:

The legal title to the mortgage and the property secured by it is in the administrator of the mortgagee, because the mortgage has never been foreclosed.

Hatch v. Bates, 54 Me. 136.

The mortgage is still, therefore, an asset of the estate, and belongs to the administrator.

See *Carter v. Manufacturers Nat. Bank*, 71 Me. 450, and authorities cited.

"It is the well-established doctrine in equity that the debt is the principal, and the mortgage is the accessory. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond. *Accessorium non ducit, sed sequitur, principale.*"

"The control over the mortgaged premises must essentially reside in him who holds the debt."

Moore v. Ware, 88 Me. 496, citing, in support of above, *Jackson v. Willard*, 4 Johns. 41; 2 Story, Eq. § 1016.

"Mortgages of real estate, and the debts thereby secured, being by law assets in the hands of the administrator, a quitclaim deed by the heirs of the mortgagee, before fore-

closure, will not operate as assignment of the mortgage."

Douglass v. Durin, 51 Me. 121.

Emery, J., delivered the opinion of the court:

This is a real action. From the admission and the admissible evidence, the following facts appear: There was a mortgage of the demanded land, conditioned for the support of the mortgagee. He began a real action for the land for a breach of the condition, pending which suit he died. His administrator with the will annexed prosecuted the action, and recovered the usual conditional judgment in case of mortgages. He afterwards received seisin and possession of the land by himself or attorney. He afterward died, and an administrator *de bonis non* was appointed. There was no foreclosure upon the judgment, and the right of redemption is not barred. The mortgage has never been redeemed, and the administrator has made no sale of the land. The estate of the mortgagee has never been finally settled in the probate court; and there has been no decree of distribution.

The demandant has acquired the title of mortgagor, and also has quitclaim deeds of the land, and deeds of release of the mortgage on the judgment, from the heirs and residuary legatees of the mortgagee. The tenant is in possession under the administrator.

The demandant contends that the legal title was in the mortgagee, and that he had the legal estate according to the Maine doctrine of mortgages; that consequently, upon his death, the legal estate and the land passed to his heirs or residuary legatees, and by their deed to the demandant, subject to the contingency of being required for the payment of the demandant's debts, etc. The demandant contends that, until the administrator shall obtain a proper special license to sell, etc., the legal estate is in him, the demandant, and he is entitled to the possession.

This contention cannot prevail against the language of our statutes, even if it otherwise could. Rev. Stat. chap. 90, § 12, declares that the executor of the mortgagee shall hold the mortgaged lands as assets; have the control of them as a personal pledge; receive seisin and possession of them for the use of such person as may be entitled to them upon the settlement of the estate. Chap. 65, § 1, declares that such lands shall be deemed personal assets so long as there remains a right of redemption; shall be held by the executor or trustee for the persons who would be entitled to the money, if redeemed; and, if not redeemed, he may sell the lands as he would personal property. Section 85 declares that, if not redeemed or sold, the lands shall be distributed among those entitled to the personal estate.

It is quite apparent from these statutes that mortgaged lands do not pass, upon the death of the mortgagee, to his heirs. They pass to the executor as fully as personal property passes to him. He administers them as such, and does personal property. His deed will convey them. *Crooker v. Jewell*, 31 Me. 306.

The deed of the heirs will not convey them. *Douglass v. Durin*, 51 Me. 121. An entry upon

by the heirs would be trespass against executor. *Palmer v. Stevens*, 11 Cush. 148. The demandant, however, further contends the case sufficiently shows there are no debts against the estate, and there can be, by reason of the Statute of Limitations, claims that thus the estate is practically sold, and the title to these lands has thus passed to him as the grantee of the heirs. He claims that in this state of affairs, there being no debts, the release of the condition of mortgage by the heirs and residuary legatee becomes effectual, as the lands must come to him.

In the case of *Webber v. Webber*, 6 Me. 127, it might be thought to sustain this contention of the demandant, cannot be considered as applicable authority. The language of the statutes has been much changed since the time in that case, and the present statutes much more explicit than that of 1821. We think the title to lands held by a decedent mortgagee passes, upon his death, to his executor, and remains in the executor and his assigns until redemption, sale, foreclosure, or distribution. The heirs only acquire title by purchase or distribution. *Boylston v. Carleton*, Mass. 598; *Taft v. Stevens*, 3 Gray, 504; *Wul. Exrs.* 214; *Bird v. Keller*, 77 Me. 270. Having acquired the legal estate, the demandant cannot maintain a real action. Whatever rights he has acquired from the heirs as legatees, he must enforce against the administrator *de bonis non*, in the probate court, upon his bond.

mandant non suit.
*Winters, Ch. J., Walton, Virgin, Lib-
and Haskell, JJ., concurred.*

Catherine MCGRAW

Frank MCGRAW *et al.*

deed duly executed and recorded, if not delivered, will convey no title. Facts stated, which were held insufficient to prove a delivery.

(Washington—Decided March 7, 1887.)

report. *Judgment for defendants.*
Real action to obtain possession of certain property in Eastport.

The opinion states the facts.
C. H. M. Heath, with him Mr. E. E. W. Moore, for plaintiff:

Some respects the case is similar to *Bean v. Boothby*, 57 Me. 295,—one of instantaneous sale, where Frank was the mere conduit through whom his father's title passed to the plaintiff. "That the seisin may be instantaneous merely, it makes no difference whether the transaction consists of one conveyance or several, or whether they are executed between two parties only, or more. If they all constitute one transaction, done at the same time, it matters not how complicated it is. If, but an instrument or conduit to pass the title to another, it is unimportant how many simultaneous conveyances are made into and out of him."

Bean v. Boothby, 57 Me. 308, citing *Hasleton v. Lesure*, 9 Allen, 24; *King v. Stetson*, 11 Allen, 407; *Chickering v. Lovejoy*, 13 Mass. 51; *Webster v. Campbell*, 1 Allen, 318. See also *Hubbard v. Cummings*, 1 Me. 11.

That both deeds were made at the same time, and constituted throughout but one transaction, is not in controversy.

In such a case no estate vests in the intermediary, and he acquires no beneficial interest. 4 Mass. 566; *Haynes v. Jones*, 5 Met. 292; *Hasleton v. Lesure*, 9 Allen, 24.

That an infant may be a trustee is well settled.

Perry, Tr. § 54, and cases; *Tucker v. Bean*, 65 Me. 352; *Wakefield v. Marr*, 65 Me. 341; *McLellan v. McLellan*, 65 Me. 500.

In *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 486; *S. C.* 10 Am. Dec. 747, a father, by parol, constituted his minor son his agent to sell a parcel of land. The son made a contract to sell, and on his refusal to perform, the court in chancery decreed specific performance, holding that an infant may be an agent, and his contracts as such, otherwise unexceptionable, will bind his principal.

See further: *Prouty v. Edgar*, 6 Iowa, 353; *Elliott v. Horn*, 10 Ala. 348; *S. C.* 44 Am. Dec. 488, citing *Co. Litt.* 172 a; *Zouch v. Parsons*, 3 Burr. 1801; *Tucker v. Moreland*, 10 Pet. 67 (35 U. S. bk. 9, L. ed. 845); *United States v. Bainbridge*, 1 Mason, 82; *Whitney v. Dutch*, 14 Mass. 457; *Bingham*, Inf. chap. 2.

The settled rule in chancery, in cases where the infant trustee also has an interest in the estate, is to afford him six months after attaining majority to show cause against the decree (*Coffin v. Heath*, 6 Met. 76). But the final decree will be made during his minority, if he has no beneficial interest. Stat. 7 Anne, chap. 19, § 2 (given in 65 Me. 508), expressly provides for this; followed by *King, L. Ch.*, in *Ex parte Vernon*, 2 P. Wms. 549, and by *Talbot, L. Ch.*, in *Goodwyn v. Lister*, 3 P. Wms. 387. "Generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit at law." *Co. Litt.* 172 a; embodied to some extent in Stat. 7 Anne, chap. 19, §§ 1, 2. The principle was applied in the famous case of *Zouch v. Parsons*, 3 Burr. 1801, where an infant mortgagee, in whom the title vested, upon payment of the mortgage made a reconveyance of the land, which was sustained. This case, and its principles, *Justice Story* upholds in *Tucker v. Moreland*, *supra*, upon the ground that the infant was the trustee of the mortgagor; *Kent, Ch.*, to same effect, in *Livingston v. Livingston*, 2 Johns. Ch. 541. The general principle is stated by *Perry* in his work on Trusts, § 54. Akin to this is the same work, § 52, that an infant is capable of executing a naked power unaccompanied with any interest, or not requiring any discretion.

4 Kent, 324.

Such trusts, as in case at bar, were executed by infants in the following cases, cited above:

Prouty v. Edgar, 6 Iowa, 353; *Elliott v. Horn*, 10 Ala. 348; *S. C.* 44 Am. Dec. 488; *Zouch v. Parsons*, 3 Burr. 1801.

Plaintiff introduced in evidence the deed of James McGraw to Frank McGraw, duly acknowledged and properly recorded. Such a deed is presumed to have been duly executed

and delivered, and the adverse party must overcome such presumption with sufficient proof.

Webster v. Cadden, 55 Me. 185.

The only delivery necessary would be the delivery to the *cestui que trust*. This would be true upon principle, and it was so held in *Chickering v. Lovejoy*, 13 Mass. 51, cited approvingly in *Bean v. Boothby*, 57 Me. 295. See also *Haynes v. Jones*, 5 Met. 292; *Hazleton v. Lesure*, 9 Allen, 24.

In *Gould v. Day*, 94 U. S. 405 (Bk. 24, L. ed. 232), the court says: "Subsequent conduct of the parties to the action, recognizing the title as transferred, is competent to show ratification of a delivery shown only by record."

In *Corley v. Corley*, 2 Coldw. (Tenn.) 520, it was held: "If the grantor of a deed of gift acknowledges the execution of a deed, and directs it to be registered, and subsequently recognizes the title of the grantee under it, that, although not a delivery, is equivalent to a delivery."

Where a deed is first delivered to a grantee after it has been recorded by the grantor, the grantee takes the deed the same as if the delivery had been before record.

Jones v. Roberts, 65 Me. 273.

In *Kerr v. Birnie*, 25 Ark. 225, the court holds that if the grantor in a deed not delivered cause the same to be recorded, this is a sufficient delivery to enable the grantee to hold the land as against the grantor.

In *Burt v. Cassety*, 12 Ala. 734, a deed of land was drawn by an attorney by direction of vendor, and left with the attorney for purpose of registration, the vendee not being present. Held a sufficient delivery.

A much stronger case is found in *Elsherry v. Boykin*, 65 Ala. 336, where a mortgagor acknowledged a deed on the day of its date before the probate judge, and left it with him for registration, and it was duly recorded. This was held sufficient to perfect the delivery.

And in *Moore v. Giles*, 49 Conn. 570, the court holds that placing a deed on record, with the intent that it should pass the title to the grantee, constitutes a valid delivery.

The rule is stated in *Ruckman v. Ruckman*, 82 N. J. Eq. 259: "Where the circumstances show unmistakably that one party intended to divest himself of the title, and to invest the other with it, delivery will be considered complete, though the instrument still remains in the hands of the grantor."

Delivery may be made by leaving it with the recording officer; and if once delivered, retention of the deed by the grantor does not affect the title.

Burkholder v. Casad, 47 Ind. 418.

A similar case is *Cecil v. Beaver*, 28 Iowa, 241, where a father executed a deed to his child, absolute in form and beneficial in effect, and caused it to be recorded. The court held that such an act was in law a sufficient delivery to the infant.

Defendants' position upon the joint control of the trunk is overthrown by *Le Saulnier v. Loeu*, 53 Wis. 207.

A want of consideration, as between the original parties, is not admissible to defeat the deed (*Goodspeed v. Fuller*, 46 Me. 141; *Bassett v. Bassett*, 55 Me. 127; *Labree v. Carleton*, 58

Me. 211); such a position would be open to creditors (*Hatch v. Bates*, 54 Me. 136).

Mr. E. B. Harvey, for defendants:

The deed under which the plaintiff claimed was never delivered; therefore no title passed from James McGraw to her.

Brown v. Brown, 66 Me. 316; *Patterson v. Snell*, 67 Me. 559; *Parker v. Hill*, 8 Me. 406; *Hawkes v. Pike*, 105 Mass. 560. See *Maynard v. Maynard*, 10 Mass. 456.

The deeds were found in the possession of James McGraw at his death, which raises a presumption against delivery.

Hatch v. Haskins, 17 Me. 391; *Stillwell v. Maynard*, 10 Wend. 44.

Deeds made under the circumstances were by James and Frank McGraw in order to pass the title of substantially the whole of a man's estate, from his own children and step-mother, should be unequivocally established. It should be done in such manner that the grantee would know that she was receiving title to property, and that at the time of delivery.

Marshall v. Jaquith, 134 Mass. 138.

Certainly no resulting trust in favor of plaintiff could arise from the transaction. A trust in her favor could arise only upon payment of a consideration by her.

See *Longdon v. Clouse*, 1 Cent. Rep. 564, cases cited; 32 Pa. 371; 87 Pa. 204.

There was no trust expressed in the deed, and a power given to an infant relating to the estate must be inserted in the deed, that she may execute it during his infancy, or his execution of it will have no effect.

1 Perry, Tr. § 52, and cases cited in note; *Coventry v. Coventry*, 2 P. Wms. 229; 8 P. Wms. 218, 220.

Peters, Ch. J., delivered the opinion of the court:

James McGraw, by deed dated May 15, 1876, conveyed a homestead to his minor son, James, by deed dated May 19, 1876, conveyed the same to Catherine McGraw, the wife of James, and both deeds were recorded on the 22d of the same month. If the deed to the plaintiff, Catherine McGraw, was never delivered to her, she cannot recover. We think a contrary view is not proved.

The further facts are these: The deeds were being sent for record by the husband, and were recorded at his expense and returned to him. He then placed them in a small hand-trunk in his bedroom, in a file of other papers of the family, where they remained till his death, without the consent of the plaintiff, they fell into the hands of the son William. No consideration was paid by the wife. The conveyance was not as an advancement or as security for a debt. The deeds were merely a form to save the husband against the recovery of fines and were, at the date of the transaction, likely to be adjudged against him by the State. A strong fact against the plaintiff is that, although a witness and an intelligent person, she does not disclose a word ever said by the husband to her about the transaction in all his life. She says on cross-examination that the deed was in her possession, and is hers; and that all she says about it. What she means by possession is that she took the trunk at

Had there been a delivery, she would be obliged to disclose more conversation and details about the deed. It also greatly makes against her that she applied for an assignment of power out of her husband's real estate, when left none but this.

It is contended by the plaintiff that she has her husband's confession of a delivery, by his executing another deed afterwards in which he describes land as bounded on one side by plaintiff's real estate, meaning the property in question. That act has its force, no doubt, and we think it is explainable. She was the owner of record,—the apparent owner,—and her husband's purpose was to have the world believe that she was the owner. It would be natural and convenient to bound the land in that way. Frank McGraw testifies that he never delivered any deed to the plaintiff, though title comes through him. It also appears that the plaintiff got more personal allowance as a representation to the court of probate than she had no real estate. These facts are much stronger against her than any that make her behalf. The controversy is between her and her husband's heirs, who are not her children.

Judgment for defendants.

Falton, Danforth, Emery, Foster, Haskell, JJ., concurred.

CITY OF PORTLAND

v.

UNION MUTUAL LIFE INSURANCE CO.

The personal property of a life insurance company organized under the laws of Maine was taxable by the town of Portland in which it had its principal place of business, prior to Stat. 1885, chap. 329.

Such personal property is not "personal property placed in the hands of any corporation as an accumulating fund for the future benefit of heirs or other persons," within the meaning of Rev. Stat. chap. 6, § 14, cl. 7, which provides that such property shall be assessed to the person for whose benefit it is accumulating.

(Cumberland—Decided March 4, 1887.)

Report. Judgment for plaintiff.

Action to recover a tax assessed by the City of Portland upon personal property of the defendant for each of the years 1882 and 1883. The case appears in the opinion.

Mr. Jos. W. Symonds, City Solicitor, for plaintiff:

In *Davis v. Macy*, 124 Mass. 195, it is said: "Nothing can be plainer than the purpose of the statute to make all the property in the Commonwealth, not included in certain specific and carefully-defined exemptions, liable to contribute, in due and just proportion, to the burden of public expenditure." Similar expressions are frequent in the opinions of our courts.

Even in the case of corporations which are required to make returns of the names and

residences of their stockholders to the assessors of the town in which they reside (Rev. Stat. chap. 46, § 30), it is provided (Rev. Stat. chap. 6, §§ 18, 19) that, if the corporation fails to make the required returns, the personal property liable to be taxed shall for such purpose be deemed corporate property, and be taxed to the corporation.

The property assessed in this case cannot be regarded as property placed in the hands of a corporation as an accumulating fund, within the meaning of Rev. Stat. chap. 6, § 14, cl. 7. The class of cases to which this clause applies may be seen by an examination of *Hatheway v. Fish*, 13 Allen, 267; *Freetown v. Fish*, 123 Mass. 355, and *Davis v. Macy*, 124 Mass. 193, in which cases reference is made to a similar provision of the Massachusetts statute.

Mr. Bion Bradbury, also for plaintiff:

In the case of *Augusta Bank v. Augusta*, 36 Me. 255, Shepley, *Ch. J.*, says: "Provision having been made by the statute, chap. 159, § 9, that all personal property, except that enumerated in the 10th section, should be assessed to the owner in the town or place where he should be an inhabitant,—when a corporation has been ascertained to be the owner, and to have its place of business established in a town or place, it must be considered as liable to taxation for personal property not composing a part of its capital, especially in cases coming within the provisions of statute, chap. 76, § 13." And in *Baldwin v. Ministerial Fund*, 37 Me. 372, the same learned judge says: "In the enactments since the Revised Statutes were operative, it has not been considered necessary to name corporations when it was intended to subject them to the provisions of the enactment."

Redf. R. R. chap. 30, § 228, c. 5; *Otis v. Ware*, 8 Gray, 509; *Portland, S. & P. R. R. Co. v. Saco*, 60 Me. 200.

A corporation, like a person, must have a residence in some one town.

Judkins v. Reed, 48 Me. 386.

The defendant corporation has a palatial residence in the city of Portland, from which emanates its great business, with all its extensive ramifications.

Hill. Tax. chap. 9, §§ 9, 12-15, 43-46, and cases cited; *Portland, S. & P. R. R. Co. v. Saco*, *supra*; *British Com. L. Ins. Co. v. Comrs.* 31 N. Y. 32; *Salem Iron Factory Co. v. Dancers*, 10 Mass. 514; *Amesbury, W. & C. Mfg. Co. v. Amesbury*, 17 Mass. 461; *Hartford F. Ins. Co. v. Hartford*, 3 Conn. 15.

The premium notes and the reserved fund of a mutual life insurance company are taxable as capital and money at interest.

Sun Mut. Ins. Co. v. New York, 5 Sandf. 10; 4 Seld. 241; *People v. New York*, 16 N. Y. 424.

Messrs. Drummond & Drummond, for defendant:

As matter of fact, the personal property held by corporations has been taxable by the municipalities in comparatively few cases. And yet, if the construction claimed by the plaintiff's counsel in this case is correct, every one of them should be taxed.

Take, for example, the case cited by the counsel for the plaintiff,—*Augusta Bank v. Augusta*, 36 Me. 255. The tax in question in that case was assessed under Laws 1845, chap.

159, and is almost exactly the same as the law was when the tax in this case was assessed. In this case we invoke and rely upon the precise principle decided in that Augusta case. The law requires the policy-holder to be taxed for the value of his policy, as in that case it required the shareholder to be taxed for the value of his share; and in neither case can the corporation be taxed.

The fact is that the law favors life insurance as it does deposits in savings banks, and even more, as is seen by the provisions in relation to exempting them from attachment; and it certainly cannot be held to subject them to double taxation.

Rev. Stat. of 1871, chap. 6, § 13 (under which the tax was assessed), provides that "all personal property within or without this State, except in the cases enumerated in the following section, shall be assessed to the owner in the town of which he is an inhabitant on the 1st day of April in each year."

The 6th exception in the following section is: "Personal property placed in the hands of any corporation as an accumulating fund for the future benefit of heirs or other persons shall be assessed to the person for whose benefit it is accumulating, if within the State; otherwise, to the person so placing it," etc.

Our funds are property placed in our hands as an accumulating fund for the future benefit of widows and orphans, whose rights are sedulously protected by the law; so that neither the person placing the funds nor his creditors can divert them. The provision in the law was evidently made for this very case, as well as for savings banks. So our funds are expressly excepted from the provisions of § 13.

Libbey, J., delivered the opinion of the court:

The only question in this case that need be decided is whether the defendant corporation, a mutual life insurance company, was legally taxable for its personal property in Portland in 1882 and 1883. It owned stocks in national banks in this State, of an assessable value sufficient to produce the tax assessed against it, and claimed in this action, besides, a large amount of other personal property, in which its funds and annual earnings had been invested. It is a corporation organized under the law of this State, and had its principal place of business in Portland, so that it was taxable there, if legally taxable.

By Rev. Stat. chap. 6, § 13, "all personal property within or without the State, except in cases enumerated in the following section, shall be assessed to the owner in the town where he is an inhabitant on the first day of each April."

This language embraces corporations as well as persons. The defendant, being the owner of the property in this State, was taxable, unless within one of the exceptions in § 14, or exempt by some other provision of the statute. It is claimed, and strenuously maintained by its counsel, that it is within the 7th exception enumerated in § 14, which reads as follows: "Personal property placed in the hands

of any corporation as an accumulating fund for the future benefit of heirs or other persons shall be assessed to the person for whose benefit it is accumulating, if within the State; otherwise, to the person so placing it, or to the executors or administrators, until a trustee is appointed to take charge of it or its income, and then to such a trustee." The deposit placed may be of a kind of property, such as stocks, to be returned *in individuo*, with interest, or it may be money to be invested, and a like sum, with its accumulations, returned at the time stipulated, either case the obligation is absolute. *away v. Fish*, 13 Allen, 267; *Davis v. Fish*, 124 Mass. 193.

Are the premiums paid as the consideration for the contract of life insurance personal property placed in the hands of the insurance company as an accumulating fund for the future benefit of heirs or other persons, within the meaning of this statute? We think not. The premiums are paid absolutely to the corporation as the consideration for the policy of insurance. They, with their accumulations, are not to be paid to heirs or other persons at some future day; but the sum to be paid is the special contract on the happening of the death of the insured is fixed and absolute, having no regard to the amount of premiums paid, or their accumulations. The insurance may become payable by the death of the insured within the first year, before a single premium becomes due; or it may not become due and payable till the premiums paid, and their accumulations, are double or triple the sum of the insurance; or it may never become payable, by reason of a failure to pay the premiums, or a violation of some other condition of the contract by the insured; and if the insurance is payable, in case of the death of the insured, to his legal representatives, and he dies leaving no widow or issue, the insurance is not for the "benefit of heirs or other persons," but goes into his general estate, to be administered as other personal assets. Rev. Stat. chap. 6, § 48, and chap. 75, § 10. If anything is payable after payment of debts, the heirs take by descent and not by purchase; as when the fund is placed in the hands of a corporation to accumulate for their future benefit. The contract of life insurance is not a deposit of the premium to be paid to some person, with their accumulations, at some future time; but a special contract of hazard for the payment of a stipulated sum, without regard to the amount in premiums before the happening of the contingency.

It is claimed that the construction of the statute we feel compelled to give to the statute upon mutual life insurance companies is a very burden. If so, it is a question added to the Legislature, and not to the courts, since this action was commenced, the Legislature has acted upon it by providing a mode of taxing all life insurance companies, so the question is no longer of practical importance. Act 1885, chap. 329.

Judgment for plaintiff.

Peters, Ch. J., Walton, Virgin, and Haskell, JJ., concurred.

MASSACHUSETTS.

SUPREME JUDICIAL COURT.

Sarah G. LENZ

v.

Oliver PRESCOTT *et al.*

When the plaintiff in an equity action is a demand growing out of an assignment by which every defendant affected, and their various interests so blended that it would be impossible to separate the investigation of them for convenience, it is proper that they be joined as defendants.

It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some matters in the suit, and that they are connected with the others.

Even if one party is a necessary party to some portion only of the case, the bill is not therefore necessarily multifarious.

Where, in view of the mode by which the parts of the transaction are connected by the assignment itself to the plaintiff; and to prevent a multiplicity of suits; and that the rights of all parties may be adjudged and settled; and that all persons interested in the subject-matter may be bound by the decree, a bill in equity affords the only appropriate remedy,—it can not be held multifarious.

Where the will devised shares of the testator's estate to his nephews, and provided that, if any of his nephews should die during the life of their mother, leaving issue, such issue should be entitled to one share of his estate by right of representation.—*Held*, that the interests of the nephews became vested on the death of the testator, although the subject to be divested by the contingency of the death of either, during the life of the mother, leaving issue; and that such interests were assignable during the life of the mother.

The probate court does not take cognizance of assignments made by legatees or distributees of their interests, but deals only with those primarily entitled to the legacies or distributive shares; and a bill may be maintained to ascertain the validity and construction of such an assignment, and to train the representatives of the estate from paying to another the portion of the estate to which the assignee is equitably entitled by his assignment.

(Bristol—Filed May 12, 1887.)

PEAL by plaintiff from a decree of a single justice of the Supreme Judicial Court denying a demurrer and dismissing a bill in equity to establish an equitable title to a trust under an assignment. *Demurrer over-*

ruled in equity by Sarah G. Lenz against Oliver Prescott and Frederick C. S. Bartlett, William E. Bird, Charles Greene, executor of the will of Roscoe Greene, deceased, James M. Cross, administrator *de bonis non* of the estate of Alfred Greene, deceased, and Welcome A. Greene. The bill alleged that Thomas A. Greene died in 1867, devising a large estate equally to his ten nephews and nieces,—among them defendant Welcome, and his brothers, Roscoe and Alfred, Greene,—subject to a prior life estate in his widow; that, prior to the widow's death, and in October, 1868, said Welcome assigned his tenth (being all the interest he then had in said estate) to defendant Prescott in trust to pay a debt of uncertain amount due from defendant Bird to said estate, and to pay the surplus to said Welcome, his representatives or assigns; that subsequently, in 1871, but still before the widow's death, said Roscoe died without issue, leaving a will of which defendant Charles Greene is executor. By this will Welcome took one eighth of Roscoe's tenth, and said Alfred also took an eighth; Alfred thus having one tenth and one eighth of one tenth, or nine eightieths of the whole. That, in February, 1874, Alfred died intestate and without issue; and Welcome took by inheritance from him one eighth of Alfred's nine eightieths. Defendant Cross is his administrator. That in July, 1875 (the widow still living), Welcome assigned to plaintiff, to secure his debt to her of \$7,000, all his then interest in said estate,—his interest being his equitable title *as cestui que trust* under his said assignment to Prescott, and his title to one eighth of Roscoe's tenth, and one eighth of Alfred's nine eightieths. That subsequently, in November, 1883, the widow died, whereby said legatees came into possession of their legacies. Thereupon defendant Bartlett was appointed administrator of said estate, and as such received the whole of said estate, amounting to \$80,000 and upwards. That in January, 1884, said Bartlett, administrator, having \$72,000 to divide, it was agreed between him and the eight surviving legatees, and the defendants Charles Greene and Cross, representatives respectively of Roscoe and Alfred, deceased, that the shares of Roscoe and Alfred should not be paid to their said representatives, but directly to the eight survivors, who alone were beneficially entitled to the same. That defendants Bartlett and Prescott had full knowledge of all the premises and of plaintiff's title as aforesaid; and that Bird's debt did not exceed \$6,986.66; and that, in respect of Welcome's original legacy so assigned to Prescott to secure said debt, Welcome's share of said \$72,000 was one tenth. Yet said Bartlett paid to said Prescott, and said Prescott received, in disregard and violation of their duty, and of plaintiff's rights, the sum of \$9,000 for account of Welcome's share in said division, being \$1,800 more than was due in respect of his legacy, and \$2,013.34 more than Bird's debt; Bartlett taking Prescott's indemnity for said excess. That immediately thereupon, Prescott, in further disregard and violation of his duty, and of plaintiff's rights, paid over to Welcome said surplus of \$2,013.34, taking Welcome's indemnity therefor.

That on hearing of such payments, in January, 1884, plaintiff gave Prescott and Bartlett

lett further notice that said payments were wrongful, and forbade said Bartlett to pay, and said Prescott to receive, any further money on account of said Welcome's interest in said residue; that, notwithstanding these notices, Bartlett, in March, 1884, paid \$1,100 more on Welcome's share to Prescott, who immediately paid over the same to Welcome, Prescott and Welcome respectively giving indemnity therefor; that plaintiff's debt against Welcome is still due and amounts now to \$11,000 and upwards, for which she has no security except his said assignment to her.

The bill was brought to establish the plaintiff's title to the property so assigned to her, namely, to all Welcome's interest in said Thomas Greene's estate, in whose hands the same may be,—her title being denied by Bartlett and Prescott and Welcome; and to charge Bartlett and Prescott and Welcome as trustees for her, and with liability to her for breach of trust, in respect of the money paid by Bartlett to Prescott over and above the amount of said Bird's debt. The prayer of the bill was for a discovery of certain papers; for an account of Bird's debt; for an account of Welcome's share in Thomas Greene's estate; that plaintiff's title to same may be established; that defendants Prescott, Bartlett, and Welcome Greene may be ordered to pay plaintiff all of said sum of \$10,100 less the amount so found to be due from said Bird; for an injunction restraining Bartlett from making further payment of any part of said Welcome's share in said estate to anybody but herself. The several defendants, except Cross, demurred to the bill for want of equity; for multifariousness; because plaintiff has complete and adequate remedy at law; and because the jurisdiction is in probate court, and not in equity. At the hearing in the supreme judicial court before Field, J., the demurrer was sustained, and it was decreed that the bill be dismissed, from which decree the plaintiff appealed.

Messrs. Rollin Mathewson and E. H. Bennett, for plaintiff:

I. Plaintiff is entitled to the relief prayed. The bill is grounded upon a trust. Bartlett, as administrator, is a trustee of the estate in favor of heirs, legatees, creditors, and others interested in the settlement of the estate.

Stone v. Hobart, 8 Pick. 464, 466; *Holland v. Cruft*, 20 Pick. 321, 326; 1 Story, Eq. Jur. § 593; 2 Id. § 1067.

Prescott received all the money he did receive solely as trustee, upon the trusts of the assignment to him.

The money in the hands of Bartlett, administrator, being trust money, the trust attached to it into whosoever hands it came with notice. Prescott and Welcome are thus both chargeable, as plaintiff's trustees, for the money they received.

1 Story, Eq. Jur. §§ 583, 584.

Plaintiff's title is an equitable title. Welcome's assignment to her is only an equitable assignment. He had conveyed to Prescott his legal title to his own legacy, and he had only an equitable title to Roscoe's and Alfred's legacies.

Plaintiff has no action at law against Bartlett, and none against Prescott in her own name, if at all. And whatever remedies she

may have at law, as Prescott and Bartlett Welcome all deny her title, she can bring them into equity in the first instance.

Walker v. Brooks, 125 Mass. 241, 243; *Gell v. Stone*, 110 Mass. 54; *Hammond v. Senger*, 9 Sim. 327, 332; Story, Eq. Pl. § and notes; 2 Story, Eq. Jur. § 1057 a.

Where a trustee is bound to account, it lies, though there be a remedy at law.

First Cong. Soc. v. Trustees, 23 Pick. *Badger v. McNamara*, 123 Mass. 117.

Other grounds of equity jurisdiction. Because here are conflicting claims to the property, and the bill is in the nature of a bill of interpleader; and because, if there is a remedy at law, the remedy in equity is plain and complete.

Treadwell v. Cordis, 5 Gray, 348; *Pollock v. Lloyd*, 5 Met. 528; *Sudbury v. Belknap*, 11 Mass. 517; *Peabody v. Tarbell*, 2 Cush. 231.

II. But the plaintiff has no remedy at law, because the amount which she is entitled to receive of either defendant cannot be determined in a court of law. These accounts can only be taken in equity. The bill asks for an injunction against Bartlett, and for a recovery.

Plaintiff has no standing in a probate court. Probate courts do not take cognizance of assignments by legatees or heirs of their testators.

Hevill's App. (Conn.) 1 New Eng. Rep. 461, 463; *Knowlton v. Johnson*, 46 Me. 461; *Wood v. Stone*, 39 N. H. 572; *Pond v. Pond*, 11 Mass. 413; *Procter v. Newhall*, 17 Mass. 81; *Osgood v. Breed*, 17 Mass. 355; *Hancock v. Hubbard*, 19 Pick. 167.

III. The bill is not multifarious. In taking of the accounts all persons interested in them or in the fund must be made parties. It is in order that multiplicity of suits may be prevented, and that the rights of all parties be adjusted and settled, and that all persons having any interest in the subject-matter of the suit may be bound by the decree.

Story, Eq. Pl. §§ 72 et seq., 218, 219; 2 Story, Eq. Jur. pp. 1-11.

Each of the defendants is interested in one or all of these accounts. Plaintiff cannot bring her claim against any defendant, and sue for a part of her claim only. She must sue for the whole of her claim, if she sues at all.

Story, Eq. Pl. §§ 287, 218, 76 c, and 1 Dan. Ch. Pr. 330, and note 2, 337.

Joining these parties does not make the bill multifarious.

Story, Eq. Pl. § 278, a, and notes; *Carr v. Mackay*, 1 Myl. & C. 603; *Percival v. Bland*, 1 L. J. 1 Ch. 1; *Kuye v. Moore*, 1 Sim. & 8; *Dimmock v. Bixby*, 20 Pick. 377; *Carr v. Way*, 105 Mass. 550.

If the case is entire as to one defendant, it is not multifarious as to another.

Parr v. Atty-Gen., 8 Cl. & F. 409; *Atty-Gen. v. Poole*, 4 Myl. & C. 17; *See Carr v. Carrier*, 4 Allen, 341.

IV. The foregoing considerations establish that equity has jurisdiction of the case brought by the bill; that plaintiff has neither an adequate remedy nor any remedy but in equity; and that the bill is not multifarious,—it answers all the demurrers.

V. Upon the question of multifariousness

be further observed: The bill has but one object, viz., to collect, by a sort of table trustee process, a single debt due Welcome to plaintiff out of his interest in his uncle's—Thomas Greene's—estate. Every allegation, every party summoned, every one asked for, is auxiliary to that one ob-

ject-matter for multifariousness will hold when the plaintiff claims several matters of different nature; and not where one right is claimed by the plaintiff, although the defendants may have separate and distinct interests.

See Dimmock v. Birby, 20 Pick. 377.

The assignment of Welcome to the plaintiff covered every dollar of his interest in Thomas Greene's estate after paying Bird's debt; and interest so conveyed cannot possibly be defeated without making all the defendants parties.

See **C. W. Clifford and F. C. S. Bartlett** for all defendants except Cross, administrators.

The bill presents three entirely distinct matters: (1) a claim for Welcome A. Greene's share under the will of Thomas A. Greene; (2) a claim for Welcome A. Greene's legacy under the will of Roscoe Greene; (3) a claim for Welcome A. Greene's distributive share as heir of Alfred Greene, deceased.

In the first case the court is asked: (1) to decree the plaintiff's assignment; (2) to confirm the assignment to Prescott; (3) to take an account of Bird's debt to Thomas A. Greene's estate; (4) to take an account of the indebtedness of Welcome A. Greene to the plaintiff. All the matters covered by this first case it is perfectly clear that the only parties interested are Bartlett, administrator, Welcome A. Greene, the legatee, and Prescott, trustee of Welcome under said assignment as afore-mentioned and William E. Bird. These defendants are all who have any interest in the disposition of said legacy.

In the second case it is alleged that, under the will of said Roscoe, said Welcome was entitled to one-eighth part of the "residue and remainder" of said estate.

If this is so, the plaintiff has a simple claim against the estate of said Roscoe, in the prosecution of which Charles Greene, the executor of the will of said Roscoe, and W. A. Greene, alone interested, of all the defendants in this case. And it is equally true and apparent that said Charles Greene, executor, is in no way interested in the above-named issues involved in the "first" case.

In the third case it is alleged that, as heir at law of said Alfred, said Welcome is entitled to a distributive share of said Alfred's estate. Asking this to be so, like the preceding claim, is a simple claim against the estate of Alfred Greene, interesting only to the legal representatives of that estate, James M. Cross, administrator, a defendant in this case; while he in turn has not a particle of interest in the issues involved by either of the other two cases.

We have here, then, three entirely distinct and independent cases embraced in one bill, with no connecting link; and not a single connection appears which renders it convenient or desirable that they should all be considered

to-

gether; and we therefore submit that the amended bill is multifarious.

The test of multifariousness, so far as it can be stated, seems to be as follows, viz.: If a defendant can say, "I am called upon to answer a bill containing two distinct subject-matters, with one of which I am concerned, and am associated with other defendants not concerned with that issue and solely concerned with the other," then he may demur for multifariousness.

Drew, Eq. Pl. 42.

This seems to be the rule in England and this Commonwealth.

Cousens v. Rose, L. R. 12 Eq. 366; *Metcalf v. Cady*, 8 Allen, 587; *Cambridge Water Works v. Somerville D. & B. Co.* 14 Gray, 193.

Several distinct matters are sometimes considered in one bill; when, however, there exists some connecting link rendering a combination of them convenient.

Heard, Eq. Pl. 44.

II. Is Welcome A. Greene's legacy under Thomas A. Greene's will a vested or contingent interest?

Thus far this case has been presented upon the theory that the interest which said Welcome has under the will of said Thomas is a vested interest, as alleged, and not a contingent one, as we contend it is; in which latter event the plaintiff's assignment is invalid, as the estate would not be a contingent estate covered by Pub. Stat. chap. 126, § 2, and hence would not be assignable.

After the recent decision of this court in the case of *Gibbens v. Gibbens*, 140 Mass. 102, 1 New Eng. Rep. 98, where the subject of vested and contingent remainders was so exhaustively argued by able counsel, it is unnecessary for us now to cite additional authorities, or to do more than attempt to distinguish the case at bar from that one, where it would seem that the court has gone to the extreme limit of the well-established rule of the court to favor vested rather than contingent remainders.

The case at bar is distinguishable from the *Gibbens Case*: (1) In the *Gibbens Case* the bequest was to the testator's own children; here it is to the children of the testator's brother; (2) the class was finally determined at the death of the testator; here it may not be finally determined until long after the termination of the life estate. The effect of this difference is very noticeable. In the *Gibbens Case* the death or the survival of the children could not change the descent of the property from the objects of the testator's bounty. Under that decision his children or his grandchildren, if he had any, must necessarily take; but in this case the result may directly violate the clear intentions of the testator.

Suppose a child of Welcome A. Greene should outlive the testator, and then die, during the life tenancy of the widow, without issue,—its share would then go, if it were a vested legacy, to the father, Welcome A. Greene, if living, as its heir; or to its mother, if living, if its father were dead, to the exclusion of its brothers and sisters. But can the court have any doubt that the testator intended that, in case a child of Welcome A. Greene died during the widowhood of Mrs. Thomas A. Greene, without issue, its share should be divided among its brothers,

and sisters? And, to carry the case a little farther, suppose under such circumstances, the father were dead, and the mother survived, and then died,—it would carry the property to her heirs, though no blood relation to Thomas A. Greene, whatever.

While the decision in the *Gibbens Case* is of course the law for this Commonwealth, the court will hesitate before extending that doctrine an iota; and the language of the court in that case, in its reference to the special language of the will and to the arguments to be drawn therefrom, indicates very strongly that the court did not intend that the decision should be precedent for a case where there was a substantial difference from the facts of the *Gibbens Case*.

III. If the plaintiff has any rights under her assignment, they can be secured through the probate court.

The amended bill prays for an account of the personal estate of the testator, Thomas A. Greene, in the hands of the administrator, Bartlett. It appears that the said Bartlett, administrator, is the duly-appointed administrator *de bonis non* of the estate of Thomas A. Greene, deceased, and that the settlement of said estate is now pending in the Probate Court for the County of Bristol. Said probate court has exclusive jurisdiction of all matters pertaining to the settlement and distribution of said estate.

IV. The plaintiff has a plain, adequate, and complete remedy at common law.

1. As to Prescott. The plaintiff states that Bird's debt to the estate of Thomas A. Greene did not exceed \$6,986.66, and that Prescott paid to said Welcome the surplus of said legacy, amounting to \$2,018.84. If the balance due said Welcome was ascertained as alleged, the plaintiff could bring a suit at law against the trustee to recover same.

2. As to Bartlett. If the plaintiff rests her claim upon the agreement made by some of the parties to this bill, by virtue of which it is alleged that Bartlett, administrator, agreed to pay the shares of said Roscoe and said Alfred in the estate of said Thomas to said eight legatees directly, and not to the legal representatives of said estates, then, upon breach of said agreement, the plaintiff would have a claim for damages in a suit at law upon said agreement. Upon the representation of the proper party, the probate court will authorize a suit at law upon the probate bond of Bartlett, administrator, if he neglects or refuses to pay said Welcome's legacy.

Pub. Stat. chap. 143, § 13.

Upon a suit upon the administrator's bond as aforesaid, execution can issue for the amount of the legacy in favor of the legatee.

Fay v. Taylor, 2 Gray, 154.

This is true even when the legacy is not for a specific and definite sum, and the amount can only be ascertained by reference to an assessor.

Conant v. Stratton, 107 Mass. 474.

3. As to Charles Greene, the executor. The plaintiff has a plain, adequate, and complete remedy at common law, if said executor refuses to pay said Welcome's legacy. It may be further said that, without the will of said Roscoe, this court cannot determine what its provisions are, or determine the plaintiff's rights under same; and said will is not a part of this case.

4. As to James M. Cross, administrator. For failure to distribute the estate of his intestate, parties interested can sue the bond of said administrator.

5. As to William E. Bird. With Prescott, trustee, out of the bill, Bird has no interest in this case.

6. As to Welcome A. Greene. With the other defendants out of the bill, the plaintiff has no case in equity against said Welcome.

Devens, J., delivered the opinion of the court:

The first ground of demurrer relied on by defendants is that the bill is multifarious. Its object is evidently to collect a debt due from Welcome A. Greene to the plaintiff, Welcome having assigned to her, as security therefor, all his interest in the estate of his uncle, Thomas A. Greene, whether the same was derived directly under the will of said Thomas, or by the will of Roscoe Greene, or by inheritance from Alfred Greene. Roscoe and Alfred Greene were brothers of Welcome, and, like him, devisees under the will of Thomas A. Both were then deceased, one testate, and the other intestate. This assignment was made subject to a previous assignment to Mr. Prescott, which was to secure the payment of a debt due from the defendant Bird to the estate of Thomas A. Greene,—the surplus remaining, by the terms of the assignment, to be paid to Welcome, his administrator or assigns. The assignment to Prescott was dated before the death of either Roscoe or Alfred Greene; but the defendants Welcome Greene, Bartlett, the administrator of the estate of Thomas A. Greene, and Prescott, as the bill alleges, all deny that the plaintiff has any rights by virtue of her assignment, pretending that the previous assignment operated to convey to Prescott all Welcome's interest in the estate of Thomas, including that to which he became entitled by the death of his brothers; that it was an absolute conveyance, and left in Welcome no assignable interest.

There are presented—as the defendants contend—three cases in a single bill: A claim for the surplus of the legacy of Welcome under the will of Thomas after payment of the debt due from Bird, in which only Welcome, Bartlett, administrator, Prescott, and Bird can be interested; a claim for Welcome's legacy under the will of Roscoe Greene, in which no one can be interested but the plaintiff, Charles Greene, one of the defendants, the executor of the will of Roscoe, and Welcome; a claim for Welcome's distributive share in the estate of Alfred Greene, in which no one can be interested except his administrator, James Cross, the plaintiff, and Welcome. We have then, as it is urged, three independent cases embraced, without any connecting link, which renders it necessary or even convenient or desirable that they should be considered in a single bill.

We are not prepared to concur in this, between the plaintiff and Bartlett, the administrator of Thomas A. Greene, Welcome Greene, and Prescott, these claims form a part of one transaction. The assignment of the plaintiff—assuming it to be valid and embracing all the claims stated—entitled her

ive from Bartlett all the surplus of the immediate legacy to Welcome, and from the representatives of Roscoe and Alfred the amounts coming to Welcome from the estates of his brothers. By an agreement set forth in a bill, made between the executor of Roscoe, the administrator of Alfred on the one hand, and the defendant Bartlett, he has released from them certain amounts due from the estates they represent to Welcome; or, more properly, Bartlett has, by their agreement, retained them, and, without paying them over to Welcome or the executor and administrator respectively of his brothers, has paid them directly to Prescott. The plaintiff has a demand growing out of an assignment by which every defendant was affected; and their own interests are so blended that it would be impossible to separate the investigation of the matter with convenience. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some matters in the suit, and that they are connected with the others. Even if one is a necessary party to some portion only of the case, a bill is not therefore necessarily multifarious. Story, Eq. Pl. 271 a.

All the parties defendant, except Bird, practically deny the right of the plaintiff under the assignment; and the transaction by which Prescott has received the money above the debt to Bird has been participated in by all the defendants except Bird. It does not appear that Mr. Prescott makes any claim to these funds except by reason of the original assignment to him, but he has paid them to Welcome.

It is a necessary party throughout, as he is interested in having his debt correctly determined, and the assignment to the plaintiff is subject to that debt so far as the surplus of the legacy is concerned. The executor of Roscoe and administrator of Alfred are also interested in having the amount of this surplus determined, as that is subject, with the funds in their hands, to the assignment in favor of the plaintiff. The assignment to the plaintiff, it is observed, is not an absolute assignment, but one for the payment of her debt; and the representatives of the three estates, his interest in which he has assigned, are properly the parties in determining how much, if anything, is to be paid by each. The plaintiff did not have, as the defendants contend, an adequate remedy at law, if the funds to which she had a right to look have been wrongfully paid to Prescott by reason of a misconstruction of the effect of the assignment to him, or by any other cause.

The suggestion is that a series of suits might be brought against the representatives of the three estates. In view of the mode in which the parts of the transaction are connected by the assignment itself to the plaintiff, and especially by the arrangement made between the representatives of the three estates, and by the payment from each, through Bartlett, to Prescott,—in order that a multiplicity of suits may be prevented; that the rights of all parties may be adjudged and settled, and that all persons interested in the subject-matter may be bound by the decree, a bill in equity affords the only

appropriate remedy; and it cannot be held multifarious.

The defendants further urge that the interest which said Welcome and his brothers had in the estate of Thomas A. Greene was a contingent interest only, and that, their mother being still alive at the time of the assignment to the plaintiff, it was invalid, as the estate sought to be assigned was not included in the class made assignable by the statute (Pub. Stat. chap. 126, § 2). There is no occasion to consider the effect of this statute as to contingent estates, as the interest of the brothers in their uncle's estate was vested. Upon this point the case, *Gibbens v. Gibbens*, 140 Mass. 102, 1 New Eng. Rep. 98, is quite decisive. The testator, Thomas A. Greene, does, indeed, provide that if any of his nephews shall die during the life of their mother, leaving issue, such issue shall be entitled to one share of his estate by right of representation. There may be a vested interest determinable upon the happening of a contingency. If the interest of Welcome and his brothers was subject to be divested by the contingency of the death of either during the lifetime of the mother, leaving issue, it was not the less, on that account, vested. *Gardner v. Hooper*, 3 Gray, 398; *Blanchard v. Blanchard*, 1 Allen, 223; *Darling v. Blanchard*, 109 Mass. 176; *McArthur v. Scott*, 113 U. S. 340, 381 [Bk. 28, L. ed. 1015].

The defendants further urge that if the plaintiff has any rights they can be secured through the probate court. The amended bill prays for an account of the personal estate of the testator, Thomas A. Greene, in the hands of his administrator, Bartlett, and of the shares to which Welcome is entitled as legatee of said Thomas, as legatee of Roscoe, and as heir of Alfred. But we do not understand that the plaintiff seeks to transfer the settlement of these accounts into this court. Nor could the bill be maintained for that purpose, as the probate court has exclusive jurisdiction of all matters pertaining to the settlement and distribution of estates. Its principal object is to ascertain the validity and the construction of the assignment under which the plaintiff claims; and for this purpose it may be maintained.

The probate court does not take cognizance of assignments made by legatees or distributees of their interests, but deals only with those primarily entitled to the legacies or distributive shares. *Pond v. Pond*, 13 Mass. 413; *Procter v. Newhall*, 17 Mass. 81, 92; *Osgood v. Breed*, Id. 355; *Hancock v. Hubbard*, 19 Pick. 157; *Knowlton v. Johnson*, 46 Me. 489; *Wood v. Stone*, 39 N. H. 572.

The bill does not set forth that the accounts of the representatives of the three estates involved have yet been settled finally in the probate court. While, until this is done, it may not be possible to determine all that is due to plaintiff under her assignment, from either, if anything, or what sums shall be finally paid by them, she is still entitled to maintain the bill to restrain them from paying over to Welcome any moneys now in their hands, or which may hereafter come into them, to which she is equitably entitled by her assignment. Should she establish the validity of her assign-

ment and notice to them thereof, the bill should also be retained, in order that, when it is ascertained by proper decrees of the probate court and an accounting there, what is due to Welcome from the estate of his uncle, Thomas A. Greene, and the estate of his brothers, Roscoe and Alfred, the representatives of those estates shall be ordered to pay to plaintiff enough to satisfy her claim, without regard to the division and distribution they have made of the assets of estates respectively represented by them, by agreement among themselves and without order from the court.

Demurrer overruled.

Mary M. KHRON

v.

Edward BROCK.

1. It is the **duty of the owner of a building** under his own control and in his own occupation, as between himself and the public, to **keep it in such safe condition** that travelers on the highway shall not suffer injury.
2. If the **work of a contractor to repair a building is completed**, the **owner will be responsible for injuries** to others thereafter resulting from the imperfect construction or dangerous condition of the work.
3. A judge is not bound to adopt the precise words of a party requesting **instructions to a jury**; and if the instructions given by the judge are not stated, it must be inferred, as against the expecting party, that they were correct and sufficient to cover the inquiry.

(Suffolk—Filed May 12, 1887.)

ON defendant's exceptions. *Overruled.*

Action of tort, in which the plaintiff seeks to recover damages for personal injuries occasioned by a piece of zinc which fell, or was blown by the wind, upon the plaintiff from the roof of defendant's house on Tufts Street, in Boston.

At the trial in the superior court before Knowlton, J., it was in evidence that defendant was the owner of the dwelling-house and land above mentioned, and that on December 23, 1884, while the plaintiff was walking on the sidewalk adjoining and opposite said house, a piece of zinc, which formed a cap for the brick wall which extended a few inches above the roof of said house, either fell, or was blown by the wind, from said wall, and, striking the plaintiff on the head, threw her down, and thereby occasioned the injury complained of. No persons were working on the roof of the defendant's house on the day of the accident; but there was a carpenter at work on the front of said house, sheathing about the front door.

It was in evidence, on the part of the defendant, that that portion of the sidewalk on which the plaintiff claims she was at the time she was struck and injured was, at the time of the accident, and for several weeks had been, obstructed on either side of said house by a fence which extended from said house

across and beyond the said sidewalk to the roadway, and made it necessary for persons walking on the sidewalk to turn out at points where the fences were, in order to pass by. This evidence was contradicted by plaintiff's testimony.

It was also in evidence that, on the day of said accident, one Blevins, a roofer, and his employees, was at work upon the roof of said house, under an entire contract for a fixed price made with the defendant, the terms of which he was to remove the gravel from the old roof of said house, and place thereof to put on new tar and gravel, zinc flashings,—he, Blevins, furnishing labor and materials therefor. The evidence was conflicting as to whether the removal and repairing of said cap was any part of said contract, which was an oral one. The evidence was also conflicting as to whether said Blevins had completed his contract at the time of the accident, and also as to whether the defendant interfered with said cap during the performance of the work. Blevins testified that he assisted the defendant in removing the cap from the wall, and also in replacing it. It was denied by the defendant, who testified that he, the defendant, in no way interfered with the same.

After the evidence was all in, the defendant asked the court to rule and instruct the jury as follows:

"1. The defendant is not liable in this action unless the zinc was unfastened by him, or was so negligently and carelessly left unfastened.

"2. If the defendant Brock entered into a contract with Blevins, the roofer, under the terms of which he, Blevins, was to remove and furnish the labor and materials for putting a new roof on the building in question, and putting the cap on the wall was a part of that contract, the defendant would not be liable in this action.

"3. If the zinc was carelessly or negligently left unfastened or loose by Blevins, or his employees, and, while in that condition, was blown from the roof, then the defendant is not liable in this action.

"4. If the jury find that it was a part of the duty of Blevins to fasten and secure the cap which fell or was blown off from the wall, then it is their duty to find a verdict for the plaintiff; as in that event the negligence would be that of Blevins, and not of the defendant.

"5. The defendant was not bound to provide for remote contingencies, such as a high or severe storm; and the burden of proof was upon the plaintiff to show what precautions the defendant failed to take which he ought to have taken.

"6. If the jury find that the plaintiff was injured upon the sidewalk in front of the defendant's house, where she claims to have been at the time she was struck, and also find that at the time the sidewalk was enclosed upon the sides of the house by a fence or barrier extending across the sidewalk to the street, impeding its use for travel, then they must find that she had no right to be there, and that she cannot recover damages in this action."

The court refused to so rule, and left

jury to determine whether the plaintiff's injury was caused by the unsafe and improper condition of the defendant's building, and whether, at the time, the plaintiff was lawfully on the street or sidewalk, in the exercise of due care; and gave full instructions touching these questions. Upon the matter of the defendant's fifth request, the following instruction was given: "The duty of an owner to his building in such a condition that a full occupant of adjacent property will not be injured by it does not create against him a liability for an accident caused by the wrong-interference of a third person, or for an avoidable accident; that is, for one produced by such a cause as a superior and unanticipated natural force, like a stroke of lightning or a tornado of such violence as could not reasonably be expected; but it does leave him liable for all accidents produced by the unsafe condition of the house in connection with the action of winds or storms ordinarily incident to our climate."

to which refusal the defendant excepted. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

Mr. James W. O'Brien, for defendant: The negligence which caused the injury to the plaintiff was the negligence of Blevins, the contractor for the roofing, and not the negligence of the defendant. It was in evidence that Blevins, with his employees, was at work on the roof on the day prior to the accident; also that he had not completed his contract, which, as claimed by defendant, included the repair and fastening of the zinc cap which caused the injury. And it further appears from the testimony of Blevins that he personally assisted in the removal of the said

the relation of Blevins and the defendant that of contractor and contractee; and the defendant would not be liable for the neglects of the contractor.

Conners v. Hennessey, 112 Mass. 96; *Hilliard v. Richardson*, 3 Gray, 349.

The first, second, third, and fourth requests and instructions should therefore have been sustained.

The case at bar is similar to cases of *Welfare v. London & B. R. Co.* L. R. 4 Q. B. 693, and *Conner v. Webb*, 101 N. Y. 378.

The jury should at least have been allowed to determine whether the injury was caused by the negligence of the contractor or of the defendant.

As regards the sixth request for instruction: It appeared from the evidence on the part of the defendant that the portion of the sidewalk on which the plaintiff claims to have fallen at the time of the injury was fenced in as required by ordinance of the city of Boston Rev. Ord. chap. 28, §§ 7, 8), and would therefore not be open for public travel; and she therefore had no right to be there; and such instruction should have been given (*Moynihan v. Whidden*, 143 Mass. 287, 3 New Eng. 362).

The defendant's first four requests for instruction are consistent with the law as settled in

Gray v. Boston Gas Light Co. 114 Mass. 149, *Jager v. Adams*, 123 Mass. 26.

Messrs. R. D. Smith and J. H. Sherburne, for plaintiff:

The court gave full instructions touching the questions whether the plaintiff's injury was caused by the unsafe and improper condition of the defendant's building; and whether, at the time, the plaintiff was lawfully on the street or sidewalk, in the exercise of due care. The evidence, which was conflicting upon these questions, is not reported. The defendant's requests, except the fifth, are based upon his views of that evidence. The court was not bound to adopt the language of these requests.

Thurston v. Perry, 130 Mass. 240; *Hovess v. Grush*, 131 Mass. 207; *Randall v. Chase*, 133 Mass. 210.

The owners of houses are bound, at their peril, to keep the stack of chimneys, or other things collected upon the building, from falling into the street below.

Gray v. Boston Gas Light Co. 114 Mass. 153; *Nichols v. Marsland*, L. R. 10 Exch. 225, 2 Exch. D. 1; *Fletcher v. Rylands*, L. R. 1 Exch. 265, 279; L. R. 3 H. L. 330, 339, 340.

An owner, by employing a contractor to build or repair his house, cannot escape liability for an injury resulting from the imperfect condition thereof, caused by the negligence of the contractor, where the contractor had ceased to work or had completed his contract.

Gorham v. Gross, 125 Mass. 232; *Currier v. Boston Music Hall Assn.* 135 Mass. 414; *Sturges v. Theological Soc.* 130 Mass. 414.

"The person who, for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief,—if it escapes, must keep it at his peril; if he does not do so, he is *prima facie* answerable for all damage which is the natural consequence of its escape."

See *Gorham v. Gross*, 125 Mass. 232, 238.

This duty does not, or should not, rest upon any doctrines of negligence in the ordinary sense (*Nichols v. Marsland*; *Gray v. Boston Gas Light Co.* *supra*); it is analogous to the duty of a carrier to ensure the safe carriage of goods, and subject to similar exceptions.

It is a rule of public policy to protect those who use the highways and adjoining premises.

Shipley v. Fifty Associates, 106 Mass. 194, 199.

The houseowner, being bound to keep his building safe, so that no part of it will fall, cannot escape that duty by making a contract with one to build or repair.

A different rule may prevail when the whole premises are given up to the control of a contractor, as in *Conners v. Hennessey*, 112 Mass. 98; but we submit that this case should have been decided the other way.

See *Mulchey v. Methodist Soc.* 125 Mass. 489; *Gray v. Boston Gas Light Co.* *supra*.

This question seems to be governed by the principles settled in *Fletcher v. Rylands*, L. R. 1 Exch. 265, and affirmed in L. R. 3 H. L. 330, and in *Gorham v. Gross*, 125 Mass. 232; *Mulchey v. Methodist Soc.* 125 Mass. 487; *Gray v. Boston Gas Light Co.* 114 Mass. 149; *Shipley v. Fifty Associates*, 106 Mass. 194; *Heaven v. Pender*, 11 Q. B. D. 503; *Kearney v. London, B. & S. C. R. Co.* L. R. 6 Q. B. 760.

Devens, J., delivered the opinion of the court:

The first ruling requested was that the defendant was not liable in this action unless the zinc (by the falling of which the injury occurred) was unfastened by him, and was so negligently and carelessly left unfastened. This instruction could not have been given. It is the duty of the owner of a building under his own control and in his own occupation, as between himself and the public, to keep it in such safe condition that travelers on the highway shall not suffer injury. *Gray v. Boston Gas Light Co.* 14 Gray, 149, and cases cited.

It was a disputed question whether one Blevins, who had contracted with the defendant to make certain repairs on the roof of his house, had completed his contract. The second, third, and fourth instructions requested, which, if given, would relieve the defendant from any responsibility if the carelessness of Blevins in leaving the zinc unfastened was the primary cause of the injury, necessarily imply that the owner of the building was not responsible for the unsafe condition, even if the contractor had completed his contract and had ceased to work. The case upon these points was left to the jury to determine whether the plaintiff's injury was caused by the unsafe condition of the building. What, in terms, the instructions were, the exceptions do not show; but it is evident that the defendant was only made responsible for the unsafe condition of the building itself, and not for any carelessness of Blevins, as an independent contractor, in actually performing the work. It cannot be contended that, if the work was completed, the owner would not be responsible for injuries resulting from the imperfect construction or dangerous condition. *Gorham v. Gross*, 125 Mass. 282.

The fifth instruction requested was given in substance, and the defendant has urged no objection thereto.

The sixth request was, in substance, that if the jury find that plaintiff was on the sidewalk, and find "that the sidewalk was enclosed on both sides of the house by a fence or barrier extending across the sidewalk to the street, and impeding the use for travel, then they must find she had no right to be there, and therefore cannot recover damages in this action." Whether the defendant had any authority from the city authorities to enclose the sidewalk in the manner described does not appear. While the presiding judge did not adopt the request of the defendant, he gave full instructions upon the question whether the plaintiff was lawfully on the street or sidewalk, in the exercise of due care. The judge was not bound to accept the precise words of the defendant; and, as his instructions are not stated, it must be inferred, as against the excepting party, that they were correct, and sufficient to cover the inquiry.

Exceptions overruled.

HORACE W. JORDAN

v.
ALICE MCKINNEY.

SAME *v.* SAME.

A party cannot, by drawing out on cross-examination the opinion of a witness

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as to the ownership of real estate, gain the right to contradict the witness by showing that, at another time, the witness had stated that the deed under which the person he had designated as the owner of the realty claimed title was fraudulent. Such evidence does not tend to contradict the testimony of the witness that he held possession by permission of the person he had designated as owner.

(Suffolk—Filed May 9, 1887.)

ON tenant's exceptions. *Sustained.*

These two actions are real actions, and were tried together in the superior court before Knowlton, J., before whom it appeared that demandant had, in March, 1883, recovered judgment against tenant's husband, Daniel McKinney, and his two sons and partners, Bernard McKinney and Daniel McKinney, Jr., that demandant had taken out execution, and under such execution had sold the real estate in question as the property of the judgment debtor, Daniel McKinney, standing in tenant's name, the property having, at the commencement of the suit, been specially attached. It appeared that at the execution sale demandant had purchased the property, and these actions were brought September 8, 1883.

Both of the pieces of land in question had been conveyed to Daniel McKinney; one in 1868, and the other in 1873. The record title had remained in him until said pieces of land were conveyed to tenant by him just prior to their marriage, in February, 1882, under such circumstances that demandant claimed the conveyances were fraudulent as against creditors. Tenant, on the other hand, claimed that the two pieces of property in question were conveyed to her,—the one in consideration of marriage, and the other as a *bona fide* sale,—under such circumstances that she was entitled to hold both against demandant. And evidence was introduced by both parties upon these issues, and instructions in the case were given by the court, to which no objection was made.

It appeared that tenant's husband, Daniel McKinney, had a son, named Bernard McKinney, by a former marriage; and that, at the time of the alleged conveyance to tenant, said Bernard McKinney was occupying the premises covered by one of said deeds (*viz.*, the parcel said to have been conveyed in consideration of marriage), and that he had occupied the same continuously from the time of the conveyance, without paying any rent to tenant. In a deposition of said Bernard, taken in California, put in evidence in the case, the following cross-interrogatories by demandant, and answers thereto, appeared:

Cross-Int. 5. Under what arrangement, and on what terms, and with whom, have you occupied, or do you occupy, by yourself or your family, the dwelling-house referred to in Cross-Int. 1?

Ans. Alice McKinney, the present wife of Daniel McKinney, my father, owns the property or dwelling-house. My family, and myself when there, occupy the dwelling-house by her permission; there is no other arrangement or terms between her and myself.

Cross-Int. 6. Do you not claim the right

occupy said dwelling-house without paying rent?

Ans. No.

Demandant then called Charles H. Snow for purpose of contradicting Bernard McKinney in regard to the manner of his occupancy, as to the ownership of tenant. Against objection of tenant, and subject to her exception, the court ruled that the evidence was admissible, and permitted Snow to testify as follows:

"On the morning of the day on which I made my attachment (April 13, 1892) I met Bernard McKinney and Daniel McKinney, Jr., together in a team, near my place of business, on the street. They seemed to be more than excited. Bernard said, 'I want you to attach my house and land on Washington Street' (meaning the premises referred to in the rest of his deposition above quoted). Said I, 'What is up?' He said, 'Father has conveyed away to defraud us boys of our legal rights and our creditors from being paid; now I want to attach that immediately; you want to do that to-day. I did not know it until last night myself.'"

Tenant did not object to any portion of this evidence of Snow after it was made, or move to strike out any portion thereof.

The jury returned a verdict for demandant in each case, and tenant alleged exceptions.

Cases. *Charles Robinson and George Blaney*, for tenant:

The admission of Snow's testimony was er-

arnum v. Farnum, 13 Gray, 508; *Fletcher v. Boston & M. R. R.* 1 Allen, 9; *Kaler v. Builders Mut. F. Ins. Co.* 120 Mass. 333; *Eames v. Whitaker*, 123 Mass. 342.

The renewal of the objection to Snow's testimony after it was given, or a request that the court should reverse the ruling which it had made, would have been useless, and was unnecessary.

Oldbrook v. Dow, 12 Gray, 357, 361; *Leyland v. Ingree*, 134 Mass. 367, 370; *Thwing v. Clifft*, 136 Mass. 432.

Cases. *Gaston & Whitney*, and *E. Tapscott*, for demandant:

The credit of a witness who has testified, or by giving his deposition, may be impeached by showing that he has made a different statement out of court, either before or after he has given his testimony; and it is not necessary that the impeached witness be first sworn of as to such different statement, or that he be present when his credit is to be impeached.

Wicker v. Welch, 17 Mass. 160. See *Hathaway v. Crocker*, 7 Met. 262; *Brigham v. Clark*, 13 Mass. 430; *Skinner v. Flint*, 105 Mass. 528; *Wick v. George*, 108 Mass. 324; *Snow v. Moore*, 112 Mass. 512; *Hayden v. Stone*, 112 Mass. 346; *Foot v. Hunkins*, 98 Mass. 528.

The foregoing cases show, what is also true in the case at bar, that a former adverse statement by the same person about the same subject raises or throws a different light upon a statement favoring statement, and hence should be admitted.

The material fact in the case at bar was whether or not the conveyances by Daniel McKinney to the tenant were fraudulent. The

statements made were different, inconsistent, and conflicting; and the statement to Snow tends to modify the statement in the deposition, and hence is admissible.

See cases above cited.

Morton, Ch. J., delivered the opinion of the court:

The only question presented is as to the competency of the testimony of Charles H. Snow, a witness called by the demandant. He testified that about two months after the deed alleged to be fraudulent was given, Bernard McKinney, a son of the grantor, stated in substance that the deed was made for the purpose of defrauding the creditors of the grantor. It is too clear to admit of any doubt that this statement of Bernard McKinney, being merely an expression of opinion by a party who is a stranger to the suit, was not admissible as substantive evidence. The demandant claims that it was admissible because it contradicted the testimony of said Bernard given in his deposition.

Undoubtedly a party may impeach the credit and contradict the testimony of an adverse witness by showing that, upon some matter which is relevant and material, he has, at other times, made statements which are inconsistent with his testimony. But it is equally well-settled that a party cannot, by drawing out on cross-examination statements by a witness which are irrelevant and collateral, gain the right to contradict such testimony by showing inconsistent statements of the witness at other times. *Farnum v. Farnum*, 13 Gray, 508; *Kaler v. Builders Mut. F. Ins. Co.* 120 Mass. 328.

Bernard McKinney states in his deposition upon cross-examination that the tenant owns the dwelling-house, and that he and his family were occupying it by her permission. The statement that the tenant owns the house is merely an expression of his opinion, is incompetent either in direct or cross examination, and would have been stricken from the deposition upon motion by the demandant. It is an immaterial and irrelevant statement, and the demandant cannot contradict it. The statement that the witness was occupying it by the permission of the tenant is material. He had occupied the house continuously for many years, both before and after the deed in question was given. If, after the deed was given, he continued to occupy under his father, in the same manner as before, the knowledge of the tenant might be inferred; and the fact would have some tendency to support the ground of the demandant that the deed was formal and fraudulent. The question therefore is the very narrow one, whether the statement made by Bernard to Snow tended to contradict his testimony that he was occupying the house by the tenant's permission. The substance of the statement to Snow was, "I want you to attach the house; father has conveyed that away to defraud us boys of our legal rights, and our creditors from being paid."

As to all the world except creditors, the deed was valid. Bernard could not contest it. We cannot see how the fact that he then thought, or now thinks, that the deed was fraudulent as to creditors, has any fair tend-

ency to show that, since it was given, he has not occupied by the permission of the tenant, who, as to him, was the legal owner. His statements to Snow are not inconsistent with, and do not contradict, his testimony in his deposition upon any material fact; and as they were of a character which could not fail to be prejudicial to the tenant, we are of opinion that she is entitled to a new trial.

Exceptions sustained.

Addison A. REEVE

v.

Herbert E. DENNETT.*

1. In order to prove that a **substance claimed to take away the pain of filling teeth** is useful to produce that effect, **evidence** by those upon whom it has been used, that, by the aid of it, their teeth were filled without pain, is **admissible, although such persons are not experts.**
2. Where **evidence is admitted subject to the condition that another fact shall be proved**, if that fact be not afterwards proved, the party objecting should ask to have the evidence stricken out, or the jury instructed to disregard it; and cannot rely alone upon his exception to its admission.
3. Whatever may be the presumptions, as between a **director of a corporation** and stockholders, or others to whom he owes a duty, there is **no such conclusive presumption that he knows the affairs of the company** as will prevent his recovering against a person who, in fact, has defrauded him.
4. The fact that one party to a transaction has been guilty of a **material fraud** is not necessarily purged of its effect if the **representation is made good before it is acted upon by the other party.** In order to have that result it certainly must be made good in the most complete and indisputable way.
5. An **election** made by the plaintiff between the **counts of his declaration upon which he will proceed** is not final unless it be made to appear of record by striking out the other counts; and the refusal of the court to order the other counts stricken out is no ground for a new trial.

(Suffolk—Filed May 10, 1887.)

ON plaintiff's and defendant's exceptions.

Overruled.

Action of tort or contract; the plaintiff alleging in his declaration that he was uncertain to which division of actions his action properly belonged. The declaration contained six counts. The 1st count was in contract for a loan of \$3,000 on June 1, 1880. The 2d count was in contract for a loan of \$1,400 May 4, 1881. The 3d count was on an account for the

same alleged loans and interest. The 4th and 5th counts were as follows:

"Fourth count in tort: The plaintiff, ignorant to which division of actions the action properly belongs, joins a fourth count in tort for the same cause of action mentioned in the 1st count.

"The plaintiff says that, early in the year 1880, the defendant promoted, organized and set up a bubble company called the Dental Naboli Company; that said company was pretended to be organized under the laws of Connecticut, and was pretended by the defendant to have a capital of \$1,000,000, paid up; that this defendant having offered to sell to plaintiff 600 shares of the capital stock of said corporation, of the par value of \$15 a share, did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that the capital stock of said company was \$1,000,000; that it was all paid up; that said stock was of the market value of \$15 a share; that it was in great demand at that price; that all the treasury stock of said company could be sold at that time for \$15 a share; that it had sold at that price until the company had funds enough on hand in its treasury to pay for the same; that it had now refused to sell any more at that price; that he had advanced the price to \$20 a share; that he had paid all charges, calls and assessments laid or to be laid upon said stock; that by said company or the directors thereof said company was in a sound financial condition, and that it had property which made said stock then worth \$15 a share, and had entered into such business contracts and engagements as would ensure a rapid advance beyond the present price; that the defendant was the president of said company, and knew that said company was solvent and responsible, with large business, and that it was a safe and profitable investment at \$15 a share. And, to further induce the plaintiff to purchase said stock, the defendant offered and proposed to borrow from the plaintiff the sum of \$3,000 as a loan, and deliver to the plaintiff 600 shares of the stock as security for said loan; and gave to the plaintiff the right to purchase said 600 shares at \$15 a share, or to return said stock to the defendant at plaintiff's election; and the plaintiff agreed, if plaintiff elected to return said stock, to repay the said \$3,000, and interest on the same during the continuance of the loan, until the plaintiff should make his election.

"And the plaintiff says that, relying upon said representations of defendant, and believing them to be true, on or about June 1, 1880, he loaned the defendant the sum of \$3,000 upon the terms so proposed by the defendant; but that the defendant wholly neglected to deliver the plaintiff the 600 shares of said stock, or any shares, and that the plaintiff received none of said stock until October, 1880; that the truth, and as defendant then well knew, was that the representations made by the defendant were false, and were made solely with intent to deceive and defraud the plaintiff, and to get possession of the plaintiff's money. And the said Dennett Dental Naboli Company was a bubble company, and organized fraudulently, without any capital whatever; that no capital was ever paid in; that it never had

*See 2 New Eng. Rep. 45.

such as \$1,000 in its treasury at any time; that its stock was worthless, and never had any market value or any value whatever; that it never sold for \$15 a share, unless by fraud and deceit, and not at a fair sale in the open market; that it never had any business; that it was never upon a sound financial basis, but, to the contrary, the said company was then insolvent, and the stock worthless; all of which the defendant then well knew.

And the plaintiff says that in October, 1880, defendant delivered him 1,000 shares of said stock, instead of 600 shares, as he had agreed, wholly neglected and refused to give plaintiff an agreement in writing setting forth the terms upon which plaintiff held said stock, though often requested so to do. And plaintiff says that said stock was worthless, and no security; and that he was misled and defrauded by defendant.

That he has tendered back said 1,000 shares of stock to defendant, and demanded a return of said \$3,000 and interest, but the defendant wholly neglects and refuses to return the same.

Fifth count in tort for the same cause as mentioned in the 2d count: And the plaintiff says that about April 25, 1881, at Boston, the defendant, having done all the acts, matters, and things mentioned in the 4th count, and made the representations therein set forth, and being then indebted to the plaintiff in the sum of \$3,000 and interest, obtained the same in consequence of said representations, and gave the plaintiff to a certain parcel of real estate in the Dorchester district, and then and there falsely represented to the plaintiff that he was the owner of said parcel of real estate; that he had made arrangements to dispose of it at a large profit, which would enable him to repay plaintiff said \$3,000 and interest; that a payment was due on said land in a few days which must be made before he could carry out the trade and get the money to repay plaintiff; and then and there proposed to the plaintiff that plaintiff should take 1,000 shares of stock in said Dennett Dental Naboli Company, and raise \$2,000 for the defendant to make said payment, so the defendant could carry out the trade and repay the plaintiff.

And plaintiff says that at defendant's request, and relying on all said representations, he was thereby induced to take said 1,000 shares of stock and borrow \$1,400 on four months' credit, with a pledge of said stock as collateral, which was all the money he could raise on said 1,000 shares, and so notified the defendant. That the defendant received said \$1,400 from plaintiff on or about May 2, 1881, and agreed to pay the notes at maturity, on which said sum was raised by the plaintiff for defendant at defendant's request; that defendant failed to pay said notes at maturity, and plaintiff was thereupon compelled to pay them, and did pay them, and redeemed said stock pledged as collateral; that he has tendered said stock to defendant, and demanded said \$1,400 and interest, but defendant neglects and refuses to repay the same.

And plaintiff says that all the representations made by defendant were false, and were known by defendant to be false when they were made, and that they were made solely for the

purpose of defrauding the plaintiff and getting possession of the plaintiff's money; that the Dennett Dental Naboli Company was a bubble company, gotten up by the defendant without any capital, credit, property, or business; that defendant used the stock for his own purposes to raise money for himself; that none of the proceeds came to the company; that this expedition to the Dorchester district was part of a scheme to further defraud the plaintiff and get possession of more of his money, and not with any intention of repaying the previous indebtedness; and defendant had not made any arrangement to dispose of any part of said land with intent to repay the plaintiff, but then designed and intended to cheat and defraud the plaintiff out of such sum as he might be able to raise by a pledge of said worthless stock, holding out to him the illusive hope that, by raising more money for the defendant, he would thereby enable defendant to repay the indebtedness theretofore contracted."

The 6th count was in contract on the alleged agreement of defendant to repay the plaintiff said \$1,400, partly raised by him at the defendant's request, and partly advanced by himself, which the plaintiff had repaid to those of whom he had borrowed. Defendant's answer contained a general denial, and alleged a ratification by the plaintiff of all the transactions, and a waiver of the wrongs alleged in the 4th and 5th counts of the declaration. Subsequently, in October, 1886, the defendant pleaded his discharge in insolvency obtained in Suffolk County June 25, 1886, to all the counts of the declaration, in an answer alleging no waiver of any previous answer. To this answer the plaintiff filed a replication, alleging the execution of a bond to dissolve an attachment, made more than four months before the defendant's proceedings in insolvency, which bond was alleged to be conditioned for the payment of any special judgment; and also alleging that the debts claimed in the plaintiff's declaration were created by fraud. Defendant filed a demurrer to this replication, which demurrer was overruled by the court.

At the trial in the superior court before Dewey, J., and a jury, the following appears from the two bills of exceptions allowed in the case:

At the opening the court required the plaintiff to elect whether he would proceed to trial on the counts alleged to be in tort or on those in contract, and the plaintiff elected to proceed to trial on the 4th and 5th counts. Thereupon the defendant moved that the other counts be stricken from the record, which motion the court refused, and to this refusal the defendant excepted.

The plaintiff put in evidence, under said 4th and 5th counts, tending to show that a little before May 11 1880, the defendant represented to the plaintiff that he had put an invention of his called "naboli" into a stock company called the Dennett Dental Naboli Company, with \$1,000,000 capital, organized under the laws of Connecticut, which capital was fully paid up and free from assessment; that the stock of said company, the par of which was \$25 a share, was selling at \$15 a share; that the price of the treasury stock of the company had been raised from \$15 a share to \$20 a share; that

dentists were using naboli, and wanted to buy the stock; that he expected that the stock would go to \$50 a share, and be a second Bell telephone stock; that the company had all the money it wanted. The plaintiff further put in evidence tending to show that said company was organized on March 4, 1880, in Connecticut, with \$1,000,000 capital, and that this capital was paid up by the transfer of a copyright, said invention, and the patents that had been applied for, or should be applied for or obtained for said invention, and some \$75 in cash; that letters patent of the United States for said invention were obtained in October, 1880, and that said invention was a compound for preventing pain in a dentist's operations of excavating and filling teeth; that the defendant was the promoter of the company, holding 32,000 shares of the stock, of which the par value was \$25, his assistant in the practice of dentistry, one Robie, holding 4,000 shares, and the solicitor who was employed to procure the patent and organize the company holding the remaining 4,000 shares; that at the time of plaintiff's loan to defendant, the company had sold no naboli, and issued no licenses for its use, and had no assets except \$600, which had been given it by defendant to defray the expenses of beginning business; that none of the Naboli stock had been sold; that naboli was not used to any considerable extent by dentists; and that after a few months the company ceased to do business. For the purpose of showing that the invention was worthless, the plaintiff called Dr. Isaac J. Wetherbee, who testified that he had been a practicing dentist for forty years, and had been president of the Merrimac Valley Dental Association, treasurer of the American Dental Association, and for fifteen years president of the Boston Dental College and Professor of Dental Science and Operative Dentistry therein; that he was familiar with the invention called naboli, and had been since it was first made public, and had made some twenty experiments with it; that the component parts are 1 ounce of pure glycerine, 120 grains of tannic acid, and 4 grains of hydrate of chloral; that all of these articles had been in use separately in the dental profession for very many years; that tannic acid had been used by him as long ago as 1850 for obtunding the sensitiveness of the dentine, and that in some cases there seemed to be an effect, but that it was so unreliable that he could not play upon the credulity of his patients by continuing its use; that glycerine had been used as a desiccant, for the purpose of drying a cavity, fifteen or twenty years before the invention of naboli; that hydrate of chloral had been used some ten years to obtain a sedative effect, but that it had no practical value; that when combined with an ounce of glycerine and tannic acid it loses its identity entirely, and is of no value whatever; that there is no advantage whatever, according to his experience, in the use of these ingredients in combination, as in naboli, over their use separately, and that, on the contrary, their effect is lessened, because the glycerine neutralizes the effect of the tannic acid to a considerable extent; that the tannic acid alone will accomplish all that can be accomplished by the combination; and that the article called naboli has no practical value

whatever over the single ingredients of which it is composed. On cross examination, defendant examined the witness in detail as to twenty experiments, and the witness testified in substance that in these experiments, naboli was used, the patients gave evidence of pain.

The plaintiff also called Dr. Albion M. Wetherbee, who testified that he had practiced dentistry for nineteen years, was secretary and ward president of the Merrimac Valley Dental Society, secretary of the New England Dental Society, president of the Boston Dental College Alumni Association, corresponding secretary of the American Dental Association, member of its executive committee, and secretary of the board of commissioners of the Boston Dental College; that he was acquainted with naboli, knew of what it was composed, and had experimented with it enough to demonstrate to himself that it was not desirable to continue its use; that glycerine had been in use in the dental profession for a number of years before naboli appeared; that it had been recommended in the various dental magazines and by dentists in their practice, and that he had used it himself for several years; that tannic acid had been used in the profession more than forty years; that he had used it several times, but not with sufficient success to warrant its continuance; that hydrate of chloral had been recommended and used in the profession for several years; that naboli had no practical value beyond that possessed by its several ingredients when used separately; that, since the first attempt to bring it into its use had diminished, and that it is no longer used at all in the profession. Drs. Wetherbee and Dudley were the only experts called by the plaintiff. They both testified that in their opinion, and as the result of their experience with naboli, it was not efficacious in preventing pain in the operations of excavating and filling teeth.

There was no other evidence in the case as to the novelty of the defendant's invention of naboli, except the letters patent of the United States.

All the foregoing evidence, when offered by the plaintiff, was admitted against the defendant's objection and subject to the defendant's exception, the defendant objecting to the evidence of fraudulent representations made either the 4th or 5th count, on the ground that they were counts in contract, and not in tort, and that no false representations were made by the plaintiff as to the novelty or practical utility of said invention.

The plaintiff also put in evidence, in answer to the defendant's objection and subject to the defendant's exception, evidence tending to show that, before the plaintiff paid his money to the defendant, and at the time of said payment, dentists were not using naboli, but few shares of the stock were sold at \$20 a share, and that the price of the treasury stock had not been raised to \$20 a share, and that the company did not have plenty of money, and that he found out about the true condition of the company's business in July, 1880, after which the defendant had got his money, and in January, 1881, when Mr. Dunn came in as treasurer. The plaintiff also testified that by the

representations, and relying upon them, he induced to lend the defendant \$3,000 in May and June, 1880, payable by the defendant demand, with interest, and the rise above a share on 600 shares of said Naboli stock, never he demanded his money, and on the press understanding that no stock was to be delivered or transferred to him or held by or him as security.

The defendant's evidence as to the foregoing representations tended to show that all he said to the plaintiff was in answer to the plaintiff's inquiries; and that all he told him was that the company was organized under the laws of Connecticut, with \$1,000,000 capital, but it was paid up by the transfer to the company of the invention and patents applied for, and that should be obtained for the same; and, in fact, the stock was selling in May, 1880, at \$15 a share; that the price of the treasury stock was advanced from \$15 to \$20 a share; that dentists were using naboli, and some fifty or sixty licenses to use naboli, which \$20 a year was paid, were taken out of dentists during May and down to June 4, 1880, when an attack upon naboli at a public meeting of dentists in Boston arrested the business of the company; that the invention was capitalized at \$1,000,000 in good faith, and in belief that the receipts of the company, on 15,000 dentists that the defendant had induced were in practice in Canada and the United States, would justify such a capital, that the receipts of the company in May, 1880, in its business, gave the company all the money it needed, and that all the defendant's statements were true.

The defendant testified that he was a dentist and had practiced dentistry for many years; that he invented the compound called naboli, and had used it, and continued to use it with great success in relieving his patients from pain while performing dental operations; and that the persons then in court and whom he subsequently called as witnesses were his patients, upon whom he had performed dental operations, in which operations he had used naboli. The defendant also testified that Drs. Sherbee and Dudley had not used naboli in their experiments properly, according to the stated directions they had for its use.

The defendant called as witnesses twelve persons,—patients of his,—who gave evidence of their personal experience in having teeth filled with naboli, and of the effect on them when naboli was used; that such dental operations were performed without pain to them, etc. This evidence was objected to by plaintiff's counsel on the ground that such persons were not experts. The court overruled the objection, and plaintiff excepted.

The court also permitted Mrs. Thaxter, one of the defendant's witnesses, to testify, under objection and exception by plaintiff, that witness had performed painless dental operations performed by Dr. Emerson, using naboli. This was admitted subject to Dr. Emerson's being called to prove that he used naboli.

The plaintiff, on cross-examination, testified that he had, in the year 1880, sent many patients to the defendant to have their teeth filled; that the patients had never expressed disappointment to him at the result; that he then had en-

tire faith in the efficacy of naboli; that he had, in the fall of 1880, proposed to the company a project for opening rooms for the practice of dentistry to use naboli; that he had, in the fall of 1880, or early winter, presented a Mr. Dunn a pamphlet of the company containing testimonials of distinguished men to the efficacy of naboli in preventing pain in excavating and filling teeth, to induce Mr. Dunn to take an interest in the company, and be its treasurer under an arrangement, which was carried out, by which the stockholders were to contribute 10,000 shares of stock to the treasury of the company, for which said Dunn should pay one dollar a share, and the money should be used in the business of the company, and all the certificates of stock should be pooled by the stockholders, and locked up so that they could not be transferred, and that they might be kept out of the market; that he, the plaintiff, had devoted much time and energy to promote the business of the company; that after Mr. Dunn had become treasurer he had bought of him 2,000 shares of stock at 75 cents a share; that he attended the annual meeting of the company in Connecticut on March 4, 1881, and was elected a director of the company, and so thereafter served, and as a director voted for the defendant as president of the company; and that at the time he became director, and while he was a director, he considered the company an honest corporation engaged in an honest business; and that at the time, he testified, he had no reason within his own knowledge or experience to doubt the efficacy of naboli.

The plaintiff further testified, in his direct testimony, that the defendant sent word to him that he, the defendant, wanted the plaintiff to go to ride with him; that the defendant drove out with him to Dorchester; that the defendant discussed with him the subject of the Naboli Company, and found fault with the management of Mr. Dunn, the treasurer; that the plaintiff asked the defendant where the defendant was taking him; that the defendant said he wanted to show the plaintiff where his \$3,000 was coming from; that the defendant said he had got \$25,000 in a certain tract of land the defendant showed him; that the plaintiff asked if the defendant owned it, and the defendant said that he had bought it, and that there was where the plaintiff's \$3,000 were; that he had bought it for 75 cents a foot, and that land all round there sold for more, and that he could get a big advance on it; that he had got cornered up, and had got to make a payment right away, and asked the plaintiff to raise for him \$2,000; that the plaintiff said he couldn't, and the defendant asked him to try, and asked him if he couldn't raise it on Naboli stock, and that the plaintiff said the defendant hadn't any stock,—it was all tied up in the pool, and was not worth anything any way; that the defendant asked if the plaintiff could not raise it on a receipt for stock in pool, and that the plaintiff said he could not; and the defendant asked the plaintiff to explain the matter to his brother, and asked where his brother lived, and proposed to drive down there; that they drove to the plaintiff's brother's in Dorchester, waited for him till he came home, and, when his brother arrived, made the statements to his brother concerning

the land that the defendant had made to the plaintiff; that the plaintiff's brother told the defendant that the plaintiff had spent time and money enough in going after his \$3,000; that the defendant said this was a big thing, that he could turn the land right away, that naboli had failed them, and that he would pay him handsomely, and if the plaintiff's brother would help, he, the defendant, would pay him, the said brother; that the plaintiff's brother, W. R. Reeve, told the defendant he would talk the matter over with the plaintiff; and that the next day the plaintiff told the defendant he would try and raise the money, and that his brother would help him; that he paid him \$500 on April 29, 1881, by the check of Vinal & Reeve, the firm of said W. R. Reeve, payable to the defendant's order, and afterwards paid the defendant, on or about May 4, \$900 more in two other checks to the defendant's order, and told the defendant that this was all he could raise; that defendant asked the plaintiff if he couldn't raise the balance on a receipt for Naboli stock in pool; that the plaintiff said he couldn't; that the defendant wrote a receipt for 1,500 shares of stock in pool, and gave it to the plaintiff; and the plaintiff said he would try and raise it, but that the stock was worth nothing; that the plaintiff asked for a voucher for the \$1,400, and the defendant said he couldn't give his note; that the plaintiff asked for something to show for the money; and the defendant said the checks were a receipt, and to come in to-morrow and the defendant would fix it up; that the defendant asked the plaintiff to see if his brother couldn't furnish the \$600, and to come in again; that he afterwards told the defendant he could do nothing with the receipt, and that the defendant told him to keep it for the present, and hold on to it, and he would make it all right with him, and he took it; that he saw the defendant afterwards, and asked for his money; that the defendant reported a delay in selling the land; and that matters dragged along, the defendant promising to sell the land and pay him as soon as he could.

On cross-examination the plaintiff testified that the ride to Dorchester was two or three days before the date of his brother's first check, April 29, 1881; that the defendant said he had bought the land; that he had got to make a payment to save the land, and said that the plaintiff's money was in it, and that he understood by this that the defendant would sell the land, and out of the proceeds pay the plaintiff his money; that if the defendant was able to complete the purchase he could sell the land and get the plaintiff's money out of it; that this was what induced him to get the money; that what induced the plaintiff to raise this \$1,400 was the defendant's statement that the plaintiff's money would all be repaid out of the proceeds of the sale of this land.

William R. Reeve, called by the plaintiff, testified that in the spring of 1881 the defendant came to his house in Dorchester with the plaintiff, in the latter part of April, late in the afternoon; that his brother, the plaintiff, said he had been with the defendant to see land in Dorchester which the defendant had bought; that the object in taking him there was that he, the defendant, had money to pay to complete

the purchase, and that there was what the plaintiff's \$3,000 was coming from, and the defendant wanted him, W. R. Reeve, to help him; that he, W. R. Reeve, said he thought he could do anything about it; that the defendant said it was as much for the plaintiff's interest as his own; that he, W. R. Reeve, said the plaintiff had spent time and money enough, and asked how much was wanted, and the defendant said \$2,000; that he, W. R. Reeve, said there was nothing he could do but that the defendant said he could make a turn of this property, and he would pay the plaintiff handsomely for helping him, and W. R. Reeve, also; that he, W. R. Reeve, said he would talk with his brother about it in the evening he drove with his brother to the property and talk the matter over; that the result was, in two or three days W. R. Reeve loaned his brother a check for \$500, and another check for \$500, making \$1,000, and he, said W. R. Reeve, promised to let the plaintiff, and which the plaintiff, before the action was brought, repaid.

The plaintiff called the defendant as a witness, and he testified that he remembered the plaintiff's ride with him to Dorchester, and could not fix the date; that he did not go to the land then; that he bought it afterwards, on May 26, 1881, at an auction sale, and that the date of the deed of the land to him was the Home Savings Bank, which was acknowledged and delivered May 7, and then he repaid; that he paid about \$15,000 for the land, about \$6,000 in money, and the rest in a mortgage for \$9,000; that when he went to Dorchester at this time he had partially gained for the land; there was no promise or agreement to sell to him, but he had repaid verbally to pay \$14,000 for it.

On cross-examination the defendant testified that the plaintiff, in April, 1881, came over to his office with him, and asked the defendant, hadn't better sell some stock in the Naboli Company, saying he had sold a good deal of his; that the defendant asked the plaintiff how much it would sell for, and the plaintiff said not so much as it was out of pool, probably \$2.50 a share, and proposed to sell stock for him at that price; that the plaintiff called when the defendant was on his doorsteps, just going out to Dorchester after his wife; that the defendant told him that he had decided to let the plaintiff have the stock to sell; that the plaintiff said he could not get more than \$2 a share; that the defendant asked him how much he could sell, and the plaintiff told him \$2.50 a share; that the plaintiff proposed to drive to Dorchester with him, as he was going to his brother's there; that the defendant told him he wanted money to use, and he would go to Dorchester to see the land; that the plaintiff proposed to drive on to the land, and they started at four or five o'clock in the afternoon; that the plaintiff thought well of the proposition to chase of the land, and said it was well to have all one's eggs in one basket, and then they drove to the plaintiff's brother's house, where the plaintiff left him; that the defendant passed the time of day with the defendant, complimented his horse, and that nothing

occurred in the brother's presence; that in riding over to Dorchester the plaintiff referred to his valuable services for naboli, and the defendant's promise to make a present of stock to the one who did most for it, and claimed he had done more than anyone else, and that he promised him 500 shares in consideration of such services, and as a commission for selling the 1,000 shares; that nothing was said by him about the plaintiff's \$3,000 being in the land, or anything of the kind; that the plaintiff, on April 29, 1881, brought him \$500 as the proceeds of the sale of the 1,000 shares of stock, and then \$900 more, and wrote a receipt for 1,500 shares of stock, which the defendant signed in the form, "Received of A. A. Reeve, 1,500 shares of stock subject to pool;" that the plaintiff promised to bring the rest of the money soon; that afterwards he made excuses why the parties who had bought the 1,000 shares didn't pay the balance; that they were out of town; that they had difficulty in raising the money, and, some six weeks after, that the plaintiff told him, in answer to a request for the remaining \$600, that he had taken the stock himself and was unable to pay the balance. The plaintiff testified that he was induced by the defendant's representations, relying upon them, to pay him said \$1,400.

The defendant objected to all the foregoing evidence bearing on the claim for tort under the 5th count, when offered, on the ground that said count was a count in contract, and not in tort; but the evidence was admitted subject to the defendant's exception.

The foregoing is all the material evidence tending to show or relating to any cause of action of the plaintiff in tort entitling him to recover said \$1,400. At the conclusion of the testimony on both sides, the defendant requested the court to direct a verdict for the defendant on the 5th count: (1) because no proper cause of action in tort is set out in the 5th count; (2) that there is no evidence that the plaintiff was induced to make the alleged loan of \$1,400 to the defendant by reason of the defendant's false representations as to the value of Naboli stock, as to the circumstances of the Naboli Company, as to its assets or property, or as to the ownership of the Dorchester land. But the court refused to direct such verdict, and to such refusal the defendant excepted, and the court instructed the jury as follows:

"The plaintiff in his allegations connects the false representation and fraudulent purpose of the defendant, as set forth in the 4th count, with the transaction stated in the 5th count; and so far as you find them to have exerted or to have had any influence upon the plaintiff, and to have been intended by the defendant to have any influence on the plaintiff in regard to raising said \$1,400 for the defendant, the instructions which I have already given are applicable. [These instructions stated what the plaintiff must prove to establish a cause of action for false and fraudulent representations, with reference to his claims under the 4th and 5th counts, and were not excepted to.] How far the evidence connects the representations in the 4th count with any effective influence is for you to consider." To these instructions the defendant excepted.

The court instructed the jury that, to en-

title the plaintiff to recover on the 5th count, the jury must be satisfied that the defendant proposed to the plaintiff that the plaintiff should take 1,000 shares of said stock, and raise \$2,000 for the defendant; but refused the defendant's requests to instruct the jury that, to entitle the plaintiff to recover on said 5th count, the jury must be satisfied that the defendant took said 1,000 shares of stock, and borrowed \$1,400 on four months' credit, with a pledge of said stock as collateral, and also that there was no evidence tending to prove this; and to these refusals the defendant excepted.

The court instructed the jury, at the defendant's request, that, to entitle the plaintiff to recover on the 5th count, the jury must be satisfied that the defendant received said \$1,400 from the plaintiff, and agreed to pay said notes at maturity. The defendant requested the court to instruct the jury that the plaintiff, on the 5th count, is not entitled to recover \$1,400 or anything more than for the service of raising \$1,400. But the court refused so to instruct the jury, and to this refusal the defendant excepted.

The defendant requested the court to instruct the jury that there was no evidence of a want of novelty in the defendant's invention. The court refused, and to this refusal the defendant excepted.

The court instructed the jury, without objection, that the claims of the plaintiff under the 4th and 5th counts were distinct and separate causes of action, and that the jury might find for the plaintiff on either or both, and for the defendant on either or both, and that they were to render separate verdicts on each count.

The court also, without objection, instructed the jury in relation to the plaintiff's claim under the 4th count, that if the jury found the \$3,000 transaction a sale of stock for this sum, and not a loan of money, they must find on the 4th count for the defendant.

The jury returned a verdict on the 4th count for the defendant, and on the 5th count for the plaintiff for \$1,866, and both parties alleged exceptions.

Messrs. Robert M. Morse, Jr., and William H. Towne, for plaintiff:

The testimony of defendant's patients, not experts, who stated that they had had their teeth filled by the defendant without pain, and that on these occasions he had used "naboli," was irrelevant and incompetent, and should have been excluded:

1. It introduced several collateral issues, such as the condition of the teeth of each of those witnesses, whether or not they would have felt pain under any circumstances, the nerve and pluck of the several witnesses, etc.

2. The plaintiff does not claim that the ingredients of this compound were not useful in preventing pain in dental operations, but that there was no practical value in the combination over the single ingredients. These witnesses were not competent to testify, and did not undertake to testify, on this point. All their statements might be true, and yet the plaintiff's claims as to this invention would not be affected.

Evidence from witnesses not experts, as to collateral facts, is not admissible.

In an action to recover damages for an injury to plaintiff's land by the working of a copper mill which produced noxious gases, and from which poisonous substances were discharged, so that the gases and water from the mill afterwards reached and injured the land, the evidence of persons other than experts was held inadmissible to show that other lands in the vicinity not owned by the plaintiff, but exposed to the same influences, had been injured by the same cause.

Lincoln v. Taunton Copper Mfg. Co. 9 Allen, 181.

So it has been held incompetent to show that where gas had escaped into other houses than the plaintiff's, sickness had followed.

Emerson v. Lowell Gas Light Co. 3 Allen, 417.

It has been held incompetent to show that, before plaintiff was hurt on a highway, another person using due care was injured at the same place.

Collins v. Dorchester, 6 Cush. 396. See also *Aldrich v. Pelham*, 1 Gray, 510; *Kidder v. Dunstable*, 11 Gray, 342; *Darling v. Stanwood*, 14 Allen, 504.

Evidence that it was cold enough to freeze apples was held inadmissible on the issue whether it was cold enough to freeze ink.

Ingledew v. Northern R. R. 7 Gray, 86.

Inconveniences suffered by another than plaintiff, from running of a railroad, inadmissible.

Concord R. R. v. Greeley, 3 Foster (N. H.), 237.

Evidence that horses other than plaintiff's were frightened by defendant's locomotives, inadmissible.

Lewis v. Eastern R. R. 60 N. H. 187.

Incompetent to show that plaintiff had supplied good beer to parties other than defendant.

Holcombe v. Hewson, 2 Camp. 391.

The testimony of Mrs. Thaxter as to the effect of dental operations performed upon her by one Dr. Emerson, when naboli was used, was inadmissible. Dr. Emerson was not called to testify that the compound in question was used.

As to defendant's exceptions, the 5th count is a count in tort.

Reeve v. Dennett, 141 Mass. 207, 2 New Eng. Rep. 45.

There was evidence for the jury tending to sustain the material allegations of the 5th count.

The court correctly ruled that the plaintiff was not bound to prove every allegation precisely as made. The gist of the charge was that the plaintiff had been induced by defendant's false representations to lend him \$1,400.

Cunningham v. Kimball, 7 Mass. 65; *Springer v. Crowell*, 103 Mass. 65; *Packard v. Pratt*, 115 Mass. 405.

Messrs. D. E. Ware and J. G. Thorp, Jr., for defendant:

The defendant's undisputed discharge in insolvency was a defense to all the plaintiff's counts in contract. There was no evidence tending to establish a cause of action in tort entitling the plaintiff to recover the \$1,400 on the 5th count, and the court should have directed a verdict for the defendant as requested. We have to consider, as sustaining the alleged cause of action in the 5th count: (a) the rep-

resentations alleged in the 4th count,—assumed, for the sake of the argument, to be imported into the 5th count,—and (b) the single representation as to ownership set out in the 5th count. Such of those representations as are actionable representations of fact, and not mere expressions of opinion, relate wholly to the condition of the company, its business, and the value of its stock. In view of the evidence, is it a tenable proposition that the plaintiff was induced to enter into the transaction of April, 1881, by defendant's representations as to the condition of the company, its stock and business, made in April and May, 1880? And in this connection it is, as a matter of law, entirely immaterial whether or not these representations, when made, were false or not; or whether or not the plaintiff was induced by them in May, 1880, to purchase stock or loan money. What he relied on or was induced by in 1880 is of no consequence in 1881, unless the same representations were continued by defendant, still believed by the plaintiff, and acted upon by him in ignorance of their falsity.

Fogg v. Pew, 10 Gray, 409; *Whiting v. Hill*, 23 Mich. 399, 405.

As a matter of law, an active member or director of a company or corporation is presumed to know the nature and state of the company's business.

Ely v. Stewart, 2 Md. 408, 416; *Corbett v. Woodward*, 5 Sawyer, 403, 416, 417; *Morgan v. Skiddy*, 62 N. Y. 319, 326.

In an action based on fraudulent representations, if the plaintiff had equal knowledge with the defendant as to the matters to which they relate, he will be presumed to have acted on that knowledge, and not on the defendant's representations.

Poland v. Brownell, 131 Mass. 138; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Brown v. Leach*, 107 Mass. 364; *Rockafellow v. Baker*, 41 Pa. 319; *Ely v. Stewart*, 2 Md. 408; *Whiting v. Hill*, 23 Mich. 399, 405; *Hobbs v. Parker*, 31 Me. 143; *Slaughter v. Gerson*, 13 Wall. 379, (80 U. S. bk. 20, L. ed. 627).

Proof of a statement of what would be, or a promise, will not sustain an action founded on false and fraudulent representations.

Jackson v. Allen, 120 Mass. 64, 79; *Jorden v. Money*, 5 H. L. Cas. 187, 214, 216; *Pedrick v. Porter*, 5 Allen, 324.

It is submitted, therefore, that the court erred in leaving it to the jury to say whether or not those earlier representations exerted, or were intended to exert, an influence upon the plaintiff's mind to induce him to enter into the \$1,400 transaction: (1) Because there was no evidence that they did exert any such influence; and (2) because, if so intended, it will be presumed, as matter of law, either that the plaintiff knew that the representations were false, or else that he did not act upon them, but upon his own sufficient knowledge of the facts to which they relate.

This court cannot say that the verdict of the jury on the 4th count shows that the jury found that no such false representations were made, and therefore they did not influence the jury in their finding on the 5th count, and that the defendant was not injured by the court's instructions. Under the instructions of the

court, the jury could have found that a sale, instead of a loan, was induced by such representations, and therefore have found the verdict for the defendant consistently with finding also that the representations were false.

There remains to be considered the representation relating to the defendant's purchase of the Dorchester land. The evidence is conclusive that, before the plaintiff acted at all in this matter, the representation on which he says he relied as inducement for his action was a true representation. The defendant had bought the land. It follows, then, as matter of law, that the representation was not actionable. To be actionable, the representation must be a false representation of a fact when acted upon. If it was not false when acted upon, or if the plaintiff knew, at the time, of its falsity, he was not induced to act by reason of any falsity in the representation.

Fogg v. Pew, supra; Whiting v. Hill, 28 Mich. 399; *Tuck v. Downing*, 76 Ill. 71; *Hagee v. Gussman*, 31 Ind. 223.

But assuming that the representation was false, and that it was acted upon by the plaintiff, what damage did he suffer?

It is a familiar principle of the law of deceit that false representations intended to influence the plaintiff are not actionable unless damage results to him.

Freeman v. Venner, 120 Mass. 424; *Bartlett v. Blaine*, 83 Ill. 25; *Bradley v. Fuller*, 118 Mass. 239; *Lamb v. Stone*, 11 Pick. 527; *Randall v. Hazelton*, 13 Allen, 412.

It is submitted on the evidence that the court erred in not directing a verdict for the defendant on this count.

The court should have ordered counts 1, 2, 3, and 6 stricken from the record after the plaintiff's election to proceed to trial on the 4th and 5th counts.

Dows v. Sweett, 127 Mass. 364; *Mullaly v. Austin*, 97 Mass. 30.

The court should have instructed the jury that, to recover on the 5th count, the plaintiff must show what the count alleged, namely, that the plaintiff took the 1,000 shares of stock, and borrowed on four months' credit, with a pledge of said stock as collateral. As this was what the plaintiff alleges he was induced to do to his injury, the proof of it was essential to his case. But there was no evidence to prove it. The plaintiff testified that he took no stock to raise money on, and raised none on the stock. This is a substantial variance.

The evidence of Drs. Wetherbee and Dudley should have been excluded. The letters patent of the United States were *prima facie* evidence of the novelty of the invention.

Nash v. Lull, 102 Mass. 60, 62.

The mere fact that the ingredients which go to make up a compound are old, and have been used for the same purpose for which the new compound is to be used, is not evidence of its want of novelty.

Ryan v. Goodwin, 3 Sum. 514; *Imhaeuser v. Buerk*, 101 U. S. 647 (Bk. 25, L. ed. 945); *Re Corbin*, 1 MacA. Pat. Cas. 521; *Bump, Patents*, 2d ed. p. 76, cases.

That the ruling of the court admitting the testimony of Dr. Dennett's patients, that, during certain dental operations on their teeth, in which Dr. Dennett testified naboli was used,

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they felt no pain, was correct, seems too plain for argument. The patient should be allowed to testify, because he alone can give expression to the sensations felt. And the courts have never doubted this. The only doubt has been whether anyone other than he should be allowed to testify as to his declarations concerning those sensations. This court has held that the usual and natural expressions of sensations made at the time when felt may be testified to by one who heard them.

Bacon v. Charlton, 7 Cush. 581, 586. See *Barber v. Merriam*, 11 Allen, 322; *Fay v. Harlan*, 128 Mass. 244.

When an objection is so general in form as not to direct attention to particular defects first made apparent at the argument before this court, the verdict will protect the party in whose favor it is, against mere formal or technical objections not affecting the real question tried and submitted to the jury.

Peck v. Waters, 104 Mass. 345, 351.

Holmes, J., delivered the opinion of the court:

The plaintiff's evidence tended to show that the defendant's invention was merely a mixture of ingredients, all of which had been used long before to allay the pain caused by filling teeth. But it did not stop at that point; it tended to show that the compound was worthless for the purpose for which it was intended to be used; for the testimony was that the ingredients separately were of no use, and that the mixture was as bad, or worse. To meet the last proposition, the defendant put on a number of his patients, who testified that the defendant's operations upon their teeth, using his invention, were practically painless, whereas similar operations before had been very painful.

Plainly, this was not testimony of a kind which the witnesses needed to be experts to give. The objections made to it are that it introduces the trial of collateral issues, and that the fact may admit of being explained by other causes than the conclusion sought to be established. In some cases at least it would seem that the painful fillings were performed by other dentists, so that it might be argued that the evidence was only a testimony to the skillfulness of the defendant's hand. But no special objection of this sort was taken or argued; and so far as the introduction of collateral issues goes, that objection is a purely practical one, a concession to the shortness of life. When the fact sought to be proved is very unlikely to have any other explanation than the fact in issue, and may be proved or disproved without unreasonably protracting the trial, there is no objection to going into it. If a dozen patients should swear that, when the defendant used his naboli, he filled their teeth without hurting them, and that he hurt them a good deal when he did not use it, supposing the testimony to be believed, and not to be explained by fancy and a general disposition on the part of the witnesses to think well of new nostrums, it would go far towards proving that naboli had some tendency to deaden pain. Indeed, the same thing is true in a less degree, if the painful operations were by another hand. Filling teeth, however skillfully done, is generally unpleasant. If it is found to be wholly

painless when a certain compound is used, as the witnesses swore, probably the compound is at least in part the cause.

The evidence of Mrs. Thaxter as to the painlessness of Dr. Emerson's operations was admitted, subject to the doctor's being called to prove that he used naboli. This was equivalent to a statement that it was not admissible unless the doctor was called. If the plaintiff had wished the evidence stricken out, or to have the jury instructed to disregard it when the case was closed without calling the doctor, he should have asked for an instruction. The admission was proper at the time, and subject to the condition which was imposed. It follows from what we have said, that the plaintiff's exceptions must be overruled.

The defendant also filed a bill of exceptions. At the present trial of this case the plaintiff elected to proceed on the 4th and 5th counts. The main questions raised by the defendant's exceptions and argued by his counsel are, whether there was any evidence that the fraudulent representations specially alleged in the 4th count, and referred to in the 5th, helped to induce the plaintiff to enter into the transaction set forth in the 5th count, or so much of it as consisted in the acceptance of more stock; and whether there was any actionable representation concerning the real estate, as specially alleged in the 5th count. There is no question of pleading before us.

It is not denied that there was evidence tending to show that the defendant made false representations as to the stock, etc., in May, 1880, for the purpose of inducing the plaintiff to buy some of it. We cannot say, as matter of law, that such representations may not have continued to operate in the plaintiff's mind in April, 1881, and may not have induced him to accept more stock. We cannot say so as matter of law, even if the plaintiff had become a director, and had acquired independent means of knowledge in the meantime, if in fact he continued to rely upon the defendant's statements in dealing with him. Whatever may be the presumptions as between a director of a corporation and stockholders, or others to whom he owes a duty, there is no such conclusive presumption that he knows the affairs of the company as will prevent his recovering against a person who in fact has defrauded him.

The plaintiff seems to have disclaimed any fraud as to the stock, bearing on the 5th count. He put in evidence that he found out about the true condition of the company in July, 1880, and testified himself that he said, just before the transaction alleged took place, that the stock was not worth anything, that the defendant said naboli had failed them, and that he, the plaintiff, was induced to make the advances by his expectations as to the land which was the subject of the representations alleged in the 5th count. Coupling these facts with the verdict for the defendant on the 4th count, it is hard to believe that the alleged representations as to the stock had any practical weight or bearing upon the verdict for the plaintiff on the 5th count. We cannot say, however, that the plaintiff's disclaimer appears on the bill of exceptions to have been so distinct as to have taken away his right to argue, if so minded, that the representations of 1880 were an operat-

ing influence in 1881, or that the judge was wrong in telling the jury that it was for them to consider how far the representations in the 4th count were an effective influence. It does not appear that the plaintiff's counsel did in fact present any argument inconsistent with the plaintiff's testimony; nor was any ruling asked on the ground that the plaintiff was concluded by his own testimony.

A more important question is raised by the evidence given in support of the allegations of the 5th count. This was to the effect that the defendant said that he wanted to show the plaintiff where his \$3,000 were coming from (referring to the sum mentioned in the 4th count); that he had got \$25,000 in a certain tract of land which he showed the plaintiff; that the plaintiff asked if the defendant owned it, and the defendant said that he had bought it, and that there was where the plaintiff's \$3,000 were; that he had bought it for 7 cents a foot, etc. The defendant admitted that he did not own the land at the time of this conversation with the plaintiff, although he gave a different account of what was said; so that, if the evidence had stopped there, the jury would have been warranted in finding that the defendant made false statements for the purpose of inducing the plaintiff to advance more money, in the hope of getting back that which he had parted with before.

But the defendant further testified that he bought the land in question on April 26, 1881, and paid about \$15,000 for it; about \$6,000 in money, and the rest in a mortgage for \$9,000; and we understand that this date was not disputed, or that the purchase took place before the plaintiff made his advance on the faith of the defendant's statement.

The defendant argues that the plaintiff has suffered nothing, because the statement was made good before it was acted upon. We are not prepared to say that the fact that one party to a transaction, A, has been guilty of a material fraud, is purged of its effect if the representation is made good before it is acted upon by the other party, B. There would be much force in the argument that if B had known of A's fraud before the bargain was completed, he would not have been likely to complete it, whatever the then state of facts. People generally break off their dealings with those whom they find trying to cheat them. The fact that A has tried to cheat B is material, it may be said, because it offers what, according to common experience, would be a strong motive for not proceeding further. See *Bales v. Weddle*, 4 Ind. 349. A partial analogy may be found in the case of purchase of goods with the fraudulent intention not to pay for them: the buyer gives the seller all the legal rights which he purports to give him, yet the seller may avoid the sale. *Dorr v. Sanborn*, 3 Allen, 181; *Stewart v. Emerson*, 52 N. H. 301. It is true, however, that in that case the implied representation of an intent to pay for the goods without putting the seller to his legal remedies is still false at the moment when the sale is made.

But whatever the law may be in the extreme case supposed, we think that the representations must at least be made good in the most complete and indisputable way before the de-

defendant can escape on that ground. We cannot say, as matter of law, that they were made good by a purchase in which, by the defendant's own statement, the greater part of the price was secured by mortgage on the land. Considering the purpose of the whole conversation, which was to induce the plaintiff to advance more money, we cannot say that there was no evidence to warrant a finding that the defendant represented the land to be his own in such a sense as to secure the plaintiff a return of past and future advances; and that his subsequent purchase did not make that representation good.

The other exceptions may be disposed of in a few words. The jury might have found that the defendant's so called invention was only an empirical mixture of known sedatives; that it gained no new quality from the compounding, but even neutralized in some degree the qualities of the several ingredients. If they believed this, they might have found that to mix the ingredients was an expedient obvious to any person knowing their respective effect, and was not patentable. If the patent was worthless, the stock was worthless.

The plaintiff's failure to prove that he pledged stock to secure the loan to him which he procured, as the first step towards advancing money to the defendant, was not material, if he proved the substantive elements of his case in the defendant's fraud and his own advance on the faith of it. See *Cunningham v. Kimball*, 7 Mass. 65; *Packard v. Pratt*, 115 Mass. 405.

The court put the plaintiff to an election between the 4th and 5th and the other counts. Supposing that the defendant was entitled to require that the election, when made, should be final, which it would not be unless made to appear of record by striking out the other counts (*Dows v. Swett*, 127 Mass. 364; *Mullaly v. Austin*, 97 Mass. 30),—the refusal of the court to order the other counts stricken out is no ground for a new trial. It did not affect the trial; it can be remedied now; and in the event which has happened, it is immaterial to the defendant whether it is remedied or not.

Exceptions overruled.

Samuel P. TRAIN *et al.*

v.

BOSTON DISINFECTING CO.

1. A demurrer which is a mere general allegation that the answer does not set forth any facts sufficient to constitute a defense will not enable a party to avail himself of technical deficiencies in pleading. The particulars in which alleged defects consist must be specially pointed out.
2. The Legislature, under its police power, may pronounce certain things or certain acts nuisances in themselves. Such laws are not unconstitutional because they do not provide compensation to the individual whose liberty to keep or do them is restrained.
3. The Legislature may determine when that which is otherwise property shall cease to be such if kept against law.

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4. Where anything is declared a nuisance by legislation, it is not competent for a party to show that it is not, in fact, so.
5. Until Congress provides a suitable system of quarantine, quarantine laws of a State are valid.
6. The board of health has power to make regulations necessary for the health and safety of the inhabitants, extending to all persons, goods, and effects arriving in vessels; it may determine that certain articles shall always be subjected to disinfection before they are delivered to the importers.
7. The Legislature having provided that all expenses incurred under quarantine laws shall be paid by the owner, it is not competent for the answer in an action, as a defense to this claim, to show that the goods did not require disinfection, and could not have transmitted disease.
8. When new remedies are given by statute to enable one more effectually or conveniently to enforce rights, and are intended for his benefit, the provisions therefor, unless expressly excluding other remedies, are to be construed as cumulative rather than restrictive.
9. The board of health may make a reasonable contract for the disinfection of goods; the duty of paying for the expenses thus incurred is, by the statute, cast upon the owner; and his promise to pay therefor is one implied by law, even against his protestation.
10. Such a contract necessarily implies a lien in favor of the contractor into whose hands the goods are taken for disinfection, to secure him for the expenses properly incurred in his work.

(Suffolk—Filed May 12, 1887.)

APPEAL by defendant from a judgment of the Superior Court of Suffolk County sustaining a demurrer to defendant's answer in an action of replevin. *Demurrer overruled.*

Action of replevin brought by Samuel P. Train and others, partners as Train, Smith & Co., doing business in Boston as importers of rags, to recover possession of certain rags imported by them, which the defendant corporation claimed the right to retain under a lien for charges for disinfecting.

The defendant filed the following answer:

The defendant answering says that, on or about December 22, 1884, the United States government, through the secretary of the treasury, issued a regulation for the disinfection of rags, by which regulation all rags imported into this country were required to be disinfected by one of four processes, viz.: (1) Boiling in water for two hours under a pressure of 50 pounds per square inch; (2) boiling in water for four hours without pressure; (3) subjection to the action of confined sulphurous acid gas for six hours, burning 1½ or 2 pounds roll brimstone in each 1,000 cubic feet of space, with the rags well scattered upon racks;

(4) disinfection in the bale by means of perforated screws or tubes through which sulphur dioxide or superheated steam, at a temperature of not less than 380 degrees, shall be forced under a pressure of four atmospheres, for a period sufficient to ensure thorough disinfection.

That thereafter letters patent were issued to one S. Webber Parker and Henry Blackman, of the city, county, and State of New York, for an improved process of disinfecting rags in the bale, covering the fourth process set forth in said treasury regulation of December 22, 1884.

That thereafter said Parker, Blackman, and others erected works for the disinfection of rags and other articles of merchandise by said process, at the Hoosac Tunnel Dock, so called, in the Charlestown district, in said city of Boston, and thereafter the said works were approved by said treasury department as a proper place for the disinfection of rags by said process; and rags thereafter imported were disinfected thereat at a maximum charge of \$5 per ton.

That June 1, 1885, the board of health of the city of Boston passed a regulation providing that, "on and after this date, all rags arriving at this port from any foreign port shall, before being discharged, be disinfected under the supervision of an officer of this board, and in a manner satisfactory to this board. Whenever any vessel arriving at this port from a foreign port is found to have rags on board, the port physician shall, before passing the vessel, ascertain as far as possible the history of the rags, and the circumstances of their shipment; and if satisfactory evidence is obtained that the port or place from which the rags were gathered or shipped was not infected with cholera or other dangerous disease liable to be carried by them, at the time of the gathering or shipment of the rags, or within the twelve months immediately preceding that time, then the port physician shall, after all other quarantine regulations have been fully complied with, issue the usual certificate, with the proviso that the rags on board the vessel are to be held for subsequent disinfection; and, immediately on the arrival of the vessel at her dock, the rags shall be forthwith disinfected in the bale, in a manner satisfactory to the board of health, before being discharged. If, however, the port physician has reason to believe that the rags on board any vessel have been shipped from or gathered at any port or place which was, at the time of such gathering or shipment, infected with cholera or other dangerous disease liable to be carried by rags, or has been so infected within the previous twelve months, then the exterior of the bales and all the other cargo of the vessel shall be satisfactorily disinfected at quarantine before proceeding further, after which the vessel may proceed with her cargo to her dock, if, in the opinion of the port physician, this may be done with safety to the public health; and the rags shall be forthwith removed for disinfection within the bale before being discharged."

That said regulations were printed in two newspapers in the city of Boston, as required by law.

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That thereafter the defendant company, a corporation organized under the laws of the State of New York, purchased said disinfecting works from the said Parker and others, together with a license for the use of said patented process in the State of Massachusetts, and continued the business of said disinfecting at said works.

That on or about June 10, 1885, the United States government, through the treasury department thereof, issued an order, which provided:

"1. That all circulars of this department concerning the disinfection of imported old rags are hereby revoked; and that all old rags hereafter imported from foreign countries shall only be admitted to entry at the custom-house upon the production of permits from the health officers at the port of importation only authorizing the landing of the same.

"2. Vessels carrying old rags arriving at any United States quarantine will be detained by the quarantine officers, and held subject to the order of the proper health authorities at the port of destination."

That thereafter the place where the said defendant's works were then established was approved by the said board of health as a proper place for the disinfection of rags, and the said process as one satisfactory to said board; and the said defendant company continued the business of disinfecting rags under the regulations and orders of the said board of health, the cost of such disinfection being charged against the owner of such rags as were disinfected, at the rate above mentioned.

That the plaintiffs in the action are shippers and importers, engaged in conducting said business in said city of Boston, and on or about December 14, 1885, they entered into an agreement with the defendant, whereby the defendant agreed to disinfect all rags which the said board of health might order to be disinfected, at the following rates, to wit: 10 per cent discount from the regular rate of \$5 per ton on the first 500 tons of rags disinfected; 15 per cent on the first 1,000 tons and upwards; that the lighterage charges should be deducted from the amount of discount allowed; that no wharfage charges were to be paid by the defendant company; and that the defendant company was to pay the lighterage charges on rags brought by the Warren line, but that the amount was to be deducted from the discount allowed on rags brought by that line. Said agreement to commence January 2, 1886, and expire April 1, 1886.

That the rags replevied by the plaintiffs were imported into this port by the plaintiffs on or about March 3, 1886, and ordered by the said board of health to be disinfected by the defendant at the said works, and were received by the defendant for disinfection in accordance with said order. On or about said date the plaintiffs protested against such disinfection in a written protest directed both to the said board of health and to the defendant; and thereafter the defendant, upon the order of said board of health, disinfected the said rags. After such disinfection the plaintiffs demanded the delivery of said rags without the payment of said charges for disinfection.

The defendant refused to deliver them without the payment of all charges, and therefore the plaintiffs replevied them.

And the defendant says that said charges for disinfection were a lien upon the rags replevied, and the defendant had a right to retain possession of the said rags until the same were paid for.

Wherefore the defendant says that it did not take said rags unlawfully, or retain them illegally.

The plaintiffs filed the following demurrer:

And now come the plaintiffs and demur to the answer of the defendant filed herein, and for cause of demurrer say that the answer does not set forth any facts sufficient to constitute a defense to this action, or which entitles the defendant to hold the goods referred to in the declaration. The complainants further say that said answer does not show that the cost of such disinfection, if any, was imposed upon the plaintiffs by any legal body or person competent to subject the plaintiffs or their goods to the charges in said answer referred, nor does it show either that said rags were disinfected at the plaintiffs' request, or that the plaintiffs agreed to pay for such disinfection.

After a full hearing on the pleadings in the Superior Court for Suffolk County, the demurrer was sustained, and judgment ordered for plaintiffs; whereupon defendants appealed to this court.

Messrs. R. D. Smith and C. A. Prince,
for defendant:

Under the Practice Act (Pub. Stat. chap. 167, § 11) it is necessary to assign specifically the causes for a demurrer; and a general allegation of insufficiency of the pleading is of no effect.

Inhab. of Washington v. Eames, 6 Allen, 417; *Suffolk Bank v. Lowell Bank*, 8 Allen, 355.

The authority of the board of health of the city of Boston to give the order for the disinfection of rags, and to impose the cost of the same upon the plaintiffs, is unquestionable.

See Acts 1816, chap. 44, §§ 2, 5, 6.

By the city charter (Stat. 1821, chap. 110, § 17, and Stat. 1854, chap. 448, § 40) the power and authority of the board of health were vested in the city council, to be carried into execution by one or more health commissioners, in this language.

See revised city charter (Stat. 1854, chap. 448, § 40); Pub. Stat. chap. 80, §§ 18, 20, 23, 27, and §§ 64, 65, 67, 69, 106.

Having power to pass the regulations and order the cargo to be disinfected, the board had further power to cast the cost of the same upon the plaintiffs.

See Acts 1816, chap. 44, § 6, and Pub. Stat. chap. 80, § 69.

There can be no question that it was for the board itself to determine as to what way the quarantine regulations should be carried out; or, in other words, how the cargo was to be purified or cleansed.

Cooley, Const. Lim. 3d ed. §§ 584, 585, and cases cited; *Salem v. Eastern R. R. Co.* 98 Mass. 431.

The board, therefore, having power to pass the regulation in question, it could enforce it and 2 MASS.

order the rags to be disinfected. This answers the first specification of causes of demurrer.

As to the second specification: It is absurd to argue that the power of the board of health is limited solely to disinfecting them themselves, as commissioners. The work of course was to be done by parties other than the commissioners themselves. It is immaterial whether they should hire for the purpose an individual or a corporation as agent. Having the power to cause the rags to be disinfected, the board could disinfect, or cause them to be disinfected, without an agreement for payment by the owner. The statute gives the right to the board to take possession of them, and prescribes that the owner must pay for the expense of disinfecting them. The custody of the agent and possession of the agent was the custody and possession of the board of health. The power of the board of health, under the statute of the Commonwealth, to impose the cost of disinfection, is well settled.

Morgan S. S. Co. v. Louisiana Board of Health, 118 U. S. 455 (Bk. 30, L. ed. 237); *Harrison v. Mayor, etc. of Baltimore*, 1 Gill, 264; *Coe v. Schultz*, 47 Barb. 64; Cooley, Const. Lim. § 584; 5 How. 632 (46 U. S. bk. 12, L. ed. 314.)

Did the defendant have a lien? Admitting that the question of the right to retain the rags for the lien is properly raised by the demurrer,—which is not admitted,—we contend that a lien at common law is given whenever any work is done on a chattel under an agreement, express or implied, with the owner thereof (*Arnold v. Delano*, 4 Cush. 33-38), and with the agent or servant.

Over. Liens, p. 46; *Day v. Caton*, 119 Mass. 513.

Defendant held these goods as the agent of the board of health, or as the employee of the board of health. In the former case the terms of the statute imply a right to retain; in the latter case the defendant has made a contract with one who is constituted by statute the agent of the owner. In view of the great expense to which the board of health, in protecting the public from disease, might be put in disinfecting the entire cargo of a large vessel, it is not a reasonable interpretation of the statute to suppose that they were not to have such security for the expenses of the same as were ordinarily given to a workman. That they should look merely to the owner, or the agent of the owner, of the cargo personally for the payment of the expenses, might result in great loss to the city. If the lien must rest upon a contract, we submit that the board of health had a right to contract with a third party for the disinfection; that a promise to pay therefor is implied by law; that a contract for such service implies a lien to secure the workman. In this is found a contract to support the lien, even as against the unwilling owner.

Earle v. Coburn, 130 Mass. 596.

The agreement set forth in the answer gives the defendant a lien. As the plaintiffs were bound by statute to pay the charges, a promise to pay that which they were bound to pay may be properly inferred. The defendant stood very much in the position of the plaintiff in the case of *Telson v. Warwick Gas Co.* 4 Barn. & C. 962.

Agreement to pay the charges to the defendant being properly implied, it follows from the nature of the work done that a lien upon the rags for the charges of disinfection existed.

As the effect of the protests: The rags were received by the defendant while the agreement was in force, one of the considerations of which was a reduced rate for disinfection. The plaintiffs had no right to rescind the same.

See *Cort v. Ambergate R. Co.* 17 Q. B. 127; *Earle v. Coburn*, *supra*.

Messrs. Samuel D. Warren, Jr., and Louis D. Brandeis, for plaintiffs:

The answers do not allege that the rags were "disinfected" at plaintiffs' request, or that plaintiffs promised to pay for the disinfection.

See *Lilly v. Barnsley*, 2 Mo. & Rob. 548.

The answers do not show that the work was done at the request of any person or body authorized by law to order the defendant to do it at the expense of the plaintiffs, so as to give defendant a lien thereon for its charges.

The disinfection of the rags by defendant does not appear to have been in accordance with the regulation of the board of health.

The board of health had no power to order the rags to be disinfected by defendant at the plaintiffs' expense.

The general powers of the board of health, so far as pertinent to this inquiry, are contained in Pub. Stat. chap. 80, §§ 18, 20, 44, 45, 47, 80. These sections do not authorize the board of health to order, by a general regulation, the disinfection of all rags, but only where there is reason to believe rags are infected.

The quarantine powers given by statute to the board are, so far as pertinent to this inquiry, contained in Pub. Stat. chap. 80, §§ 64, 65, 67, 69. None of these sections authorize the board of health to order the disinfection of all the rags by some independent contractor, in pursuance of a general regulation.

Section 67 gave no such authority to order the disinfection. It provides for the removal of vessel and cargo to the "quarantine ground." What shall be a quarantine ground is determined, not by the board of health, but by the city council.

Pub. Stat. chap. 80, § 62.

It is not alleged that the works of the defendant in the Charlestown District were ever made a quarantine ground for the city of Boston.

The section contemplates a removal, to the quarantine ground, of the vessel with the cargo. It does not appear that the vessel containing the rags was ordered to the defendant's works, or actually was sent there. Indeed, the contrary must be inferred from the facts stated. It contemplates that the purification shall be undertaken by the board of health itself, or by its immediate agents or servants. It appears that the work was performed by a foreign corporation, who undertakes to charge the owners, not the cost of labor and materials, but a round sum per ton, which obviously includes a profit to the company. That section evidently contemplates a special exercise of judgment by the board of health, as to each

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cargo arriving, and not the passage of a general regulation.

See *Gregory v. New York*, 40 N. Y. 278; *Underwood v. Green*, 42 N. Y. 140, 142.

Section 64 does not authorize the issuing of the regulation as being one which the board "judges necessary for the health and safety of the inhabitants." As § 67 provides specifically for cargoes which there is reason to believe are infected, it must be taken to provide specifically for all such cases. Such specific provision excludes, by implication, the power to deal otherwise, by general regulation, with cargoes suspected of infection. But independently of this limitation upon the powers of the board of health, the regulation is void because it is unreasonable.

See *Tugman v. Chicago*, 78 Ill. 405; *Austin v. Murray*, 16 Pick. 120, 124; *Commonwealth v. Patch*, 97 Mass. 221. See *Wail v. Ricard*, 24 N. J. Eq. 169; *State v. Trenton*, 36 N. J. L. 283; *Wreford v. People*, 14 Mich. 41.

The regulation is also void as trenching upon the domain of Congress "to regulate commerce with foreign nations."

Hannibal & St. J. R. R. Co. v. Husen, 95 U. S. 465, 471, 474 (Bk. 24, L. ed. 527); *Henderson v. Wickham*, 92 U. S. 259 (Bk. 23, L. ed. 548); *Chy Lung v. Freeman*, 92 U. S. 275 (Bk. 23, L. ed. 550); *Yick Wo v. Hopkins*, 118 U. S. 856 (Bk. 30, L. ed. 220). Cf. *Morgan & S. Co. v. Louisiana Board of Health*, 118 U. S. 455 (Bk. 30, L. ed. 287).

We submit that a statute of the Commonwealth which in terms enacted the regulation of June 1, 1885, and imposed this great expense of disinfection upon the owner, would be void under our Constitution as being against "common right."

See *Mead v. Acton*, 139 Mass. 341.

The regulation is void so far as it seeks to impose the expense of disinfection upon the owner without a hearing.

Salem v. Eastern R. Co. 98 Mass. 431, 443; *Belcher v. Farrar*, 8 Allen, 325, 327, 328; *Sawyer v. State Board of Health*, 125 Mass. 183, 196, 197.

Even if the board of health had the power to order the rags to be disinfected by defendant at plaintiffs' expense, still, "disinfection" under their order did not give defendant a lien upon the rags.

The statute contemplates that the expense attendant upon the enforcement of health regulations shall be borne, in the first instance, by the city or town. This appears clearly from § 80, which calls them "expenses incurred by a town for the preservation of health," and declares that such as are "recoverable of any private person or corporation may be sued for and recovered in an action of contract."

Cf. Pub. Stat. chap. 80, § 83.

The statute contemplates that any proceedings which may be found necessary for securing to the city or town reimbursement of its expenditures shall be by an action of contract; it does not provide for any lien.

Pub. Stat. chap. 80, §§ 45, 67, and 69, provide that the expense of carrying out the health or quarantine regulations shall be borne by the owner, etc. Section 80 provides that the expenses incurred by a town in the removal of

a nuisance, or for the preservation of the public health, and which are recoverable from a private person or corporation, may be sued for in an action of contract.

As the statute which casts upon the owner of the cargo this expense, and creates the right, provides also the remedy for its enforcement, that remedy is exclusive. The right of lien is therefore excluded by implication.

Tilcomb v. Union Marine F. Ins. Co. 8 Mass. 326, 334; *Almy v. Harris*, 5 Johns. 175; *Camden v. Allen*, 2 Dutch. 398.

A person who, by doing work under contract, would himself be entitled to a lien, cannot, by giving the work to another to do, vest such other with a lien.

Hollingsworth v. Dow, 19 Pick. 229.

A lien can only be acquired under contract with the owner or his duly authorized agent; i. e., the mere fact of work done does not give rise to a lien, if done without authority.

Clarke v. Lovell & L. R. 9 Gray, 281; *Robinson v. Baker*, 5 Cush. 187; *Gilson v. Guinn*, 107 Mass. 126; *Small v. Robinson*, 69 Me. 427; *Bates v. Emery*, 134 Mass. 186; *Thaxter v. Williams*, 14 Pick. 49; *Howard v. Veazie*, 3 Gray, 233.

Devens, J., delivered the opinion of the court:

The plaintiffs, in the argument, contend that the disinfection of the rags by defendant does not appear by the answer to have been in accordance with the regulations of the board of health, because the regulation requires disinfection to the satisfaction and under the supervision of the board, and the answers do not show that the disinfection was accomplished to the satisfaction of the board, but only that defendant's process was one satisfactory to the board. This objection, if it have any force, is purely technical. It is not specifically assigned by the plaintiffs as one of the causes of demurrer. A mere general allegation that the answer does not set forth any facts sufficient to constitute a defense, or to maintain the lien claimed, will not enable a party to avail himself of similar deficiencies in pleading. The particulars in which alleged defects consist are to be specially pointed out. Pub. Stat. chap. 167, § 11; *Inhab. of Washington v. Eames*, 6 Allen, 417. The plaintiffs further contend that the board of health had no power to order the rags to be disinfected by defendant at plaintiffs' expense, by an order made under the general regulation which it undertook to make on June 1, 1885, a copy of which is annexed to the answer. By the charter of the city of Boston, all powers vested in the city council, or in the board of mayor and aldermen, relative to the public health and the quarantine of vessels, were conferred on the city council with authority to delegate the whole or any part thereof. By the city ordinance (Rev. Ord. 1885, chap. 23, §§ 1, 2), all these powers were granted to the board of health, which was created by the same ordinance. These powers are derived from Acts 1816, chap. 44, the general legislation in relation to boards of health, Pub. Stat. chap. 80, and the authority there given, including the power to make quarantine regulations. By Acts 1816, chap. 44, the board of health had power "to examine into all

causes of sickness, nuisances, and sources of filth, etc., * * * in any vessel in the harbor of Boston or within the limits thereof, and the same to destroy, remove, or prevent, as the case may require." By § 5 of the same chapter it might make any "rules, orders, and regulations relating to clothing or any article capable of containing or conveying any infectious disease or creating sickness, which may be brought into or conveyed from the town of Boston, or into or from any vessel, * * * as they shall think proper for public safety, or to prevent the spreading of any dangerous or contagious disease." Pub. Stat. chap. 80, § 18, provides that "the board of health of a town shall make such regulations as it judges necessary for the public health and safety, respecting nuisances, sources of filth, and causes of sickness within its town or on board of vessels within the harbor of such town, and respecting articles which are capable of containing or conveying infection or contagion, or of creating sickness, brought into or conveyed from its town, into or from any vessel." Section 64 provides that the board of health in each seaport town "may make such quarantine regulations as it judges necessary for the health and safety of its inhabitants." By § 65 "such regulations shall extend to all persons, goods, and effects arriving in such vessels." By § 67 "the board in each seaport may at any time cause a vessel arriving in such port, when such vessel or the cargo is, in its opinion, foul or infected so as to endanger the public health, to be removed to the quarantine ground, and thoroughly purified at the expense of the owners, consignees, or persons in possession of the same." By § 69 "all expenses incurred on account of any person, vessel, or goods, under quarantine regulations, shall be paid by such person, or the owner of such vessel or goods respectively." These sections are sufficient to authorize the board of health, when articles arrived in the harbor "capable of containing or conveying infection or contagion, or of creating sickness," to provide for their being cleansed, and for imposing the expense thereof upon the owners. If they could be separated from the other goods in a cargo, there was no reason why this should not be done, and why they alone should not be subjected to purification, or why the vessel should necessarily be carried to the quarantine grounds, and thus its owner and the owners of other goods forming a part of the cargo, but not dangerous to public health, should be subjected to serious inconvenience. The quarantine order of the board of health of June 1, 1885, after reciting the unreliable character of the evidence as to the origin, history, and treatment of rags brought to this city from foreign ports, the misleading character of the health certificates brought by masters of vessels from ports from which rags are shipped, and the danger from cholera and other contagia likely to be carried by these importations, orders "that on and after this date all rags arriving at this port from any foreign port shall, before being discharged, be disinfected under the supervision of an officer of this board, and in a manner satisfactory to this board." The remainder of the order provides for different modes of disinfection, as the history or circumstances of

the shipment may require, and for the details of the manner in which the port physician shall perform his duties in passing the vessel or ordering disinfection; and the words "being discharged," in the order, are explained as meaning "before being discharged by the board of health, and allowed to be delivered to the consignees."

The plaintiffs contend that the statute contemplates a special exercise of the judgment of the board of health as to each cargo arriving, and not the passage of a general regulation. This contention we do not think open to the plaintiffs. An examination of the answer shows that there was a distinct order relating to the rags the price for the disinfection of which is here under discussion, by which a disinfection of them was directed. Nor, if we assume that the order was a formal one only, and that it was passed without any inquiry into the character of the rags or their special history, should we be prepared to say that the regulation was unreasonable because it dealt with a particular class of goods and subjected all to more or less disinfection. There may be articles of commerce, as the recital of the order describes the rags, so capable of carrying or transmitting infection that they cannot be admitted in any case into a city or town without danger, and should therefore always be subjected to examination and more or less purification. There would seem to be no doubt that, as certain things may be pronounced nuisances *per se*, certain articles also may be held as always properly subject to quarantine regulations. The plaintiffs further urge that the regulation is void as trenching upon the domain of Congress in its power "to regulate commerce with foreign nations." The plaintiffs rely much on the case of *Hannibal & St. J. R. R. Co. v. Husen*, 95 U. S. 465 [Bk. 24, L. ed. 527], in which a statute of Missouri which forbade the driving or conveying into the State, within certain periods, of any Texas, Mexican, or Indian cattle, was held unconstitutional. But this decision most fully recognizes the right of a State to pass reasonable quarantine or inspection laws, as being clearly within the police powers necessary for its protection. The Act in question was an exercise of the highest power over the subject of transportation, namely, its entire destruction; but in holding this to be beyond the police powers of the State, Mr. Justice Story, who delivered the opinion of the court, observes that the police power "would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious diseases. All these assertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive." He further unhesitatingly admits "that a State may pass sanitary laws, and laws for the protection of life, liberty, or property within its borders;" "that it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State;" and that "for the purpose of self-protection, it may establish quarantine and reasonable inspection laws."

So far from the regulation in question interfering with any legislation of the United States, or any regulation of its executive departments, the circular of the treasury department of December 22, 1884, and the circular of June 10, 1885, show that the construction of those departments at least is quite otherwise. The circular of 1884 directs that "no old rags, except those afloat before January 1, 1885, shall be landed in the United States * * * from any foreign country, except upon disinfection at the expense of the importer, as provided in this circular"; and prescribes certain processes which will be considered satisfactory, and "will entitle them to enter and to be landed in the United States, upon the usual permit of the local health officer." The circular of June 10, 1885, assigns as the reason for the withdrawal of the previous circular the fact that, "under existing laws, no general regulations can be legally framed, whereby the disinfection of old rags can be accomplished in foreign ports to the satisfaction of the several health authorities;" revokes previous circulars concerning the disinfection of imported old rags; provides that, when imported from foreign countries, they shall only be admitted to entry upon production of permits from the health officers at ports of importation; and adds, "Vessels carrying old rags, arriving at any United States quarantine, will be detained by the quarantine officers, and held subject to the order of the proper health authorities at the port of destination." The treasury department of the United States, so far from treating the regulations of local health officers as an interference with the rights or the legislation of the United States, transfers to the regulations, as made in different localities by the respective health officers, the whole subject of the disinfection of foreign imported rags. The regulations made by the board of health do not infringe the power of Congress to regulate commerce; they are strictly police regulations, and, as such, may be passed under the authority of the Legislature of the Commonwealth.

It is further the contention of the plaintiffs that the regulation of the board of health is invalid in so far as it seeks to impose the expense of disinfection upon the owner without a hearing, and that, as no method is provided by law for reviewing, by appeal to a jury, or otherwise, the action of the board of health, whether this action was taken under its general regulation, or was a special examination of this particular cargo, it cannot determine whether the plaintiffs are liable for the expense of disinfection; and, further, that even if the order may be valid to the extent of protecting the board from an action of tort for their interference, to render the plaintiffs liable for those expenses, the answer should show, and the defendant must prove, that there was reasonable ground to believe that the rags were dangerous to the public health. The plaintiffs rely much on *Salom v. Eastern R. R. Co.* 98 Mass. 481, 483, where it was held that, while the board of health would not be liable in tort for its action in removing, without notice or hearing, an alleged nuisance, if no nuisance actually existed, the expense attendant on the action of the board could not be recovered from the owner of the property. The case then before the court was one where a struc-

ture otherwise lawful had, as was alleged, become nuisance by the mode in which it had been constructed, so as to set back stagnant water upon adjacent lands. It belongs to that class of cases where trades otherwise lawful become nuisances by the offensive or filthy manner in which they are conducted. *Belcher v. Farrar*, 8 Allen, 325; *Sawyer v. State Board of Health*, 125 Mass. 182.

But there can be no doubt of the right of the Legislature to pronounce, under its police power, certain things or certain acts nuisances in themselves. Nor are such laws obnoxious to any constitutional provision because they do not provide compensation to the individual whose liberty to keep or do them is restrained. It may forbid entirely the exercise of certain noxious or offensive trades, or trades which it holds to be such, or only under such safeguards as it may prescribe; it may forbid certain articles—as gunpowder,—to be stored near habitations; it may regulate the height of buildings; and it may provide that these things may be regulated by ordinances or by laws of the respective cities or towns, or controlled by their authorities. It may determine when that which is otherwise property shall cease to be such if kept against law. *Commonwealth v. Alger*, 7 Cush. 58; *Fisher v. McGirr*, 1 Gray, 1; *Commonwealth v. Tewksbury*, 11 Met. 55; *Baker v. Boston*, 12 Pick. 184; *Vandine, Petitioner*, 6 Pick. 187; *Inhabitants of Watertown v. Mayo*, 109 Mass. 315. Where anything is declared a nuisance by legislation, it is not competent for a party to show that it is not, in fact, one. The owner or keeper of intoxicating liquor proved to have been kept for unlawful sale cannot show that such keeping is not a nuisance in fact, when the Legislature has declared it to be one. Rights of property are not indeed to be invaded under the guise of police regulations for the preservation of public order, the protection of public health, or to guard against threatened nuisances. If it appears that the real object and purposes of the regulation are other than these, courts will interfere to protect the just rights of the citizen in his property.

Quarantine laws are a familiar exercise of the police power of a State. Their enactment is within its police province; and the making of regulations for their enforcement has always been entrusted to subordinate boards. Even if it be conceded, as has been often contended, that whenever Congress shall undertake to provide for the commercial cities of the Union a general system of quarantine, or shall confide the execution of such a system to a national board of health, or to local boards, as may be found expedient,—all State laws will be abrogated, at least so far as the two are inconsistent, until this is done the laws of the State are valid. *Morgan S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455 [Bk. 1, L. ed. 237]. The board of health is instituted by the Legislature with the power to make regulations necessary for the health and safety of the inhabitants, extending to all persons, goods, and effects arriving in vessels. It may determine that certain articles, on account of their liability to convey infection, and the impossibility of ascertaining their history, and where they have been originally col-

lected, shall always be subjected to disinfection, at least externally in the bales in which they are imported; and that such a precaution is necessary before they are delivered to the importers for distribution among the inhabitants. This is a reasonable regulation, made under the police power of the State, which the board is executing. Nor, legislation having provided that all expenses incurred on account of goods under quarantine laws shall be paid by the owner, is it competent for the answer, as a defense to this claim, to show that the goods did not require disinfection, and could not have transmitted disease, if they were of the class concerning which the regulation had been made. Whether he might show that the expense incurred in doing that which was ordered to be done was unreasonable, and thus, unjustifiable, is a question that does not here arise.

The plaintiffs further contend that, even if the board of health had the power to order the rags to be disinfected by the defendant at plaintiffs' expense, still, disinfection under their order did not give defendant a lien upon the rags; and this, for the reason that the statute contemplates that the expenses shall be borne by the city or town. In the first instance, for whom the board of health acts, and for whom the work of disinfection is to be performed by its agents or servants; and, further, that while §§ 45, 67, and 69 of Pub. Stat. chap. 80, provide that the expense of carrying out the quarantine regulations, etc., shall be borne by the owner, as § 80 of the same chapter provides that the expense incurred by a town in the removal of a nuisance, or for the preservation of the public health, and which are recoverable from a private person or corporation, may be sued for in an action of contract, this remedy is exclusive. Any right of lien, whether in favor of the city or town, or of any one by whom the work may be done, is therefore, according to plaintiffs' contention, excluded by implication. If we concede that § 80 applies to expenses under quarantine regulations as well as to those incurred under general orders of the board; and if no such remedy previously existed, a cumulative remedy was simply provided thereby, in addition to those which had before existed. The statute from which this section is derived was Stat. 1849, chap. 211 (Gen. Stat. chap. 26, § 49). Long before this time, the owner of goods upon which expenses had been incurred for disinfection under quarantine regulations had been rendered liable for the same. Stat. 1816, chap. 44, § 6; Rev. Stat. chap. 21, §§ 30-34. When new remedies are given by statute, to enable one more effectually or conveniently to enforce rights, and are intended for his benefit, the provisions therefor, unless expressly excluding other remedies, are to be construed as cumulative rather than restrictive. *Barden v. Crocker*, 10 Pick. 383; *Kiader v. Dunstable*, 11 Gray, 342; *Coffin v. Field*, 7 Cush. 355; *Counter v. Couch*, 8 Allen, 436; *Reynolds v. Hanrahan*, 100 Mass. 813.

It cannot be important that in this Commonwealth the creditor has a right of attachment on mesne process. Such a remedy is very imperfect as compared with that afforded by a lien, which is a usual and

efficient remedy where work is done upon a chattel by a bailee to whom it is confided under any agreement, either express or implied, with the owner thereof. Over. Liens, 46. Nor is it important that, while expenditures may be made upon real estate under the orders of the board of health, a lien can only exist upon personal property, and thus that this remedy is partial. There is no reason why a well-recognized remedy as to personal property should not be enforced, because there may be cases coming within the statute affecting real estate, to which it would not be applicable. Even if a lien might exist in favor of the city, if it had done the work through its officers, agents, or servants,—and the plaintiffs contend that this was the only mode in which it was authorized to do it,—they further argue that no lien can exist in the case at bar; that there can be none in favor of the city, as it has done no work; none in favor of the defendant, as it was an independent contractor with the city, and there was no debt due to such contractor from the plaintiffs as the owners of the goods.

The board of health might certainly delegate the work to an independent contractor; it was not necessarily to be done by it or its immediate servants and under its personal supervision: it was sufficient if it prescribed the method, and that this was complied with. The board, in the language of the statute, was to "cause" the goods to be purified. Section 67. It had a right to make a reasonable contract for the disinfection of the goods; the duty of paying for the expenses thus incurred was, by the statute, cast upon the plaintiffs; and their promise to pay therefor is one implied by law. Where a party is subjected to such a duty, this obligation is to be performed; and the law will, of its own force imply a promise, even against his protestation and express declaration. *Earle v. Coburn*, 180 Mass. 596. Such a contract necessarily implies a lien in favor of the contractor into whose hands the goods are taken for disinfection, to secure him for the expenses properly incurred in his work.

We have not found it necessary to consider whether the agreement set forth in the answer, between the plaintiffs and defendant, would entitle the defendant to a lien on the goods disinfected by it.

Demurrer overruled.

James F. COOK *et al.*

v.

William H. H. YOUNG *et al.*

1. When an arrangement was made between persons interested in real estate which was subject to a mortgage, that, at the mortgage foreclosure sale, one of them should take the title, hold it until a sale could be made, and, after making such sale, divide the surplus above the amount of the mortgage debt,—*Held*, that the terms of the arrangement implied that such one should have power to make a sale, convey a good title to the purchaser,

and collect the purchase money; and that it was necessarily left to the discretion of such one when to make the sale, in case the others interested should fail to pay in their shares of the expense of carrying the property, as was contemplated by the arrangement.

2. *Held*, further, that the person so taking the title at the foreclosure sale did not take and hold the title subject to a resulting trust which followed the land and could be enforced against the purchaser from her; and that the title held by the purchaser from her was free from any trust, where the conveyance to him was made by her in good faith and without fraud.

(Suffolk—Filed May 9, 1897.)

A PPEAL by plaintiffs from a decree of a single justice of the Supreme Judicial Court dismissing a bill in equity to establish a trust. *Affirmed.*

This bill was filed by James F. Cook, Harriet N. Byron, Henrietta E. Cook, Lizzie F. Lowe, Frances L. Davis, Hannah Young, and Margaret Cook, against William H. H. Young, and Susan T. Young, his wife, Ella T. Tucker, and the city of Boston. The bill alleged that Hannah M. Cook, late of said Boston, widow, died testate in September, 1877, seized and possessed of a certain tract of land, etc., in West Roxbury, containing 36 acres, more or less, subject to a mortgage to the Home Savings Bank, of said Boston, for \$12,000. That, by her last will and testament and codicils, said land was devised to testatrix's children. That the respondent William H. H. Young assumed substantially the charge and management of the interests of the devisees in said estate, the said devisees consenting thereto. That, in accordance with some arrangement made between the said Young and the said savings bank, orators understood and believed the said bank advertised the sale of said real estate under the power of sale contained in said mortgage. That thereupon the said Young proposed and advised that the said devisees should severally contribute and pay a proportionate part of the purchase money necessary to be advanced and paid to said bank in the purchase of said estate at said sale, and that said estate should be bought, and a deed thereof taken in the name of said Ella T., in trust for the said devisees in proportion to their several interests, as provided in the will of said Hannah M.; the said Young then representing that the said bank would require a cash payment only of the amount of the interest due upon the said mortgage note, with the costs and charges of the sale, and would accept a new note and mortgage for \$12,000, for and in the place of the note and mortgage then held by the bank. That, in accordance therewith, the said devisees contributed and paid their respective shares and proportions of the money to meet the cash payment required in consummating said transaction, amounting in all to \$1,166.32, and said estate was sold by said bank, under the power in said mortgage, on November 27, 1877; that Ella T. was declared to be the

purchaser thereof, and the same was conveyed to her by deed of said bank, the consideration expressed therein being \$13,150, and a mortgage deed and note of the same date for \$12,000 were given by the said Ella T. to the said bank. That said Young alone, as representing said devisees, had the direction and supervision in the preparing and drafting of said deeds, and none of the complainants were consulted as to the form of said deed to said Ella T., and none of them saw it or knew of the form thereof prior to its execution and delivery; but they supposed it was to be, and that it was, drawn in proper and sufficient form to express and secure in the seisin and holding of said Ella T. a trust for the benefit of all of said devisees in the proportion of their several interests in said devised estate. That afterwards money was contributed by said devisees to pay the interest accruing on said mortgage. That afterwards said Young induced said Ella T. to make and deliver to one Varney a note of \$1,000 secured by a mortgage on said real estate; which mortgage was immediately assigned to said Young, the said Young representing that such conveyance was proper and necessary in order to raise the money needed to pay certain taxes. That, as your complainants are informed and believe, no money was ever received by said Ella T. upon said note and mortgage, but that the whole amount thereof was paid to said Young, who thereupon paid and discharged said tax, and retained the balance for his own use. That the complainants were never consulted in regard to the making of said mortgage to said Varney, and they knew nothing of it until long afterwards. That in April, 1879, as the complainants are informed and believe, the said Young caused to be drafted a deed in fee of said estate from said Ella T. to his wife, the respondent Susan T. Young, dated April 26, 1879, for the nominal consideration of \$15,000; which deed, as the complainants are informed and believe, by undue influence and by false and fraudulent representations and promises, he induced and constrained the said Ella T. to sign, and which he retained and caused to be recorded without the knowledge of complainants.

The bill further alleged that, at the time of said conveyance of said estate to said Ella T. by the said savings bank, the said Ella T. was but twenty-three years of age and unmarried. That she had had no experience in, and little knowledge of, business matters. That, from the time of her mother's death in September, 1877, or shortly thereafter, until her marriage in October, 1879, she lived in the family of said Young, whose wife, the said Susan T., is her sister; and all her acts in the buying, selling, and mortgaging said estate, and in taking and giving deeds thereof, as hereinbefore set forth, were done under the direction and at the dictation of said William H. H. Young, as the complainants are informed and believe. That for several weeks prior to the execution of said deed given by said Ella T. to said Susan T., as the complainants are informed and believe, the said William H. H. Young strove by importunities, specious arguments, and promises of special benefit to herself, to prevail upon her to execute said deed. That,

as the complainants are informed and believe, he represented to her, among other things, that money was due on said mortgages, and that the holders thereof threatened to sell, and would sell, the said estate unless their claims were paid at once. That the other devisees would not contribute and pay their proportional part to discharge the claims accrued and accruing against said estate, and that the estate would be lost to them, together with all they had advanced and paid thereon, if she persisted in her refusal to execute said deed. That he promised her, among the promises which he failed to keep and perform, that if she would execute said deed, he would pay to the other devisees all the money they had theretofore contributed, and paid for and on account of said estate; that he would pay all the debts of her mother's estate, and would make to her, the said Ella T., a special present of \$1,000, and, in substance, that if said estate should be sold, as was contemplated, all the parties in interest should be fairly dealt with. That by such representations and promises, and by undue influence, dictation, and persistence, he finally constrained her to execute said deed as aforesaid. That the said Susan T., as one of the said devisees, well knew of the said trust pertaining to and qualifying the seisin and possession of said estate by the said Ella T., and had known of it from its beginning.

Wherefore the complainants claim and allege that the said deed of said Ella T. to said Susan T. did not in equity convey to and vest in said Susan T. the title to said estate in fee simple or otherwise, discharged of said trust; but that, if said deed conveyed to and vested in said Susan T. any title, she thereby becomes, and still is, charged with said trust to the same extent and in the same manner that said Ella T. had been thereby and therewith bound and charged before said deed was executed.

The complainants further say that in the year 1876 the said real estate was valued by the assessors to the said city of Boston, in their assessment of the tax thereon for that year, at \$60,000. That while in subsequent years, in the general depreciation in the value of real estate, the valuation of said estate by said assessors has never been as high as it was in 1876, it has never been so low as \$30,000, and for the present year said valuation is \$35,200, and, as the complainants believe, its true and fair market value has never been less than the valuation placed upon it by said assessors.

That in the year 1876, the park commissioners of the said city of Boston located a public park in that part of said Boston which was formerly West Roxbury, and said city has since adopted the said park substantially as so located, to wit, a park of 400 acres in area; in which park all of the said real estate hereinbefore described is included, and the purchase thereof by said city has long been anticipated by the said parties in interest.

That within the last week prior to the filing of this bill, the city council of said Boston has passed a bill, and the mayor of said city has signed and approved the same, in substance appropriating \$600,000 for the purchase of the land included in said park as aforesaid; and the complainants are informed and believe

that the land described in this bill is equally as valuable as any land included in said park; all which matters,—as to the value of said estate, the including thereof in said park, and the expected purchase thereof by said city,—the complainants believe and have reason to believe, and allege, are and long have been well known, understood, and anticipated by said Young.

The prayer of the bill is that said estate may be declared to be held by said Susan T. in trust for the use and benefit of the persons named as the devisees thereof, and in the proportions declared in the said will and codicils of said Hannah M. Cook, or for such of said devisees, and in such proportions, as the court may determine; that an account may be taken of all payments made, and of all money received by or for the said several devisees, and of all sums properly to be debited and credited to each and every of them, for or on account of said estate since the death of said Hannah M.; that the said Susan T. may be enjoined from making any deed, lease, lien, or incumbrance of or upon the real estate, or of any part thereof, or of any interest therein, described in said deed of said Ella T. to her, the said Susan T., except a deed thereof to the said city of Boston; and that the said city of Boston may be enjoined, until the further order of this court, from paying any of the purchase money for such deed to any person other than the clerk of this court; that such purchase money, when so paid, may be distributed and paid to and among such of said devisees and in such proportions as the court shall order; and that the complainants may have such other and further relief in the premises as the court may deem meet.

On answers of respondents and replication filed thereto, the case was referred to Francis W. Hurd, Esq., master in chancery, to hear the parties and their evidence, to find the facts, and to state the accounts between the parties, and to make report to the court.

The master reported as follows:

Pursuant to an order of court in the above-entitled cause, I, having been attended at several times by counsel for the complainants and for the defendants, and having examined the evidence and testimony produced before me upon the matters directed to be inquired into by such order, do report:

1. That Hannah M. Cook, widow, late of Boston in this Commonwealth, October 22, 1874, was seised in fee of the estate described in the plaintiffs' bill, situated in that part of Boston, which formerly was West Roxbury. The estate consisted of a farm of 36 acres of land, with buildings thereon, where she had resided for many years. October 22, 1874, she executed and delivered to the Home Savings Bank, of said Boston, a mortgage deed of said premises, with the usual power of sale, to secure payment of her promissory note dated said October 22, for the sum of \$12,000, payable in three years from said date, with interest thereon at 8 per cent, payable semi-annually. By the terms of said mortgage, the mortgagor, her heirs or assigns, were to pay the taxes assessed upon said estate.

2. Said Hannah M. Cook died at Boston,

testate, on September 30, 1877, seised and possessed of the equity of said estate, and certain personal property which was appraised at, and was of the value of, \$1,035.64. The value of the equity in said estate was appraised by the appraisers of said estate at \$16,510.77. The principal of said mortgage debt became payable October 22, 1877, and interest to the amount of \$974.40 had accrued and was unpaid, and the tax for 1877, amounting to \$574.83, was unpaid; making the total incumbrance October 22, 1877, the sum of \$13,489.23, and the total value, as appraised by said appraisers, \$80,000.

3. Said Hannah M. Cook left ten children, of whom six were daughters and four were sons. By her will and two codicils, and which were admitted to probate in Suffolk County, October 29, 1877, said testatrix devised to her children, Harriet, James, Susan, Frances, Lizzie, Hannah, and Ella, and to Henrietta, wife of her son Edward, and to Margaret, wife of her son William, and to a trustee for her son Thomas, each, one undivided one-tenth part of all the right, title, and interest in said real estate that she died seised and possessed of.

The portion of said Thomas was to be held by a trustee for ten years, and if within that time said Thomas was not heard from, or did not claim said interest, it was to be divided between two of the daughters, viz., Lizzie and Ella. Said trustee was the executor of the will, and resident of Boston, and was informed of the transactions mentioned in this report.

4. At the time of the death of said Hannah M. Cook, the son Thomas had not been heard from by any of the family for upwards of fifteen years. He was last heard of indirectly, some fifteen years ago, as being in California, and since then nothing has been heard from him, directly or indirectly; his whereabouts or address has not, within that period or up to the present time, been known by any of his brothers or sisters, nor is it now known by them whether he is living or dead. The son James, at the time of his mother's death, resided in Boston, and has since continued to reside in this vicinity.

Edward resided upon the farm with his mother, and continued in possession thereof after her death until about October 1, 1878; his wife, Henrietta, was devisee under the will of one tenth part. William resided in California until June, 1882, when he came to Boston to reside; his wife, Margaret, was devisee under the will of one tenth part. His residence and address while in California were known to his brothers and sisters, and correspondence was had with him, as hereinafter appears. Susan was the wife of William H. H. Young; they resided in Boston, and are defendants in this action. Harriet was the wife of William D. Byron; they resided in the State of New York until November, 1882, when they came to Boston to reside. Frances was the wife of Alexander M. Davis; they resided in Brooklyn, New York, until the spring of 1878, when they removed to Boston. Hannah was the wife of Charles Young, who is a brother of said William H. H. Young; they reside in Boston. At the time of their mother's death, Lizzie was a widow, Mrs. Whiting; she has since married Thomas C. Low; and Ella was unmarried.

These two daughters, Lizzie and Ella, resided with their mother, and after her death they resided with their sister, Mrs. William H. H. Young, until the spring of 1878, when Lizzie went to reside with her sister, Mrs. Davis, and until October, 1879, when Ella married Charles H. Tucker, and then went to New York to reside.

5. On or about October 2, 1877, at an interview at which the above named parties, excepting Thomas, William, his wife Margaret, Thomas C. Low, and Charles H. Tucker, were present, the wish was expressed and acquiesced in by all that some arrangement and concert of action might be had whereby the real estate left by Mrs. Cook should be carried for the benefit of all interested therein until a favorable sale thereof could be made. No definite arrangement was then made, as the amount of the incumbrances and of the personal property was not sufficiently known. It was suggested that a subsequent conference should be held after the necessary information had been obtained.

6. On or about October 9, 1877, a meeting was held at the office of the executor of the will, at which were present James F. and Edward Cook, Mr. and Mrs. William H. H. Young, Mrs. Charles Young, Mrs. Whiting, and Ella T. Cook.

Mrs. Henrietta Cook had notice of this meeting, but was not present; her husband, Edward, attended in her behalf. Mr. and Mrs. Byron and Mr. and Mrs. Davis had notice of this meeting, but were not present. William Cook and his wife, Margaret, were in California and had no notice. At this meeting it was found and stated that the amount of interest on the mortgage debt, and taxes which must soon be paid, was over \$1,800; the principal of the mortgage debt would be payable on the 22d of the same month of October. The wish was again expressed and acquiesced in that some arrangement and concerted action might be had whereby the mortgage interest and taxes then due and hereafter to become due might be paid and provided for, and the said real estate carried for the benefit of all the devisees until a satisfactory sale thereof could be made. It was then expected and believed that all the devisees under the will, excepting the trustee of Thomas, would be willing to contribute an equal aliquot part of such sums as then and thereafter would be necessary.

The parties were then and there advised by counsel that, in order to simplify the management and subsequent conveyance of the property, it might be expedient to have the estate sold by the mortgagee under the power of sale, the property bought in by one of the parties in interest, who should take a deed from the mortgagee without containing therein any declaration of trust, and who should hold and manage the property, collect from the devisees and pay the interest and taxes, and, when a satisfactory sale was finally made, divide the surplus.

No person was named at this meeting who was to take the title. No dissent from these suggestions was expressed at this meeting by anyone but Edward Cook, and he ultimately withdrew his objections, and said he would pay his wife's share.

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It was not finally decided at this meeting what course should be pursued. It was also suggested that, by means of a second mortgage, money might be raised to carry the estate without assessing the devisees.

7. The next day, October 10, 1877, William H. H. Young wrote a letter to William D. Byron, in which he told him the meeting had been held, and that the payment of taxes and mortgage interest had been the subject of talk; that to renew the mortgage, interest and taxes must be paid by October 22; that the trustee for Thomas would not contribute, and as William P. Cook was in California and could not be heard from by that time, the amount to be raised must be divided by eight; and if William P. Cook should ultimately contribute, about \$20 to each of the eight could be refunded; that this arrangement was subject to the approval of all, with the alternative of letting the estate go; that one-eighth part was \$186.75. This letter was answered by Mr. Byron under date of October 16, enclosing a draft for the amount. Throughout the transactions mentioned in this report, Mr. Byron acted with the knowledge and consent of his wife.

8. Both before and immediately after the death of Mrs. Cook, said William H. H. Young wrote to William P. Cook in California, informing him that money would have to be raised for the benefit of the estate; under date of October 10, 1877, he wrote him that his interest was left to his wife, and informed him of the amount needed to prevent an immediate sale of this estate; and under date of October 19, 1877, he wrote him again, informing him of the amount of his share, asking whether he would contribute to keep the estate, or whether he would have it sold to the highest bidder, and informing that all the rest had rather hold on to the place, at least until another summer. The letters of October 10 and 19 were received and answered by William Cook. Correspondence was had with William Cook by other members of the family. William Cook declined to contribute in behalf of his wife, and neither of them has paid anything towards the expense of carrying the place. Margaret Cook had knowledge of the correspondence carried on by her husband, and of the contents of the letters.

9. Correspondence was carried on between Mr. Davis and William H. H. Young, and between Mr. Davis and James F. Cook, in which Mr. Davis was informed of the situation, and requested to contribute. In a letter dated October 28, 1877, Mr. Davis declined, on the ground of pecuniary inability, to contribute anything in behalf of his wife; and neither of them has paid anything towards the expense of carrying the estate. Mrs. Davis was informed of the correspondence and of the contents of the letters.

10. Edward Cook and his family were in possession of the estate after the death of Hannah M. Cook, and paid no rent. A writ of entry was brought against him and his wife, wherein Ella T. Cook was defendant, by writ dated December 18, 1877. In June, 1878, this action, by agreement of counsel, was entered "Neither Party," and at the same time said Edward paid \$30 in part payment of \$150, then agreed upon as the rent up to that date,

and gave his note for \$345 to Ella T. Cook, which note was made up of \$215 for his share of the expenses then incurred for carrying the estate, \$120 for the balance of the rent then agreed upon, and \$10 on account of costs of suit. Said note was afterwards presented to him for payment, but no part of it has ever been paid, and it was and is uncollectible. Other than as stated in this paragraph, neither Edward Cook nor his wife has contributed anything towards the expense of carrying the estate.

11. November 2, 1877, the principal of the mortgage debt, a year's interest and taxes being due and payable, the Home Savings Bank, mortgagees, advertised the mortgaged premises for sale at public auction on November 27, 1877, under the power of sale contained in said mortgage.

It having been found for various reasons impracticable to carry the property in its then existing status, some time between October 29 and November 9, 1877, a plan was entertained of allowing the estate to be sold under the mortgage, to have it bought in by Ella T. Cook, and, by means of a mortgage for a larger sum than \$12,000, or by a second mortgage, to raise money to enable the estate to be carried for a time for the benefit of all the devisees without calling upon any of them for cash contributions. This plan was found not feasible by reason of the bank refusing to increase the existing mortgage, and the difficulty of getting a second mortgage.

While this plan was in contemplation, in a letter dated November 9, 1877, W. H. H. Young wrote to Mr. Davis, "The place will be sold the 27th at 3 P. M., and Ella will buy it, and we shall try and pay the interest and taxes by a mortgage, and not call on anybody for cash just now."

12. Some time between November 9 and November 27, 1877, which last day was that fixed for the mortgagee's sale, an interview was had between William H. H. Young, James Cook, and the president of the said savings bank, by which it was arranged that the bank would sell under their mortgage; that the estate should be bid in by one of the devisees for the amount of the mortgage debt, interest, and taxes; that the interest and taxes and expenses of sale should be paid to the bank in cash, and a new mortgage taken from the purchaser for the same principal sum of \$12,000, with interest at 6½ per cent per annum. This arrangement was made with the president of the bank after he had refused to increase the amount of the mortgage or to take a second one, and after a previous interview between Young and James F. Cook with the attorney of the bank, at which the attorney objected to the proposition because Ella T. Cook, the proposed grantee, had no means of paying the interest that might accrue, and the attorney referred the parties to the president of the bank. The bank president had been an acquaintance and friend of Hannah M. Cook in her lifetime, and knew the proposed arrangement was intended to enable the parties interested to obtain an improved ultimate sale of the estate. At the time said arrangement was made with the bank, as William H. H. Young and James F. Cook did not expect all the dev-

isees would be ready before the sale to contribute to the amount to be paid the bank, it was agreed between them that they would make up the deficiency not contributed by others, and, upon being reimbursed by any devisee subsequently contributing a proportion, such subsequently-contributing devisee should stand upon the same footing as themselves, and be reimbursed out of the proceeds of a second mortgage, if one sufficiently large should be raised; and also share in any benefit that might accrue from the ultimate sale of the property. The said arrangement with the bank, and the agreement between said Young and Cook was communicated to Ella T. Cook, to Mrs. Whiting, and to Mrs. William H. H. Young, and was acquiesced in by them.

13. November 27, 1877, the mortgagee's sale was made. It had been duly advertised, and there was a fair attendance at the sale. By instructions to the auctioneer, the sale was not to be made for an amount less than the incumbrances. One bid was made by a stranger for a less sum than that amount; the auctioneer named the amount of the incumbrances, and, in accordance with the aforesaid agreement, Ella T. Cook bid it in at that sum, and was declared the purchaser. She was in fact the highest bidder at the sale. A mortgagee's deed in the usual form was prepared by the attorney of the bank without instructions or request from anyone as to its form, and it contained no declaration of trust. No representative of the bank was present at the sale, which occupied but a short time.

14. On December 7, 1877, payment in cash was made to the Home Savings Bank of its interest, and the expenses of mortgagee's sale were also paid. A deed of the estate, dated December 5, 1877, was given by the bank to Ella T. Cook; and, at the same time and of the same date, a new mortgage to the bank was given, with a note, signed by Ella T. Cook, for \$12,000 and interest at 6½ per cent. The total amount of cash paid the bank was \$1,168.80, which amount was contributed,—\$200 by James F. Cook, \$100 by Mrs. Lizzie Whiting, \$100 by Ella T. Cook, and \$768.80 by William H. H. Young. Notes were given by Ella T. Cook for these sums to each of said parties. Owing to some misunderstanding as to its application, \$186.75 which had been contributed by William D. Byron was not used at this time; it was, however, subsequently applied, together with a contribution of \$116.80 by Hannah, the wife of Charles Young, and notes given by Ella T. Cook therefor; these two sums reduced the amount paid by William H. H. Young to \$464.74.

The notes mentioned in this paragraph varied in form, and were not intended or regarded by the parties as imposing an absolute personal obligation upon the signer, but as vouchers for the sums contributed, and to be paid from proceeds of a second mortgage, if one was obtained, or from the ultimate sale of the estate. Said Ella T. Cook, now Mrs. Tucker, testified that her payments in the purchase of said estate were made for the equal benefit of all the devisees; while carrying the estate, she declared she was so doing for the benefit of those devisees who contributed to the expense. And I find that, at any time while the

title stood in her name, anyone of the devisees would have been allowed to contribute a proportion of such expense, and, upon so doing, would have been considered by her as entitled to have their contributions repaid, and to share in the benefit of the ultimate sale of the estate, in like manner as those who had already contributed.

15. The fact that the sale had been made as aforesaid to Ella T. Cook was known to all the parties to this suit within a short time of its occurrence. It did not appear that they then had knowledge of the form of the deed to Ella T. Cook, which was duly recorded December 7, 1877. No concealment or false statement was ever made by either Ella T. Cook or William H. H. Young as to the form of said deed. It did not appear that any inquiry was made by anyone, excepting by Mr. Byron, upon this subject. In a letter written by William H. H. Young to Mr. Davis under date of November 9, 1877, informing him that a sale was to be made to Ella, the language used, which is quoted at the close of ¶ 11 of this report, would naturally convey the impression that a deed in the usual form was to be made. Said William H. H. Young never proposed or advised that a deed to Ella T. Cook should be taken expressing a trust. There was no evidence of any specific act or declaration of said Young, whereby any of the plaintiffs could have been led to suppose that the deed to Ella T. Cook was to be, or that it had been, drawn in such form as to express a trust for the benefit of the devisees. I find that it was advised by counsel, who was the executor of the will of Hannah M. Cook, that the deed should not contain any declaration of trust, as hereinbefore stated in ¶ 6 of this report; and the deed in fact was drawn by the attorney of the savings bank without a request or intimation from anyone as to its form. And said Ella T. Cook was advised by said executor not to make any declaration that she held said property in trust.

16. In June, 1878, six months' interest upon the mortgage became due, \$390, and the taxes for the year 1877 had not been paid. During this month Edward Cook offered to release any right he or his wife might have in the estate or proceeds of its sale for the sum of \$600, and said William H. H. Young asked Mr. Byron to contribute one half that sum, and he, Young, would contribute the other, and together buy out such right. Mr. Byron declined, but he contributed \$72.75 towards the amount for interest and taxes, additional to the \$186.75 before mentioned, which was at this time applied. Under date of June 20, 1878, said Young wrote to Mr. Byron, with the knowledge and approval of Ella: "Ella says that each must sign a paper binding themselves to take care of at least the one-tenth part, as proposed, or we will lose the place, as she cannot pay for only her own share, as agreed upon." There was no evidence that such paper was signed by anyone.

Under date of July 31, 1878, said Young wrote to said Byron, with the knowledge and approval of Ella T. Cook, that they were in need of someone to help carry along the place, and asking if he would carry an additional share, and expressing the wish that he would

come to Boston and arrange it so as either to keep or sell the place; and that he (Young) thought it ought to be kept for a while longer. Under date of August 2, 1878, Mr. Byron replied that, after consultation with his wife, they thought it more desirable to sell than to assume any more obligations or attempt to carry anyone's share.

17. In August, 1878, said Young paid the interest due in June, and the taxes of 1877, together amounting to \$946.75. To pay this he had, in addition to sums before credited, the \$72.75 contributed by Mr. Byron; \$112.50 by Mrs. Lizzie Whiting; \$87.50 by Ella T. Cook; the \$30 paid on account of rent by Edward Cook; \$95.06 by Mrs. Hannah Young; and \$172, proceeds of sale of grass from the premises,—in all \$569.81, leaving \$376.94 contributed by said William H. H. Young, which included his wife's aliquot portion of said \$946.75.

18. The said sums of \$376.94 mentioned in the last paragraph, and \$464.74 mentioned in ¶ 14, together, made \$841.68 contributed, up to September, 1878, for interest and taxes by said Young, including therein his wife's aliquot portion, which was \$264.88, if the whole is divided into eight parts. He had also paid out a few other items to an amount of fifty odd dollars. In September, 1878, a second mortgage was made by said Ella T. Cook to Elias C. Varney for \$1,000; Varney had formerly been a partner of said Young, and at this time occupied an office with him. Varney gave his check for the \$1,000 to said Ella, who handed it over to said Young; and on the same day said Young, by his own check, repaid to Varney the \$1,000. This mortgage stood in the name of Varney until the sale to said Young hereinafter mentioned; but it was under the control of said Young, and, if valid in law, operated as security to him for advances to the amount of \$1,000. None of the other devisees, excepting Mrs. W. H. H. Young, knew of this Varney mortgage until after it was given, but they knew of the general scheme, hereinbefore mentioned, by means of a second mortgage to raise money to be applied in carrying the estate for the benefit of all the devisees.

19. The said William D. Byron, in the winter of 1877-78 had learned from W. H. H. Young the form of the deed from the bank to said Ella T. Cook, and in an interview had with said Young and Ella in the fall of 1878, said Byron endeavored to obtain from said Ella some written statement that she held said real estate in trust, but she refused to give him such statement. Said Byron was also told by said Young and Ella, in the fall of 1878, that devisees who made no contribution towards the expenses would not be considered by them as entitled to share in any surplus that might be realized from a sale.

20. In December, 1878, when \$390,—being six months' more interest,—became due, said Young requested said Byron to contribute to that and for the taxes of 1878, and after some correspondence, in a letter dated February 28, 1879, Mr. Byron declined to pay any more money towards keeping the farm. All the other devisees were unwilling or unable to contribute any further sum. James F. Cook had refused

to make any contribution beyond the \$200 put in by him; Mrs. Lizzie Whiting and Ella T. Cook had no means from which they were able to contribute further. In January, 1879, said Young paid the said December interest without contribution by anyone.

21. In March, 1879, said William H. H. Young proposed to Mr. Byron that they should jointly carry the estate and pay the expenses. Mr. Byron refused.

In April, 1879, the taxes for 1878 were unpaid. Said William H. H. Young proposed to said Ella T. Cook that she should sell the estate to him for the gross sum of \$15,000, including the two mortgages, and that what cash was paid above the sum of said mortgages should be refunded *pro rata* to those who had contributed as hereinbefore stated. Said Ella consulted James F. Cook as to said proposed sale to said Young, and he advised her to make it; and on April 27, 1879, a bond for a deed to be delivered on or before May 15 was made from said Ella to said William H. H. Young for the sum of \$15,000, subject to the incumbrances and taxes. This bond was attested by said James F. Cook, and he assented to and advised its execution.

22. In May, 1879, said Young procured a deed to be drafted of said estate from said Ella T. Cook to his wife, said Susan T. Young, for the sum of \$15,000, subject to said mortgages and taxes, including the taxes for 1879, which mortgages and taxes were to be assumed and paid by the grantee in said deed. Said deed was dated April 28, and was executed and delivered May 19, 1879. The amount of cash paid by W. H. H. Young to Ella T. Cook for said conveyance was \$845.43, being the balance of \$15,000 after deducting the incumbrances aforesaid, and the contribution, less \$39.54, made by said Young; said amount of \$845.43 was distributed by her or by him to those who had contributed the sums hereinbefore mentioned. The amount failed to fully reimburse the several parties, and each one received, on or about said 19th day of May, \$39.54 less than they had contributed, knowing the source and reason of its payment, and surrendered their notes.

23. Besides James F. Cook, Mrs. Lizzie Whiting knew it was proposed to sell the estate to said William H. H. Young before the deed was executed, and Mr. Byron was notified by letter from James F. Cook, dated April 28, 1879, that the estate had been sold to said William H. H. Young for \$15,000, in which letter said James expressed his approval of the transaction, and says the price will cover all charges against the estate, including said contributions. The substitution of Mrs. Young as grantee was not known by Ella T. Cook until the deed was executed, nor by any of the other devisees until afterwards.

24. I find that said William H. H. Young did not, by undue influence or by any false or fraudulent representations, induce or constrain Ella T. Cook to execute said deed; and he used no importunities, specious arguments, or promises thereto, as alleged in the plaintiffs' bill. As to the specific allegations in the bill under this head, I find that, at the time of said conveyance, taxes for 1878 were overdue, and this fact was as well known to Ella T. Cook as

to said William H. H. Young, and was known to all the plaintiffs. It was also true that all the devisees, except said William H. H. Young in behalf of his wife, had refused or were unable to make further contributions, and this was as well known to Ella T. Cook as to William H. H. Young; and it was also true that the estate was in danger of being lost to the plaintiffs unless the taxes for 1878 were paid and the accruing interest to the bank provided for, one installment of which would become payable June 5, 1879. None of these facts, however, were urged to induce said Ella to execute said bond or deed. No promise was made by said William H. H. Young that he would repay what the devisees had contributed. He expressly limited himself to the sum of \$15,000; and when this offer was first made, and before the items and balance had been figured up, he expressed the opinion that the balance would probably be sufficient to reimburse the devisees. He made no promise that he would pay the debts of the estate of Hannah M. Cook, deceased. He made no special promise to said Ella T. of \$1,000; and it was stated by the plaintiffs' solicitor in opening the case that this averment was inserted in the bill by mistake.

25. As to what actually did induce said conveyance, I find the following facts: Ella T. Cook was selected as the grantee under the mortgagee's sale upon suggestion and request of James F. Cook. There were satisfactory reasons why neither Edward nor James F. Cook should be the grantee under the mortgagee's sale, and Mrs. Whiting expressly refused to be such grantee. At that time Ella T. Cook was about twenty-six years of age, unmarried, and not engaged to be married. She was a woman of intelligence and firmness, but without any business experience. She was earning no money, and had but a few hundred dollars in property. William H. H. Young did not improperly assume to manage the business of this estate for said Ella; he and James F. Cook were her chief advisers, and she was living in Young's family, and had entire confidence in him. There were satisfactory reasons why her brothers were not called upon by her to act, and William H. H. Young and Charles Young were the only brothers-in-law then living in Boston. During all the time the title stood in the name of said Ella, every reasonable effort was made by her and William H. H. Young to induce the devisees to contribute equally. Some of them were unable to contribute; William D. Byron and James F. Cook were those most able to assist, and they had both, before any sale to said William H. H. Young was suggested, absolutely refused to make any further contribution or to assist in sustaining a half part of the expenses.

Said Byron so refused because said Ella refused to give him a written statement that she held said real estate in trust, as hereinbefore stated in ¶ 19.

William H. H. Young had told Ella T. Cook that, if she could find anyone to pay one quarter, he would pay three quarters, of such expenses. She had no sufficient means of her own, and it had become practically impossible for her to raise any money for the purpose, and she had become discouraged, and this not

by any reason of any action of said William H. H. Young,—he was the only one who had assisted her to any considerable sum, and he had candidly advised the others to contribute. Ella T. Cook became engaged to be married before the said sale was proposed, and it was her wish, and the wish of her intended husband, that she should be rid of the care of said real estate before her marriage.

William H. H. Young had advanced, in the manner and by the items hereinbefore stated, more cash than anyone, and the deed was made to Mrs. Young without any urging or false representations, because Ella T. Cook wanted to be rid of the business; the devisees had refused or were unable to contribute as hereinbefore stated, and she could see no way by which she could pay the accrued and accruing liabilities; and because William H. H. Young wanted to indemnify himself for the relatively large portion of the expenses which he had contributed to carry the estate.

26. Soon after the said deed to Mrs. Young, Mr. Young commenced making repairs and improvements upon the estate, and early in July, 1879, occupied the premises. During all the time the title was in Ella Cook, the dwelling-house upon the premises was in such condition as to be untenable.

27. In November, 1879, a bond for a deed of said premises was executed by said Susan and William H. H. Young, conditioned to convey said estate to the city of Boston for the sum of \$35,000, said estate being a portion of the land taken by said city for the purposes of a public park, provided the city should elect to purchase said estate on or before January 1, 1880. The city did not elect to purchase under said bond, but have subsequently taken it as a portion of such park at a greatly advanced price.

28. For some years before 1879, it had been proposed that the city of Boston should lay out a public park, and this was known to the parties to this suit; and the supposition that said estate might be included in the limits of such proposed park was talked about by said parties as a motive for carrying said estate. William H. H. Young had no special knowledge upon this subject. The proposition was a subject of public and newspaper information. Before the deed to Mrs. Young was made, the city council of Boston had refused to pass an order for the appropriation of money for such park, and at the time of said conveyance, in May, 1879, there was no immediate probability that such park would be laid out. The action by the city which led to the giving of said bond was taken in November, 1879. In the spring of 1879, the value and sale of real estate of the character and in the neighborhood of the aforesaid premises was depressed.

29. Whether or not upon the facts stated in this report the plaintiffs have any relief in equity is reserved, by request of the parties, for the ruling of the court.

On the hearing before a single justice of the supreme judicial court, on the pleadings and master's report, the bill was dismissed and plaintiffs appealed to the full bench.

Mr. George H. Kingsbury, for plaintiffs:
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I. Whenever the consideration for a deed is paid, in whole or in part, by or in behalf of another person than the nominal grantee, with the intent to secure to such person a definite interest in the estate conveyed by the deed, a resulting trust is thereby created in behalf of such person, to the extent of such intended interest. It is immaterial whether the consideration be paid by the intended beneficiary, or by the grantee, or by a third party, or by a contribution,—if only the intent is clear.

McDonough v. O'Neill, 113 Mass. 93; *Jackson v. Stevens*, 108 Mass. 95; *Wall v. Hickey*, 112 Mass. 171; *Campbell v. Dearborn*, 109 Mass. 135.

Ella T. Cook, the grantee in the deed from the bank, never claimed or imagined that the entire interest in the estate belonged to her.

Six of the devisees contributed to the consideration for the deed, with the intent and understanding that they would thereby secure at least their own several interests in the estate.

More than nine tenths of the entire consideration for the deed from the bank was paid by Ella T. Cook, to wit: \$100 in money, and \$12,000 by her promissory note,—and she testified before the master that her payment was made for the benefit of all the devisees equally.

II. The sale by the bank to Ella Cook can be sustained only on the ground that it was made for the benefit of all the owners of the equity. Considered abstractly as the execution of a power of sale, it was invalid. The mortgagee, in executing such a power, assumes all the obligations of a trustee. He must not only exercise entire good faith towards all the parties in interest, but he must make every reasonable effort to realize the full value of the estate, and in every way to promote the interests of all concerned. Any appearance of collusion with, or advantage given to, some over others,—and especially if the sale is made for a price greatly below a fair valuation of the estate,—is in equity sufficient ground for declaring the sale void.

Briggs v. Briggs, 135 Mass. 309; *Thompson v. Heywood*, 129 Mass. 401; *Dyer v. Shurtleff*, 112 Mass. 169; *Drinan v. Nichols*, 115 Mass. 353; *Roche v. Farnsworth*, 106 Mass. 509; *Montague v. Dawes*, 14 Allen, 369; *Perry*, Tr. chap. 20, § 602 o—602 x.

Within three weeks before the mortgagee's sale, the estate was valued at \$30,000 by sworn appraisers appointed by the probate court. At said sale Ella T. Cook was declared to be the buyer for \$13,168.30, "in accordance with the arrangement" previously made between the bank president and J. F. Cook and Young.

When the bank president agreed to that "arrangement," he could not have believed the price at which the estate was to be bid in was the fair value of it; for he then considered it good security for a new loan of \$12,000 at a reduced rate of interest.

No effort or attempt was made to obtain a full or fair price for the estate. Nobody representing the mortgagee was present at the sale, to protect the interests of absent equity owners. Only three of the equity owners were informed of the arrangement with the bank president; one of them being Ella T. Cook, and another being Young's wife.

III. If a resulting trust existed, it was not discharged or determined by Ella Cook's

deed to Mrs. Young. Ella Cook held only a nominal title to the estate,—except as to her own interest therein. She could not convey the interests of the other devisees to a person having knowledge of the trust;—certainly not without their express consent. In the case of a specific trust, where the legal title is vested in the trustee, an unwarrantable conveyance imposes upon the grantee the obligations of the trust. If Ella Cook's deed to Mrs. Young conveyed a full legal title, it was an unwarranted conveyance, and devolved upon Mrs. Young the obligations of the trust.

Young was Ella Cook's confidential adviser, and manager of the estate, and therefore he could not properly take a deed from her, either to himself or to his wife.

Not one of the devisees knew of the purposed conveyance to Mrs. Young, and it does not appear when they afterwards knew of it. Ella Cook herself did not know of it until the moment of signing the deed. There was no necessity for the deed, and Young had it made solely for his own benefit. Four of the devisees, not parties to the deed, received back a part of the money they had advanced; four others received nothing, and none of them gave any surrender, release, or discharge in any form.

Receiving back a part of the money advances on account of the estate was no ratification of the conveyance to Mrs. Young.

Perry, Tr. chap. 27, § 850; Lewin, Tr. chap. 27, § 8.

Messrs. Augustus Russ and Dudley A. Dorr, for respondents:

No trust concerning lands, except such as may result by implication of law, can be created in this State, except by an instrument in writing, signed by the party or his attorney, creating or declaring the trust.

Pub. Stat. chap. 141, § 1.

An oral agreement that the grantee shall hold land conveyed to him by a voluntary deed absolute in form, in trust for the grantor, cannot create a trust which can be enforced.

Campbell v. Brown, 129 Mass. 23, 25; *Tilcomb v. Morrill*, 10 Allen, 15; *Bartlett v. Bartlett*, 14 Gray, 277.

"Nor can a trust be created in that manner for the benefit of a third person, under such a deed."

Slack v. Black, 109 Mass. 499; *Campbell v. Brown*, 129 Mass. 25; *Ahrend v. Odiorne*, 118 Mass. 268; *Walker v. Locke*, 5 Cush. 90.

"The statute of this Commonwealth is different from the English statute, which does not require the trust to be declared in writing, but only manifested and proved in writing."

Tilcomb v. Morrill, 10 Allen, 15, 17.

No resulting trust can be created by after advances or funds subsequently furnished.

Buck v. Swazey, 35 Me. 41, 51; *Rogers v. Murray*, 3 Paige, 390; *White v. Carpenter*, 2 Paige, 217, 238; *Kendall v. Mann*, 11 Allen, 15, 19; *Barnard v. Jewett*, 97 Mass. 87; *Gould v. Lynde*, 114 Mass. 366; *Fickett v. Durham*, 109 Mass. 419; *Parsons v. Phelan*, 134 Mass. 109; *Perry v. Perry*, 65 Me. 399, 401; *Botsford v. Burr*, 2 Johns. Ch. 405; *Dudley v. Bachelder*, 53 Me. 403, 409; *Conner v. Lewis*, 16 Me. 268, 274.

An express trust, though by parol only, will prevent the resulting trust.

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Sugd. Vend. & P. 14th ed. (1862) 702; *Bellasis v. Compton*, 2 Ver. 294; *Altham v. Anglosey*, Gilb. Eq. 16. See *Davenport v. Mason*, 15 Mass. 85, 91; *Roe v. Popham*, 1 Doug. 25; *Langfield v. Hodges*, Lofft, 280; *Rider v. Kidder*, 10 Ves. 360; *Maddison v. Andrew*, 1 Ves. 57; *Bartlett v. Pickersgill*, 1 Eden, 516.

If, when the money was received, a promise was given to repay, when, or from the proceeds of the land when sold, no trust would arise in the land, but a contract would exist which might be enforced at common law if the estate was converted into money, or enforced in equity if some species of property was received by the seller and title taken in his name.

Buck v. Swazey, 35 Me. 41, 51.

The report of the master in this case finds that just such a contract was made and has been performed.

No trust is created if, for the funds advanced and used in a purchase, the grantee in a conveyance gives an obligation or promissory note to repay the money, or if the money is advanced as a loan.

Baker v. Vining, 30 Me. 121, 128.

The allegation that Ella T. Cook took the deed from the Home Savings Bank in trust for those devisees who never contributed any funds, or became obligated to contribute, tends to show merely (as in *Barnard v. Jewett*, 97 Mass. 87) "that those plaintiffs had merely an oral promise, for which no valid consideration had been given."

Fickett v. Durham, 109 Mass. 419-422; *Botsford v. Burr*, 2 Johns. Ch. 405, 409.

If a party makes no payment, and none is made on his account, either actually or constructively, he cannot claim a resulting trust.

Gould v. Lynde, 114 Mass. 366; *Gove v. Leavoy*, 140 Mass. 524, 1 New Eng. Rep. 913; *Collins v. Sullivan*, 135 Mass. 461.

The presumption arising from the bare payment of the consideration may in all cases be controlled and rebutted by other evidence showing that the party making the payment did not intend to become the equitable owner of the estate.

Perkins v. Nichols, 11 Allen, 542, 545; *Baker v. Vining*, 30 Me. 121, 128.

A resulting trust is not created in favor of one who pays part of the purchase money of real estate conveyed to another, unless such payment is made for some specific part or distinct interest in the estate.

McGowan v. McGowan, 14 Gray, 119, 121; *Buck v. Warren*, Id. 122, note; *Olcott v. Bynum*, 17 Wall. 44, 59 (84 U. S. bk. 21, L. ed. 570); *Turner v. Nye*, 7 Allen, 176, 184; *Snow v. Paine*, 114 Mass. 520, 526; *Brenihan v. Sheehan*, 125 Mass. 11, 13; *Dudley v. Bachelder*, 53 Me. 403, 408; *Perry v. Perry*, 65 Me. 399, 401.

If part only of the consideration is paid, the land will only be charged with the money advanced, *pro tanto*.

Botsford v. Burr, 2 Johns. Ch. 405, 410, and cases above cited.

From what appears in the report, there is nothing to impeach the sale and conveyance by the Home Savings Bank as mortgagee. The savings bank was under no obligation to wait until the market should improve.

Franklin v. Greene, 2 Allen, 519-523.

It is no ground for setting aside the sale by

the bank, that an arrangement was made with Ella Cook to bid a sum not less than the mortgage debt with accrued interest and expenses. *Dexter v. Shepard*, 117 Mass. 480.

A mortgagee may employ an auctioneer to make the sale; and personal presence of the mortgagee at the time and place of sale is not essential.

Fogarty v. Sawyer, 23 Cal. 570.

The mortgagee ratifies the acts of his agent making the sale by subsequently making the deed to convey the property in pursuance of such sale.

Munn v. Burges, 70 Ill. 604; *McHany v. Schenk*, 88 Ill. 357; *Parker v. Banks*, 79 N. C. 480.

The acquiescence of the mortgagor in the conduct of the sale cures any defect and gives validity to it.

Olcott v. Bynum, 17 Wall. 44.61 (84 U. S. bk. 21, L. ed. 570); *Markey v. Langley*, 92 U. S. 142 (Bk. 23, L. ed. 701).

In *Markey v. Langley*, the mortgagor was present at the sale, and made no objection to the terms and conditions of it, and his acquiescence was held to conclude him from making objection afterwards.

The master finds that Ella Cook has in good faith conveyed the estate to Susan T. Young, who bought in good faith; that Ella Cook has thus ratified and confirmed the sale of the bank; and all the parties who claim to have any interest in this property, with notice of this resale by Ella, have not only made no objection thereto, but they have participated to the full extent of their equitable interests in the proceeds of this sale; thus, in the strongest manner they have ratified and confirmed this sale.

Burns v. Thayer, 115 Mass. 89, 98; *Patten v. Pearson*, 57 Me. 428; *Learned v. Foster*, 117 Mass. 865; *Royal Bank v. Grand Junction R. R. & D. Co.* 125 Mass. 490, 494, 495.

To apply the language of Chapman, J., in *Franklin v. Greene*, 2 Allen, 519, 523, the defendant Young "practiced no fraud. Both parties had equal opportunities to judge of its value, and it does not appear to have been an unconscionable bargain in this respect. Courts never interfere with prices fixed by parties under such circumstances."

C. Allen, J., delivered the opinion of the court:

All allegations of fraud having been negatived by the master's report, the plaintiffs now seek to maintain their bill on the ground that Ella T. Cook took and held her title subject to a resulting trust which follows the land and can be enforced against purchasers from her.

But the objections to this view are insuperable. According to the facts found in the master's report, there never was an understanding that the plaintiffs should have any such interest in the estate as to prevent Ella from making a sale thereof. The whole plan and purpose of the arrangement, so far as any plan and purpose were matured, contemplated that she should take the title, hold it until a sale could be made, and, after making such sale, divide the surplus above the amount of the mortgage debt. The very terms of the understanding implied that she should have

power to make a sale, convey a good title to the purchaser, and collect the purchase money; and it was necessarily left to her discretion when to make such sale, in case the other devisees should fail to pay in their shares of the expense of carrying the property. They were under no obligation to make such contribution. Some of them, in point of fact, paid nothing at all. Others were unable to continue their payments. To such of them as made payments, her only promise was in substance that, when the estate should be sold, they should have their share of the benefit that might accrue therefrom. This she has paid to them, and they have accepted it. The plaintiffs have received all that the oral agreement contemplated. It was unfortunate for them that the rapid rise in the value of the land, which occurred soon after the sale by Ella to Mrs. Young, did not take place sooner. But no legal right of theirs has been infringed. It was always contemplated that she should have a right to convey a good legal title, free from any trust. By her conveyance, made in good faith and without fraud, the legal title thus vested in Mrs. Young, who lawfully holds the same without any responsibility to the plaintiffs, and it is unnecessary to consider other objections urged by the defendants. *Sears v. Russell*, 8 Gray, 86, 89; *Cleveland v. Hallett*, 6 Cush. 403, 407; *Neilson v. Lagoon*, 12 How. 98, 106, 107 [53 U. S. bk. 13, L. ed. 909]; *Buck v. Seasey*, 35 Me. 41, 51; *Lewin*, Tr. 7th ed. 130, 136, 137.

Decree affirmed.

John S. ELLENWOOD *et al.*

v.

George W. BURGESS *et al.*

1. A sealed written contract to erect a building for another—payments therefor to be made in the notes of the latter, which the builder agreed to accept, and which had been tendered, and two of which have actually been accepted,—is a waiver of any mechanics' lien upon the land upon which it was to be performed.
2. Where such contract was made with one who had no interest in the land, the law will not imply that the real owner contracted to pay the builder the money for his labor and materials, instead of delivering the notes which were the contract price therefor, although such contract was made in pursuance of a fraudulent scheme between the owner and the one who contracted with the builder, to procure the erection of the building without subjecting the land to a lien or the owner to personal liability. Such fraud cannot make a contract on the owner's part to do that which he had never promised.
3. No lien attaches for materials furnished, unless the party furnishing the same, before so doing, gives notice in writing to the owner of the property to be affected by the lien, if such owner is

not the purchaser of the materials, that he intends to claim such lien.

4. Where the two classes of **charges for labor and for materials** are so mingled, the contract being entire, that they cannot be determined respectively, there is no lien for either.
5. **No debt could be found due on the sealed contract after** the petitioners had abandoned and rescinded it, and where there was no default in its performance, all the notes having been tendered; nor any debt found due for specific labor and materials, as they were not distinguishable; **nor could a lien be established for the amount which the land had been enhanced in value,** as the statute makes no provision therefor.
6. When, under a contract, no lien exists, its rescission cannot create one, against the rights of innocent third parties which may have intervened while it was still in force.

(Middlesex—Filed May 12, 1887.)

ON report. *Petition dismissed.*

Petition to enforce a mechanics' lien. At the trial in the superior court before Blodgett, J., without a jury, the following facts appeared:

May 26, 1884, a sealed contract was entered into between the plaintiffs, Ellenwood & McDonald, and one George W. Burgess, to build a building "on land of said Burgess," to be completed September 1, for the sum of \$2,750, to be paid in three equal payments as the work progressed, the payments to be made by notes of Burgess, given on four months' time. At the date of the above contract the land was owned by one Williams, and continued to be owned by him until after the work was completed, on October 22, 1884.

There was no agreement, oral or written, and no understanding between Williams and Burgess, that Burgess had, on or before May 26, 1884, or should have thereafter, any interest in said land, or in the building to be erected thereon, or in the money which might be received upon a mortgage or sale of said land and building, except such interest as would enable said Burgess to convey the said land in fee absolutely, or in fee and in mortgage.

At some time in the winter or spring of 1884, and before May 26, 1884, a scheme was devised between Burgess and Williams to procure the erection of a dwelling-house on said land, without subjecting the land to a lien or Williams to personal liability; and, as a part of this scheme, Burgess, at the request of Williams and with his knowledge, made the written contract with the petitioners above referred to, dated May 26, 1884, Williams being acquainted with all its terms.

The petitioners, believing that Burgess owned the land, and that, in making said contract, he was acting on his own account, proceeded under the contract to build the house; and about August 1, 1884, for the first payment, received the negotiable promissory note of Burgess, payable in four months after date.

The petitioners, being unable to get this note discounted at the bank where they did business, thereupon stopped work upon the building, and made inquiry and examination of the records of deeds through an attorney at law, to ascertain what interest Burgess had in the land, and learned that the record title was in Williams; and thereupon, with a creditor of theirs named Wood, went to see Williams, and he indorsed the note, and they transferred it to Wood. (It was paid at maturity by Williams.)

Williams, at the time of indorsing the note, told them that he had sold the land to Burgess, but had not passed any deed, and that Burgess had paid him \$1,500 towards the land; that he had offered to give Burgess a deed of the land, but Burgess told him to wait till he got the rest of his money; also, that he considered Burgess perfectly responsible, and that the note would be paid.

About the same time Williams stated to the attorney at law who had examined the records of deeds for the petitioners, in the presence of one of the petitioners, that "Burgess perhaps had not much ready money, but that he was a man perfectly sound financially, and that these notes would be made all right." These statements were untrue, and known by Williams to be so, and were made by Williams for the purpose of deceiving the petitioners, and they were thereby deceived. Williams further said, "You can have your lien at any time, and I authorized that building to be built on there. I know the records show that the building is in my name, but I understood that the building was going up there, and you are perfectly safe in your lien."

Relying upon the representations of Williams that Burgess was all right and would pay, and that there was no trouble about the money, and also influenced by the recommendations of Mr. Wood so to do, the petitioners resumed work and continued to work, without rescission of the written contract or notice to any one that they rescinded it or intended to abandon it, till the work was all completed, and the deed to Burgess and the mortgage to Mrs. Cotton made. The building was completed October 22, 1884.

September 10, 1884, Burgess gave and the petitioners received his note on four months, in payment of the second installment of the contract price. This note they indorsed to a creditor, and it was not the property or under the control of the petitioners till they took it up after maturity and protest. It has never been paid by Burgess, and is now held by the petitioners, and, until the hearing on the petition, was never offered to be returned to Burgess. At said hearing it was offered to be returned.

The certificate to enforce a lien was filed November 20, 1884. Credit was given on it for the first note, but not for the second.

When the work was completed, Burgess offered the petitioners his note for the unpaid installment, as required by the written contract, but the petitioners refused to accept it.

They were required, under the contract, to furnish materials of various kinds; such as lumber, laths, shingles, clapboards, plaster, lime, marble, plumbing materials, paint, hardware, and other articles, and they were furnished as required by the contract. No evi-

dence was offered of their price or value, or the amount or quality used, or of the amount or value of the labor furnished.

The petitioners knew from the time the first note was given, which was early in August, 1884, that Burgess was not, and Williams was, the owner of the land, and continued furnishing the labor and materials without notifying Burgess or Williams that they abandoned or rescinded the contract, or should not accept payment as therein provided, till the building was fully completed, and till the deed and mortgage were delivered and recorded, and the money advanced by the mortgagee.

October 27, 1884, Williams executed a warranty deed to Burgess, and Burgess a mortgage to R. J. Cotton, one of the respondents, to secure the payment of three promissory notes signed by Burgess, amounting to \$6,000, which sum was at that time loaned by her on said notes and mortgage, in good faith and without notice of the lien claimed by the petitioners. The negotiations for the mortgage were conducted by Williams, and he received the \$6,000 loaned thereon; and after the deed to Burgess and mortgage to Cotton, the equity of redemption was understood and treated by Burgess and Williams as belonging to Williams.

The deed to Burgess and the mortgage to Cotton were recorded at the registry of deeds November 4, 1884, and the petitioners, from their attorney, learned that these conveyances had been made, but were unable to state when.

The petitioners, at the time of making and filing the certificate, did not know who owned the land. The land was enhanced in value by the labor and materials applied thereto by the petitioners to the amount of \$2,791.72.

Burgess, in all his dealings with the petitioners, acted under the direction of Williams and as his agent, and upon the promise of Williams that Burgess should have no financial annoyance in the matter; but the fact that Burgess was so acting was not known to the petitioners till the month of December, 1885, and was not known to the mortgagee at any time.

When the certificate was filed and the petition entered in court, the petitioners still relied upon the written contract.

Upon the foregoing facts and evidence the court found the lien of the petitioners established as against all the respondents, and that the amount due the petitioners, for which they have such lien, is \$1,875.72, with interest thereon from December 11, 1884, and, at the request of the parties, reported the case for the determination of the supreme judicial court.

Mr. George Wm. Estabrook, for respondent Rebecca J. Cotton:

The mortgagee contends her rights attached when the mortgage was given, according to the contract then in force, and cannot be prejudiced by subsequent acts of any person; and that, till the actual election by the petitioners to rescind the written contract, it, and no other, was in force.

The rule as to *bona fide* purchasers of chattels from fraudulent vendees before rescission by the defrauded vendors should apply in this case.

Buffington v. Gerrish, 15 Mass. 156; *Rowley v. Bigelow*, 12 Pick. 306; *Hoffman v. Noble*, 6 Met. 68.
2 Mass.

The same principle applies in view of the finding that Burgess acted under the direction of and as agent for Williams in his transactions with the petitioners. The contract was made with Burgess, and the petitioners did not rescind it till after the mortgage to Mrs. Cotton. It was not a void contract. Being under seal, in the absence of fraud the petitioners could not have recourse to Williams as principal.

Story, Ag. § 450; *Stackpole v. Arnold*, 11 Mass. 27; *Kimball v. Tucker*, 10 Mass. 192.

In any event it was a contract with Burgess till the petitioners, after the mortgage, rescinded it, and no other contract was in fact then existing. An implied contract would only exist by a fiction of law, and should not be presumed to the injury of innocent parties.

3 Bl. Com. 43.

Such a lien exists only by virtue of statute, being unknown to and in derogation of the common law. The statute must be strictly construed in determining when a lien exists.

Trask v. Searle, 121 Mass. 229.

The statute prescribes three conditions for the existence of a lien: (1) There must be a debt; (2) the debt must be due; (3) it must be for work done or material furnished and actually used in the erection, alteration, or repair of a building, by virtue of an agreement with or by consent of the owner.

By the owner is meant the owner of the land on which the building stands.

Stevens v. Lincoln, 114 Mass. 476.

All the conditions are wanting in this case. There was no debt. If Burgess had failed to give the notes as agreed, there would have been a breach of contract, and damages would have been recoverable against him; but till after there had been a judgment obtained, there would have been no debt. For obvious reasons, such a contract should not be the basis of a lien. Pub. Stat. chap. 191, does not create a lien in such cases. See §§ 2, 6, 11, 13, 15, 22, 23, 28.

Messrs. William S. Stearns and John Haskell Butler, for respondents Williams and Burgess.

Mr. William Schofield, for petitioners:

I. Upon the facts stated, the petitioners contend that Williams is indebted to them, upon an implied contract, for labor and materials applied to his land.

Van Dusen v. Blum, 18 Pick. 229; *Bearce v. Bowker*, 115 Mass. 129; *Day v. Caton*, 119 Mass. 513; *Teague v. Irvin*, 134 Mass. 303.

Although an express contract under seal was made by the petitioners with Burgess, relating to the same subject-matter, it cannot be set up in favor of Williams to rebut the implied contract, because it was procured by his fraud.

Rogers v. Holden, 142 Mass. 196, 2 New Eng. Rep. 657; *Hill v. Perrott*, 3 Taunt. 274.

II. The debt due from Williams on the implied contract began to accrue as soon as the work was begun, and was due and payable as soon as the work was finished; and the petitioners had the right, when they discovered its existence, to elect to abandon their claim against Burgess, and pursue that against Williams.

Raymond v. Crown & Eagle Mills, 2 Met. 319; *Curtis v. Williamson*, L. R. 10 Q. B. 57.

This election was made by them in January, 1886, soon after discovering that Burgess was

the agent of Williams. It was made by filing the first amendment to their petition, the only means available at that time. In an ordinary action *in personam*, that would be sufficient (*Clough v. London & N. W. R. Co.* L. R. 7 Ex. 26) without offering to return the dishonored note (*Bridge v. Batchelder*, 9 Allen, 894); and it is therefore sufficient in case of a lien; for the statute authorizes amendments in lien suits as freely as in actions at law (Pub. Stat. chap. 191, § 20).

III. The amount of the debt due from Williams is measured by the benefit conferred upon him by the labor and materials of the petitioners applied to his land; that is, by the increased value of the land due to such labor and materials.

Van Drusen v. Blum, *supra*; *Oullen v. Sears*, 112 Mass. 399.

The price mentioned in the contract with Burgess is evidence of value against Williams, in the nature of an admission by him.

Morrell v. Cawley, 17 Abb. Pr. 76; *Jennings v. McComb*, 112 Pa. 518; *Crawford v. Jones*, 64 Ala. 459; *Moore v. Granby Mining & Smelting Co.* 80 Mo. 86. See *Basford v. Pearson*, 9 Allen, 387, 392.

It was fixed by him, or under his direction; the labor and materials of the petitioners were furnished under the expectation that they would be paid that price; and he knew of that expectation when he accepted the benefit of their services, and therefore, by implication, promised to pay that price.

Rogers v. Holden, 142 Mass. 196, 2 New Eng. Rep. 657.

IV. The debt due from Williams, although arising from an implied contract, is secured by a lien (*Parker v. Bell*, 7 Gray, 429, 434; *Manchester v. Searle*, 121 Mass. 418, 421); and by the terms of the statute, the lien attached, if at all, as soon as the work was finished or the debt became due (*Gale v. Blaikie*, 126 Mass. 274).

V. The conditions necessary to keep the lien alive were complied with in due time and in proper form. The certificate of lien, filed in the registry of deeds, contained the name of the person supposed by the petitioners to be owner, viz., Williams.

Williams was also in fact the owner, and therefore the petitioners were at liberty, even if they knew the title had been transferred to Burgess, to disregard the transfer, and describe the property as owned by the grantor.

Amidon v. Benjamin, 126 Mass. 276.

A debt is due from Williams, and he is not entitled to credit for the promissory note of Burgess, taken in ignorance of his liability. It is *res inter alios acta*.

Stevens v. Austin, 1 Met. 557; *Lowell v. Williams*, 125 Mass. 439; *Clough v. London & N. W. R. Co. supra*.

VI. For the same reason, the agreement in the contract with Burgess to take his promissory notes in payment, if intended by the parties as a waiver of a mechanics' lien, or if so construed by law, is a waiver in favor of Burgess only, and not in favor of Williams.

Devens, J., delivered the opinion of the court:

The petitioners made a sealed contract with the defendant Burgess, which must be inter-

preted as a waiver of any lien upon the land upon which it was to be performed. It contemplated a payment in certain promissory notes, all of which had been tendered to them before they undertook to rescind the contract, and two of the three of which they had actually accepted before filing the certificate to enforce a lien. The petitioners became apprehensive of the responsibility of Burgess at the time of receiving the first note from him, but were reassured upon this point by Williams, and thereafter, although fully aware that the land was not the property of Burgess, continued in the performance of their contract with him until it was fully completed by them. They claim that, although an express contract under seal was made with Burgess, the law will imply a coexistent contract with Williams as the owner of the land, which began to be performed as soon as the work was begun, and the amount due on which became payable when it was finished. They further claim that they had the right to elect to abandon their claim against Burgess, and rescind their contract with him, after discovering the fraudulent conduct of Williams, and after they had filed their certificate for a lien, and the statement which purported to be a just and true account of what was due them, and thereafter pursue their remedy against Williams by the enforcement of a lien, the amount of which should be determined by the increased value of the land of Williams, due to the labor and materials they had expended on it. They claim also that this is so, irrespective of any intervening rights in favor of third parties.

When the petitioners had made a contract under seal with Burgess, even if it were possible to hold—on account of any relation of agency which Burgess may have held to have sustained to Williams—that Williams was responsible thereon (which we are not prepared to say), it certainly is not possible to hold, when the sealed contract has been fully performed, that Williams must be implied to have entered into an entirely distinct contract, by which an entirely different consideration was to be paid for the work and materials provided by the petitioners. Whatever remedies the petitioners may have against Williams for the deceit by which they were induced to enter into the contract with Burgess, or by which they were induced, even after their suspicions were aroused, to continue to perform it,—the law cannot imply that Williams contracted thereby to pay them the money for their labor and material, instead of delivering the notes, which was the contract price therefor. In considering the damages which the petitioners had sustained by the fraudulent device of Williams, it may be that it would be proper to consider how much his land had been increased by the value of the labor and materials the petitioners had been induced to place upon it: but this is quite different from a contract on his part to pay for it. His fraud cannot make a contract on his part to do that which neither he nor Burgess ever promised. He was not an actor in the transaction, who made any contract. If any lien could have been maintained against the property of Williams, it must have been upon the ground that the petitioners had performed and furnished labor upon it with his

knowledge and consent. But no lien attaches for materials furnished, unless the party furnishing the same, before so doing, gives notice in writing to the owner of the property to be affected by the lien—if such owner is not the purchaser of the materials—that he intends to claim such lien. Pub. Stat. chap. 191, §§ 1-3. Although the petitioners knew that Williams was the owner of the property, while they were performing their contract, no such notice was given to him; and he certainly was not the purchaser of the materials,—if it is possible to interpret the account filed as specifying the sums due for labor and those for materials, and it is somewhat difficult to do so. At the trial it appeared that while, under the contract, materials of various kinds were to be and were furnished, no evidence was offered of their price or value, or the amount or quality used, or of the amount or value of the labor furnished. It is well established that where the two classes of charges—for labor and for materials—are so mingled, the contract being entire, that they cannot be determined respectively, there is no lien for either. *Gogin v. Walsh*, 124 Mass. 516; *Clark v. Kingsley*, 8 Allen, 543.

At the trial, no debt could have been found to be due on the sealed contract, the petitioner having then formally abandoned and rescinded it; and, further, because there was no default in the performance thereof, all the notes having been tendered. Nor could any debt have been found to be due for specific labor or materials, as they were not distinguishable. Nor was it competent to establish a lien for the amount which the land had been enhanced in value, as the statute makes no provision therefor.

For the reasons above stated, a lien cannot be maintained for the item of putting in the water. There was no evidence as to what the labor, or what the materials, separately, were worth; nor is there any statement of this item in the petition.

The remarks we have made render it perhaps superfluous to consider especially the claim of petitioners to establish a lien as against the rights of Mrs. Cotton, to whom this land was mortgaged in good faith on her part, and for full consideration; but there is an independent ground in relation to her claim which is quite decisive in favor of its validity against the lien which the petitioners seek to assert. The petitioners were acting under their written contract when Mrs. Cotton's rights accrued. Even if the contract they had made with Burgess was voidable, it was not void, and they had made no election to avoid it. Mrs. Cotton's rights accrued while it was still in force; and the subsequent acts of the petitioners—whatever might be their effect on the rights of Burgess or Williams—could not diminish hers. When, under a contract, no lien exists, its rescission could not create one, against the rights of innocent third parties, which might have intervened while it was still in force. Mrs. Cotton had no knowledge of the frauds of Williams or Burgess, or of any agency of one for the other. Upon the same principle upon which it has been held that a *bona fide* purchaser of a chattel from a fraudulent vendee upon rescission acquires a good title against the defrauded vendor, a person who has hon-

estly advanced her money upon a mortgage of real estate upon which there was no lien by the then existing contract cannot be prejudiced by a rescission of the contract, even if, as against other parties, such rescission might operate to create a lien.

Petition dismissed.

Patrick KINNEEN

v.

James H. WELLS *et al.*

1. The seventh section of chapter 345, Acts of 1885, which enacts that "no person hereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization," is unconstitutional.
2. An action against the registrars of voters, to recover damages for wrongfully refusing to register plaintiff as a voter, can be maintained.

(Middlesex—Filed May 11, 1887.)

ON report. *Demurrer overruled.*

Action of tort against defendants as registrars of voters in the city of Cambridge, to recover damages for refusing to register plaintiff as a voter at the State election in 1886. The case was heard in the superior court before Thompson, J., on demurrer to the complaint. The court sustained the demurrer, and reported the case to this court.

The facts appear from the opinion.

Mr. Charles Theodore Russell, for plaintiff:

Since the Royal Charter of 1691, the right to vote in Massachusetts has been fixed by organic law, and the General Court deprived of any jurisdiction to add to or abridge the qualifications of voters.

Amendment of 1820; Amendment to Const. art. 20, 1857; Declaration of Rights, art. 9.

All the qualifications for voters are definitely fixed and limited by the Constitution itself; they are clear and precise; all of them must exist as prerequisites to the right to vote; and whoever possesses them has the right vested in him by the Constitution. Such a person "shall have the right to vote," "an equal right to elect officers." The Constitution nowhere gives to any body—legislative, judicial, or executive—any right to provide additional, or alter present, qualifications, and any such enactment is unconstitutional and void.

Blanchard v. Stearns, 5 Met. 298, 301; *Capen v. Foster*, 12 Pick. 485; *Williams v. Whiting*, 11 Mass. 424, 438; *Opinion of Justices*, 5 Met. 592.

The declaration alleges the possession by plaintiff, at the time he demanded registration, of all the qualifications required by the Constitution. He was made a citizen by naturalization in the United States District Court, October 18, 1886, and applied for registration October 18. By his naturalization, he became, *eo instanti*, a citizen of the United States and of this Commonwealth. "All persons born or naturalized in the United States, and subject

to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

U. S. Const. 14th Amend.; Morse, Citizenship, § 98; *Campbell v. Gordon*, 6 Cranch, 182 (10 U. S. bk. 3, L. ed. 192); *Spratt v. Spratt*, 4 Pet. 407 (29 U. S. bk. 7, L. ed. 902).

Having, then, all the qualifications of a voter required by the Constitution, he was entitled to registration upon equal terms with other voters, as a constitutional right of which no statute could deprive him. Possession of the necessary qualifications at the time of voting or registration has always been regarded as sufficient, without regard to the length of time the voter has possessed them. To require the existence of the qualifications for any period before the election is necessarily to alter and increase such qualifications.

Bridge v. Lincoln, 14 Mass. 367; *Opinion of Justices*, 122 Mass. 594; *Opinion of Justices*, 124 Mass. 597; *Humphrey v. Kingman*, 5 Met. 162, 165; *Kilham v. Ward*, 2 Mass. 235. See also *Morgan v. Dudley*, 18 B. Mon. 693, 725; *Wood v. Fitzgerald*, 3 Ore. 568; *Commonwealth v. Pella*, 1 Brews. 159; *Election Registry Acts*, 2 Brews. 138.

If, as matter of fact and constitutional construction, the plaintiff had the qualifications of a voter, he was then, by the Constitution, equally entitled with other voters to registration. No legislative action could postpone the exercise of the right, without "altering or modifying by law" his qualifications as prescribed by the Constitution, and depriving him of his "equal right to elect officers." "When the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the conditions or to extend the penalty to other cases."

Cooley, Const. Lim. 5th ed. p. 78; McCrary, Elections, § 5.

It is not contended that the Legislature has not the power to make any reasonable, uniform, and impartial regulation of the mode of exercising the right of suffrage, and ascertaining the qualifications of voters. The right to vote,—"the equal right to elect officers,"—is vested and secured by the Constitution; the mode of proving the right and exercising it is, by implication, left to statute provision. But no statute, even under the form of regulation of the exercise of the right, can abridge or suspend the right itself. The Legislature can regulate, it cannot destroy or suspend, the right to vote. The distinction was recognized and the test established in the leading case of—

Capen v. Foster, 12 Pick. 485.

The power of the Legislature is limited to suitable, reasonable, and impartial provision for the ascertainment of what persons possess the constitutional qualifications of voters. The limitation established by *Capen v. Foster* has been accepted without exception.

McCafferty v. Guyer, 59 Pa. 109; *Barker v. People*, 20 Johns. 457; *Rison v. Farr*, 24 Ark. 161; *Clayton v. Harris*, 7 Nev. 64; *St. Joseph R. R. v. Buchanan County Court*, 39 Mo. 485; *State v. Staten*, 6 Cold. (Tenn.) 233; *Day v.*

Jones, 31 Cal. 261; *People v. Blodgett*, 13 Mich. 127; *Chase v. Miller*, 41 Pa. 403; *Opinion of Judges*, 30 Conn. 591; *Opinion of Judges*, 37 Vt. 665.

Applying the test established in *Capen v. Foster*, it is submitted that the statute in question does not regulate the mode of ascertaining the qualifications of voters, or of conducting the election. Neither in its language, context, nor effect can it be construed as a regulation for the ascertainment of the qualifications of voters. It simply forbids to a certain class of citizens, although otherwise qualified, the right to register, for thirty days, after they have acquired the qualification of citizenship.

The Act is not one regulating registration, because the provision relates wholly to thirty days before registration. It does not close registration thirty days before election; it forbids registration for thirty days after qualification. It does not concern any examination into the question whether a person is properly naturalized, because it assumes that he is naturalized. If naturalized, he has become a citizen, and his certificate is conclusive upon his right to vote. It cannot be attacked collaterally. If he is not naturalized, he cannot register at any time. The Act therefore is a bold denial of the right of registration as a voter to naturalized voters, for a fixed period, not applicable to other qualified voters. It does not relate to any general ascertainment of the qualifications of voters, but relates only to one qualification, that of citizenship. If the Legislature can impose a probationary period of thirty days upon naturalized citizens, as matter of discretion, what limit is there to its discretion, and who is to fix the limit? If the Legislature can oblige the naturalized voter to wait thirty days before exercising the rights of citizenship, why cannot it fix the period at six months or a year?

The statute simply adds another qualification to those prescribed by the Constitution; namely, that a citizen, if he becomes such by naturalization, shall have been a citizen at least thirty days before registration. Any such requirement of time in citizenship adds to the qualifications of voters, and must therefore be extraconstitutional.

Opinion of Justices, 122 Mass. 594; *Opinion of Justices*, 124 Mass. 596.

The case is similar in principle to those where registration laws have been held unconstitutional because they extend the period of residence required by the Constitution.

Page v. Allen, 58 Pa. 338; *State v. Williams*, 5 Wis. 808; *Quinn v. State*, 35 Ind. 435; *People v. Canaday*, 78 N. C. 198.

If this statute be regarded as a regulation of the mode of ascertaining the qualifications of voters, it is equally unconstitutional. It prohibits a certain class of inhabitants, "having such qualifications as they shall establish by their frame of government," from "equal right to elect officers," guaranteed by Declaration of Rights, art. 9. Naturalized citizens are delayed thirty days in exercising the right, over and beyond the time of registration fixed for their fellow citizens.

The restrictions upon the Legislature in regulating the suffrage are clearly defined in *Capen v. Foster*, 12 Pick. 485. The regulations

must be "reasonable" and "uniform." The Legislature cannot, "under the pretense and color of regulating, subvert or injuriously restrain the right itself." The regulations must not be "calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right."

"A registry Act which should impose upon a particular class of citizens conditions and requirements not required of others would be void."

McCrary, Elections, § 8; Cooley Const. Lim. 5th ed. 756; *Monroe v. Collins*, 17 Ohio St. 665, 686. And see *State v. Lean*, 9 Wis. 279; *State v. Baker*, 38 Wis. 71; *Byler v. Asher*, 47 Ill. 101; *Edmonds v. Banbury*, 28 Iowa, 267; *State v. Butte*, 31 Kan. 537.

This legislative discrimination is based upon nationality. It draws the line between native-born and naturalized citizens. If this discrimination be one of race, the statute is void under the Fifteenth Amendment to the Constitution of the United States, providing that "the right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude."

Mr. C. J. McIntire, for defendants:

Suffrage is not a natural, unlimited right. The privilege of voting arises under the Constitutions of the several States, and, excepting as is provided by the Fifteenth Amendment of the Constitution of the United States, the qualifications of the voter are exclusively within the regulation and control of each State.

United States v. Anthony, 11 Blatchf. 200; *Spencer v. Board of Registration*, 1 McA. (D. C.) 169; Cooley, Const. L. 248-250.

Mass. Const. Amend. art. 3, prescribes the qualifications of a voter; but the constitutional provisions do not limit the right of the Legislature to make such reasonable regulations and conditions concerning the exercise of the franchise as will protect the privilege and prevent imposition and fraud. It seems to be well settled that the Legislature has the legal power to require the voter to register his name upon a registry of voters previous to the day of election, and to provide that, unless he has conformed to such requirement, he shall not be permitted to vote.

Copen v. Foster, 12 Pick. 485; *Davis v. School Dist.* 44 N. H. 404; *Hyde v. Brush*, 34 Conn. 454; *People v. Kopplekom*, 16 Mich. 342; *State v. Bond*, 38 Mo. 425; *State v. Hilmentel*, 21 Wis. 574; *State v. Baker*, 38 Wis. 71; *Patterson v. Barlow*, 60 Pa. 54; *Re Polling Lists*, 13 R. I. 799; *People v. Hoffman* (Ill.), 3 West. Rep. 522; Cooley, Const. Lim. 757; Cooley, Const. L. 252; *State v. Butts*, 31 Kan. 537. Cf. *Daggett v. Hudson*, 43 Ohio St. 548, 1 West. Rep. 789; *McCulloch v. Maryland*, 4 Wheat. 418 [17 U. S. bk. 4, L. ed. 600]; 3 Story, Const. 122; 1 Kent, Const. 250.

So a statute providing that a naturalized citizen shall not be entitled to be registered as a voter until he has been naturalized thirty days is a reasonable regulation to protect the public from possible fraud of the applicant in obtaining his certificate of naturalization. See Acts 1885, chap. 345, § 7, which contains other conditions and precautions, all of which are within the power of the Legislature to make, and are not repugnant to the Third Amendment of the Constitution of this Commonwealth.

gislatre to make, and are not repugnant to the Third Amendment of the Constitution of this Commonwealth.

Such is not in contravention of U. S. Const. 14th Amend. as an abridgement of the privilege of citizens of the United States.

Cooley, Const. Lim. 599-601; 1 Story, Const. 577, 582; *United States v. Anthony*, *supra*.

Devens, J., delivered the opinion of the court:

The case at bar is an action of tort against the registrars of voters in the city of Cambridge, to recover damages for wrongfully refusing, as the plaintiff alleges, to register him as a voter for the State election of 1886. The demurrer to the plaintiff's declaration having been sustained, the case is before us upon the report of the learned judge who presided. It raises but a single question, but one of much importance.

The defendants refused to register the plaintiff because he had been naturalized within thirty days previous to his application for registration. They were fully justified in so doing under Acts 1885, chap. 345, § 7, if the provisions of this section are constitutional. This section enacts that "no person hereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization."

By naturalization the plaintiff became, *eo instanti*, a citizen of the United States, and therefore a citizen of the State of his residence. By the Fourteenth Amendment to the Constitution of the United States "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The right or privilege of voting is a right or privilege arising under the Constitution of each State, and not under the Constitution of the United States. The voter is entitled to vote in the election of officers of the United States by reason of the fact that he is a voter in the State in which he resides. He exercises this right because he is entitled to by the laws of the State where he offers to exercise it, and not because he is a citizen of the United States. *United States v. Anthony*, 11 Blatchf. 200. What are the rights of citizens of the United States as such, and not as citizens of particular States, need not be here considered. They have repeatedly been discussed and defined. *Corfield v. Coryell*, 4 Wash. C. Ct. 371; *Ward v. Maryland*, 12 Wall. 418-430 [79 U. S. bk. 20, L. ed. 449]; *Paul v. Virginia*, 8 Wall. 168 [75 U. S. bk. 19, L. ed. 357]; *Slaughter-house Cases*, 16 Wall. 36 [83 U. S. bk. 21, L. ed. 394].

The qualifications of voters are fixed by State legislation. The requisitions as to ownership of property, citizenship, sex, residence, in connection with the right of voting, vary with the Constitution or laws of the several States. However unwise, unjust, or even tyrannical its regulations may be or seem to be in this regard, the right of each State to define the qualifications of its voters is complete and perfect,

except so far as it is controlled by the Fifteenth Amendment to the Constitution of the United States, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The question whether Acts 1885, chap. 345, § 7, is constitutional must be decided by determining whether this legislation is in conformity with the Constitution of this Commonwealth, or whether it adds anything to the qualifications which the voter is thereby required to possess, and thus interferes with the enjoyment of the rights with which this Constitution invests him.

The Amendment of 1825 to the Constitution of Massachusetts is as follows:

"Every male citizen of twenty-one years of age and upwards, except paupers and persons under guardianship, who shall have resided within the Commonwealth one year, and within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant-governor, senators, or representatives; and who shall have paid, by himself or his parent, master, or guardian, any State or county tax, which shall, within two years next preceding such election, have been assessed upon him, in any town or district of the Commonwealth; and also every citizen who shall be, by law, exempted from taxation, and who shall be, in all other respects, qualified as above mentioned, shall have a right to vote in such election of governor, lieutenant-governor, senators, and representatives; and no other person shall be entitled to vote in such election." Amendment, art. 8.

A reading and writing qualification was established in 1857, by Amendment to Constitution, art. 20. But this it will not be necessary to consider in the present discussion.

The qualifications of voters are thus defined with clearness and precision. Without the possession of those, the citizen or inhabitant cannot exercise the privilege of voting; and as whoever possesses them is, by the Constitution, entitled to their privilege, legislation cannot deprive him of it. By the Constitution (Pt. 11, chap. 1, art. 4) full authority and power is given to the General Court "from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defense of the government thereof." To the provisions of the Constitution all legislation is thus made subordinate; and it cannot add to or diminish the qualifications of a voter, which that instrument has prescribed. *Blanchard v. Stearns*, 5 Met. 298, 301; *Williams v. Whiting*, 11 Mass. 433. "This provision of the Constitution," says *Opinion of the Justices*, 5 Met. 592 (referring to art. 3 of the Amendment above quoted), "being irrepealable by any Act of ordinary legislation, must be obeyed and carried into effect according to its plain

intent and meaning, as far as that can be ascertained."

The plaintiff, according to the allegations of his declaration, possessed, when he offered himself for registration, all the qualifications of a voter required by the Constitution. Any legislation by which the exercise of his rights is postponed diminishes them, and must be unconstitutional, unless it can be defended on the ground that it is reasonable and necessary in order that the rights of the proposed voter may be ascertained and proved, and thus the rights of others (which are to be protected as well as his own) guarded against the danger of illegal voting. The Constitution, while providing for the qualifications of voters, contemplates that equal and reasonable rules will be made by legislation as to the method of exercising the privilege, and also that, somewhere and at some time, under proper regulations, there will be an inquiry whether those offering to vote possess the requisite qualifications. This inquiry involves an investigation of various facts; as those in regard to the proposed voter's age, sex, residence, payment of taxes, etc. It is not an unreasonable provision that all persons entitled as voters shall be registered as such previous to depositing their ballots; and if the Legislature deems that such an inquiry could not proceed concurrently with the actual voting or election, and both be conducted in a deliberate and orderly manner, it is not unreasonable that it should provide that such an inquiry should terminate before the election actually commences, at a time previous sufficiently long to make proper preparation therefor.

The plaintiff in the case at bar does not contend that the Legislature has not the right to make any reasonable, uniform, and impartial regulation of the mode of exercising the right of suffrage, and also of ascertaining the qualifications of voters. He denies that the seventh section of the statute under discussion is of this character.

The leading case, not only in this Commonwealth, but in the whole discussion that has taken place in this country in regard to the right of Legislatures to provide for judging the qualifications of voters, and for regulating the exercise of their privileges by them, as these are prescribed by the Constitutions of the States respectively, is *Capen v. Foster*, 12 Pick. 435. It was there held that the Acts of 1821, chap. 110, and 1822, chap. 104, providing for a registration of voters in Boston, and requiring that, previous to an election, the qualifications of voters should be proved and their names be placed on an alphabetical list or register, was not to be regarded as prescribing a qualification in addition to those which, by the Constitution, entitled a citizen to vote; but only as a reasonable regulation of the mode of exercising the right of voting, which it was competent for the Legislature to make. But while it is held to be within the proper limits of legislative power to provide suitable regulations for exercising the right of suffrage in a prompt, orderly, and convenient manner, the court, speaking through *Chief Justice Shaw*, is careful to add: "Such a construction would afford no warrant for such an exercise of legislative

power as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself. * * * It [the Constitution] fixed the qualifications of voters with precision, and left all the rest to be regulated by law. * * * The Constitution, by carefully prescribing the qualifications of voters, necessarily requires that an examination of the claims of persons to vote, on the ground of possessing the qualifications, must at some time be had by those who are to decide upon them. * * * If, then, the Constitution has made no provision in regard to the time, place, and manner in which such examination shall be had, and yet such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects respecting the mode of exercising the right in relation to which it is competent to the Legislature to make suitable and reasonable regulations, not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right."

If the seventh section of the Statute of 1885 were general in terms, and allowed no person to register as a voter until he had possessed the requisite qualifications for a period of thirty days, it would be difficult to maintain its constitutionality. It would still provide for adding another qualification to those required by the Constitution, as much as if the period of domicile within the town or the Commonwealth required by the Constitution, before voting, were extended to a longer period. *State v. Williams*, 5 Wis. 308; *Quinn v. State*, 35 Ind. 485. The Constitution does not provide that the qualifications it requires shall be possessed by the voter for any period before the election; nor has it ever been held that this was necessary. To add this requirement before one can be registered as a voter is certainly to increase the qualifications. *Bridge v. Lincoln*, 14 Mass. 367; *Humphrey v. Kingman*, 5 Met. 162-165; *Kitham v. Ward*, 2 Mass. 285.

In an *Opinion of the Justices*, 124 Mass. 597, in reply to an inquiry by the House of Representatives as to whether one who had been, but had ceased to be, a pauper, must have ceased to be such for any definite period before he could exercise the right of suffrage, it was said:

"It is no more required that the voter shall have ceased to be a pauper or under guardianship a year or six months before the election than that he shall have been a citizen or of age during a like period. It has never been doubted that minors having the other requisite qualifications become qualified to vote immediately upon arriving at full age. And by uniform usage, recognized and approved in an opinion given to the Honorable House last year, persons, otherwise qualified, who have been naturalized at any time before the election, have been deemed entitled to vote. The necessary conclusion appears to us to be that, by the third article of Amendment of the Constitution of the Commonwealth, the disqualification of pauperism or guardianship, like that of alienage or nonage, is not required to have ceased to exist for any definite period of time in order to entitle a man actually free from every such disqualification, and duly qualified in point of

residence and of payment of taxes, to exercise the right of suffrage."

Nor if such a law were general is it easy to see how it could be defended upon the ground that it was a reasonable regulation for the purpose simply of ascertaining qualifications, and determining whether an applicant actually possessed them. Every system of registration of voters contemplates that the registration will be completed, and that the list of voters will be prepared, before voting actually commences. No system would be just that did not extend the time of registration up to a time as near that of actually depositing the votes as would be consistent with the necessary preparation for conducting the election in an orderly manner, and with a reasonable scrutiny of the correctness of the list. While cases may be conceived where the right to vote might depend on a somewhat complicated inquiry, ordinarily the facts on which it depends are simple and susceptible of rapid investigation. Because a difficult inquiry is possible, to provide that all citizens proving themselves to possess the requisite qualifications as voters should not be allowed to register as such for thirty days thereafter, and thus be obliged to show, in addition, that they had possessed them for that length of time, might be held an unreasonable regulation in regard to the exercise of the privilege of suffrage. In many instances the right to vote might itself accrue,—as by expiration of time, by payment of taxes, etc.,—within thirty days which precedes the registration.

But serious as these objections would be to the constitutionality of a general law applicable to all classes of citizens, it is not necessary now to consider them, as the section of the statute in question presents an even more serious difficulty. It undertakes to prevent a single class of citizens, namely, those who are naturalized, possessing all the qualifications established by the Constitution of the Commonwealth, from exercising the right with which that Constitution invests them, for a period of thirty days, by forbidding to the registrars of voters to register them during that period. All citizens must stand equal before the law; and the statute, assuming them to be citizens, imposes this prohibition upon them as citizens of a specified class. A statute regulating the exercise of the right of suffrage, or the ascertainment of the qualifications of voters, must not only be reasonable in its character, but uniform and impartial in its application. If it were possible to impose a period of probation upon all qualified citizens before they were entitled to exercise the privilege, it certainly is not possible, under the Constitution, to select a single class and impose it on them alone.

"A registry Act," says Mr. McCrary in his work on Elections (§ 8), "which should undertake to require a longer residence, prior to the time of voting, than that required by the Constitution, or which should require the payment of taxes not required to be paid by constitutional provision, or which should impose upon a particular class of citizens conditions and requirements not required of all others, would be void."

It was suggested at the argument that the section of the statute here in question might be upheld as a reasonable regulation to protect the public from possible fraud in obtaining certificates of naturalization, and that the delay of thirty days before naturalized citizens are permitted to register allows this investigation. But the board of registrars is not competent to pass upon the question whether a certificate of naturalization was erroneously granted; nor can such a certificate be attacked before them thus collaterally. The only question upon this part of their inquiry into the qualifications of the applicant is whether he is in fact the person named in the certificate he produces,—if such certificate be itself properly authenticated. It is a question of identity solely.

No argument in favor of the constitutionality of the section can be founded upon any peculiarity in the situation of naturalized citizens, which renders an inquiry in regard to their qualifications different from similar inquiries when applied to all other citizens. The regulation which it assumes to make is partial, and calculated injuriously to restrain and impede in the exercise of their rights the class to whom it applies, in that it denies to them, for the period of thirty days, the exercise of a right which the Constitution has conferred upon them. There is no warrant for this within the just and constitutional limits of the legislative power, which permits reasonable and uniform regulations to be made as to the time and mode of exercising the right of suffrage, and as to the ascertainment of the qualifications of voters.

We must therefore pronounce the seventh section of chapter 845, Acts of 1885, to be unconstitutional. It follows that this action can be maintained. *Kilham v. Ward*, 2 Mass. 285; *Lincoln v. Hapgood*, 11 Mass. 350-353; *Blanchard v. Stearns*, 5 Met. 298, 301; *Larned v. Wheeler*, 140 Mass. 390, 1 New Eng. Rep. 788.

The case will stand for trial, and the entry will be—

Demurrer overruled.

George E. WYETH *et al.*

v.

Howard L. STONE.

1. The Statute of 1876, chap. 213, §§ 8, 9, re-enacted in Pub. Stat. chap. 148, §§ 7, 8, as to succession or inheritance of property by an adopted child, makes a distinction between property which the adopting parent owns and can dispose of by will, and other property or rights which a natural child can take derivatively, through, or by reason of, his kinship to his parents.
2. By the 7th section an adopted child will take, by succession or inheritance, the same share of the property which the parent owns so that he can dispose of it by his will, as if he were a natural child; but he cannot take property not owned by the parent, but which would come to a natural child by right

of representation after the parent's death.

3. He can inherit directly from the parent, but he cannot inherit in lieu of his parent, by right of representation, from any of his parent's kindred.
4. The purpose of the 8th section is to provide for cases where property comes to a man's children, not by inheritance, but under a settlement, trust deed, or will; and to establish a rule governing the rights of adopted children in such cases.
5. Where a will devised the remainder of an estate to testator's adopted daughter in her own right, but if she died without issue before the death of testator's wife, then it devised such remainder to the heirs at law of said wife; and the adopted daughter died without issue before the death of such wife; and the wife had no natural children, but, after the testator's death, she adopted defendant, who survived her,—*Held*, that, inasmuch as the testator was not the adopting parent, the burden is upon defendant to show that it was the intention of the testator to include an adopted child; and, as that is not shown, and the will shows that the testator had in his mind the natural heirs of his wife, it cannot be said to have been the testator's intention to include in his devise an adopted child of his wife.
6. Under said statute the term "child," or its equivalent, in a grant, trust, settlement, or devise, will include a child adopted by the settler, grantor, or testator, unless the contrary plainly appears; but where the settler, grantor, or testator is not the adopting parent, the child by adoption will not have, under such an instrument, the right of a child born in lawful wedlock to the adopting parent, unless it plainly appears to have been the intention of the settler, grantor, or testator to include such adopted child.

(Middlesex—Filed May 8, 1887.)

APPEAL by demandants from a judgment of the Superior Court of Middlesex County in favor of defendant upon agreed facts in a writ of entry. *Judgment for demandants.*

The demandants are children of the brothers and sister of Catherine Baker, widow of Jalel Baker. The tenant, Howard L. Stone, was the husband of Eliza Stone, and the same person mentioned in the will of Jalel Baker as "Howard Stone."

Further facts appear from the opinion.

Messrs. Charles S. Lincoln and Edwin G. McInnes, for demandants:

It seems clear that the testator only contemplated the collateral heirs of his wife, and that it was manifestly his intention that his estate, if Eliza Stone died without issue before his wife, should be taken by his wife's heirs by blood. His wife at that time was sixty-eight years of age. There was no person then

living who could then become her lineal heir except that Eliza Stone be considered one; and he could hardly have entertained a thought that his wife would ever bear any children, if such an event were possible, or that the tenant would ever become an heir of his wife. And it may be further urged that the intention of the testator was to exclude the tenant, not only from receiving any part of his estate by will, but from ever receiving any part by inheritance, unless through the possible children by his wife Eliza. His wife dying without issue before Mrs. Baker, he could never have acquired any part of the estate by inheritance.

The provisions of the Act of 1876, chap. 213, § 7 thereof, defining the effects of the decree of adoption, expressly except from such definition the effect as regards succession to property, which is left to be treated in the other sections of the Act.

The only other material provision appears in § 9 of the same Act, and is as follows: "The term 'child,' or its equivalent, in any grant, trust, settlement, entail, devise, or bequest, shall be held to include any child adopted by the settler, grantor, or testator, unless the contrary plainly appears by the terms thereof; but in no other case shall a child by adoption have, under such an instrument, the rights of a child born in lawful wedlock to the adopting parent, unless it plainly appears to have been the intention of the settler, grantor, or testator to include an adopted child." In this case the testator was not the adopting parent, and no intention appears to include any adopted child, much less the tenant.

The case of *Sevall v. Roberts*, 115 Mass. 262, was decided under a very different statute from that of 1876. Section 7, chapter 110, of the General Statutes then in force, provided that "a child so adopted shall be deemed, for the purposes of inheritance by such child, and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock; except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation." The case therefore is, in that view, entirely irrelevant to the present question.

Mr. Elihu G. Loomis, for defendant:

Defendant being, by the statutes of adoption (Stat. 1876, chap. 213; Pub. Stat. chap. 148, §§ 6, 7), only heir of testator's wife, took at her death, under third clause of will, the entire remainder of estate.

The defendant claims that the expression "heirs at law" is a *designatio personarum*. It refers to the class who would have inherited property from testator's wife had she left any. As they could not be ascertained till her death, he is her only heir.

The "heirs at law" of Catherine Baker were determined as of the date of her death. *Nemo est heres viventis*.

A devise by a testator of a remainder, after a life estate, to the heirs of the life tenant, vests the remainder in the heirs as ascertained at the death of the life tenant.

Putnam v. Gleason, 99 Mass. 454; *Loring v. 2 Mass.*

Thorndike, 5 Allen, 257; *Richardson v. Wheatland*, 7 Met. 169.

The term "heirs at law" is a mere *designatio personarum* of those who were to be purchasers under the will.

Clarke v. Cordis, 4 Allen, 466, 480; *Richardson v. Wheatland*, 7 Met. 169, 175.

The term "heirs at law" does not mean "heirs of the body;" neither does it mean "children," but heirs properly.

Sevall v. Roberts, 115 Mass. 262, 277; *Clarke v. Cordis*, 4 Allen, 466, 480; *Putnam v. Gleason*, 99 Mass. 454, 456.

The words, "except as regards succession to property," in Pub. Stat. chap. 148, § 6, cannot be held to impair the defendant's title, because he does not take this estate by succession, but by purchase.

The phrase in § 7, "He shall stand in regard to legal descendants, but to no other of the kindred of said parent, in the same position as if born to him," must be construed to refer to property not to be inherited from other kindred of said parent, in order to make it harmonize with the other provisions of the same section.

The language of Pub. Stat. chap. 148, § 8, cannot be held to affect defendant's title, because the term "heirs at law" in the will is not an equivalent of the term "child."

Morton, Ch. J., delivered the opinion of the court:

Jalel Baker died in 1878, leaving a widow and no children except an adopted daughter, Eliza Stone. By his will he left all his property to a trustee, who was to pay all the income to his wife during her life. By the second clause he gave, at the death of his wife, certain pecuniary legacies to her nephews and nieces. The third clause is as follows: "After the payment of the foregoing legacies, I give, bequeath, and devise all the remainder of my estate to my adopted daughter, Eliza Stone, wife of Howard Stone, of said Waltham, in her own right; but if the said Eliza Stone shall die without issue before the decease of my said wife, then I give, bequeath, and devise said remainder to the heirs at law of my said wife." All the debts, legacies, and expenses have been paid, and the demanded premises are the only property undisposed of. It is not disputed that the demandants can maintain this action if they are the owners of the equitable estate devised by the third clause of the will.

Eliza Stone died without issue in May, 1877. The wife of the testator died in March, 1868. She had no natural children, but in September, 1877, she had adopted the tenant, Howard L. Stone.

The tenant's rights depend upon the construction of the Statute of 1876, chap. 213, §§ 8, 9, re-enacted in Pub. Stat. chap. 148, §§ 7, 8. These statutes provide that, as to succession or inheritance of property, an adopted child shall take the same share of property which the adopting parent could have devised by will that he would have taken if born to such parent in lawful wedlock; and he shall stand in regard to the legal descendants, but to no other of the kindred of such parent, in the same position as if so born to him. The following section provides that "the term 'child,' or its equivalent, in a grant, trust, settlement, entail,

devise, or bequest, shall be held to include a child adopted by the settler, grantor, or testator, unless the contrary plainly appears by the terms of the instrument; but where the settler, grantor, or testator is not himself the adopting parent, the child by adoption shall not have, under such an instrument, the right of a child born in lawful wedlock to the adopting parent, unless it plainly appears to have been the intention of the settler, grantor, or testator to include an adopted child." These provisions made a material change in the laws as to the rights of adopted children, and therefore the decision in *Sevall v. Roberts*, 115 Mass. 262, does not aid us in the present inquiry. See Gen. Stat. chap. 110; Stat. 1871, chap. 310.

It is quite probable that the Statute of 1876 was passed in consequence of that decision. The design of the Legislature in this statute clearly was to qualify and limit the rights of an adopted child under the previous statute as construed by the court. The purpose of the statute seems to be to make a distinction between property which the adopting parent owns and can dispose of by will, and other property or rights, which a natural child can take derivatively through, or by reason of, his kinship to his parent. Thus by the 7th section an adopted child will take, by succession or inheritance, the same share of the property which the parent owns so that he can dispose of it by his will, as if he were a natural child; but he cannot take property not owned by the parent, but which would come to a natural child by right of representation after the parent's death. He can inherit directly from the parent, but he cannot inherit in lieu of his parent, by right of representation, from any of his parent's kindred. The purpose of the 8th section is to provide for cases where property comes to a man's children, not by inheritance, but under a settlement, trust deed, or will, and to establish a rule governing the rights of adopted children in such cases. There is no word which is exactly the equivalent of "child" so as to be interchangeable with it under all conditions. We think the intention was to provide that if, by a settlement, deed, or will, property is given by terms which embrace and include a natural child, and which, in their application to existing facts, have the same effect, and mean the same thing, as child or children, such as the terms "issue," "descendant," or "heir at law," the rules provided by this section shall apply in the construction of the instrument. Any other construction would give the statute a very narrow scope, and, to a great extent, defeat its purposes. In the case at bar the property is devised to "the heirs at law of my said wife." The tenant is not the natural heir at law of Mrs. Baker. The statutes do not give him all the qualities and rights of an heir at law, but only certain limited rights. He claims upon the ground that, in this case, the term "heir at law" embraces and is equivalent to "child," and therefore that he, having by the adoption the rights of a natural child, is entitled to the whole estate.

We are of opinion that the 8th section above cited applies to this case, and therefore, inasmuch as the testator is not the adopting parent, the burden is upon the tenant to show

that it was the intention of the testator to include an adopted child.

The will shows that the testator had in his mind the natural heirs of his wife, as he gives to most of them pecuniary legacies, describing them as "my" nephews and nieces. There is nothing to show that he contemplated that his wife might, after his death, adopt a child; and it is impossible to say that, in the words of the statute, it plainly appears to have been the intention of the testator to include in his devise an adopted child of his wife.

We are therefore of opinion that the demandants are entitled to recover.

Judgment for demandants.

City of CAMBRIDGE

v.

INHABITANTS OF PAXTON.

1. A citizen without legal settlement, who enlisted into the service of the United States, as part of the quota of the town of Paxton, during the late civil war, and was honorably discharged, and who subsequently enlisted as part of the quota of the city of Boston, and deserted, and was tried and sentenced therefor, and during his sentence was discharged with his regiment, on the mustering out of the volunteers at the close of the war, did not acquire any legal settlement by his enlistment as part of the quota of the city of Boston.
2. Nor does the Act of 1865, chap. 230, enable him to gain a settlement in the town of Paxton, which, but for his desertion and sentence, he might have acquired by virtue of his first enlistment.
3. The right to a settlement is a valuable privilege, which such Act intended to confer only on faithful soldiers.

(Middlesex—Filed May 12, 1897.)

APPEAL by plaintiff from a judgment of the Superior Court of Middlesex County in favor of defendant in an action to recover for support furnished a pauper. *Affirmed.*

The case was heard in the superior court before Thompson, J., on agreed facts, and judgment ordered thereon for defendant. The case is sufficiently stated in the opinion.

Mr. C. J. McIntire, for plaintiff:

The plaintiff claims that Bernard Hastings acquired a settlement in the defendant town under the provisions of Pub. Stat. chap. 83, § 1, cl. 11.

The statute is retroactive and takes effect as if it were in force on February 9, 1864, the date of the honorable discharge of Hastings at the expiration of the term of his naval service.

Granville v. Southampton, 138 Mass. 264; *Boston v. Warwick*, 133 Mass. 519; *Inhabitants of Dedham v. Inhabitants of Milton*, 136 Mass. 400; *Worcester v. Springfield*, 127 Mass. 540; *Peabody v. Lunenburg*, 103 Mass. 360. See Pub. Stat. chap. 83.

Hastings therefore legally holds his settle-

ment duly acquired in Paxton, unless he has since acquired a new one within the State.

Inhabs. of Oakham v. Sutton, 18 Met. 192.

His settlement in Paxton on February 9, 1864, being then admitted, but one defense to this suit is open to the defendant, which is that said Hastings has defeated or lost his settlement in that town by acquiring a new one in some other town within the State; and the burden of proving this is on the defendant.

Worcester v. Wilbraham, 18 Gray, 589; *Shrewsbury v. Salem*, 19 Pick. 889; *Attleborough v. Middleborough*, 10 Pick. 378; *Oakham v. Sutton*, 18 Met. 192.

A subsequent enlistment, desertion, and conviction cannot defeat a settlement already, by any legal method, acquired.

Granville v. Southampton, 188 Mass. 258; Pub. Stat. chap. 83, § 5.

Desertion only prevents acquiring a settlement which otherwise might be acquired by the particular service in which the enlisted person is enlisted, at the time of such desertion, and will not affect a settlement which has already been acquired by a previous completed service of one year and an honorable discharge.

The proviso only applies to acquiring a "settlement in such place." A contrary construction of the statute would not only be unjust to the enlisted person, but also to those who have gained a derivative settlement through him.

Worcester v. Springfield, 127 Mass. 541.

Mr. W. S. B. Hopkins, for defendant:

Military settlements are not acquired under the laws by men "who shall have been proved guilty of willful desertion," or who have "left the service otherwise than by reason of disability or an honorable discharge."

Fitchburg v. Lunenburg, 103 Mass. 360; *Lunenburg v. Shirley*, 132 Mass. 500.

There is no evidence of an honorable discharge. The presumption that public officials do their duty would imply that the facts appear in the discharge, which is not produced; to wit, that he was discharged as a convicted deserter, serving sentence.

The case is analogous to *Lunenburg v. Shirley*, 132 Mass. 500, where the soldier was discharged "as a surrendered deserter." A discharge of some nature, and with some recital, is necessary to get a man out of the service.

Articles of War, art. 11, cited in *Sheffield v. Otis*, 107 Mass. 284; U. S. Rev. Stat. 1842, art. 4.

If it be said that a discharge is to be regarded as a pardon, as has sometimes been argued, and purges the offense, the argument cannot avail here. An honorable discharge, as a certificate of leaving the service in a status of honor, is applied in the cases only to an offense for which the soldier has never been held to trial, and of which he has never been convicted.

United States v. Kelly, 15 Wall. 84 (82 U. S. bk. 21, L. ed. 106); *United States v. Landers*, 92 U. S. 77 (Bk. 23, L. ed. 608).

Devens, J., delivered the opinion of the court:

Hastings was duly enlisted, and mustered into the naval service of the United States as a part of the quota of the town of Paxton, dur-

3 MASS. N. E. R., V. IV.

ing the late civil war, duly served for a period of more than one year, and left the service by an honorable discharge. Unless he is, from some cause, one of the persons not included within the operation of the Statute of 1865, chap. 280 (Pub. Stat. chap. 83, § 1, cl. 11), or unless he has since acquired a legal settlement elsewhere within the State, by which an earlier settlement would be defeated, his settlement is within the defendant town; and the plaintiff would be entitled to recover for the sums lawfully expended for his relief. The evidence admitted showed that Hastings, subsequent to his honorable discharge from his first enlistment in February, 1864, again enlisted as a part of the quota of the city of Boston, on March 7, 1864, in the 59th Massachusetts Volunteers, for three years, deserted August 12, 1864, was tried and convicted of willful desertion by court-martial, and was undergoing sentence at the time the regiment was mustered out of service, at the close of active hostilities, July 30, 1865. What was the form of discharge he received does not appear. Some form of discharge was necessary to release him from the service. Articles of War, art. 11; *Sheffield v. Otis*, 107 Mass. 284. It cannot be presumed that he was discharged otherwise than as a convicted deserter receiving sentence, as he was not entitled to an honorable discharge. To this evidence the plaintiff objects, on the ground of incompetency. It contends that, through the retroactive force of the statute, Hastings acquired a settlement in the defendant town in February, 1864, as of that date, by his honorable discharge from the naval force, and that any subsequent enlistment, desertion, and conviction therefor cannot defeat a settlement already acquired by any legal method; and, further, that this evidence does not tend to prove "the acquirement of a new settlement within the Commonwealth, but is intended only to destroy a settlement already acquired." That Hastings did not acquire any legal settlement by his enlistment as a part of the quota of the city of Boston is quite clear; and the evidence in relation thereto would be inadmissible if we could adopt the plaintiff's contention that Hastings had acquired a settlement in February, 1864, notwithstanding his subsequent enlistment and desertion. The Act of 1865 was passed, as has been frequently pointed out, after the war had substantially closed by the surrender of the last of the large Confederate armies on April 26, 1865, although it was more than a year later before the President of the United States, by proclamation, formally announced that the insurrection against the national authority was at an end. *Lunenburg v. Shirley*, 132 Mass. 498. This Act, we have heretofore held, is to be construed, as far as possible, as if it were in force at the time when the service by which a military settlement could be acquired was rendered; but this construction has been adopted only when it has appeared that the soldier whose settlement was discussed was one to whom the statute applied. *Granville v. Southampton*, 188 Mass. 256. When it is said, in *Boston v. Warwick*, 132 Mass. 519, 520, that the settlement conferred upon the soldier "is not a settlement acquired at the time of the passage of the statute, but, by

virtue of the retroactive force of the statute, is to be treated in all respects as a settlement acquired by him at the expiration of his service for a term not less than a year," the court is dealing with the effect of the military settlements of those men to whom the statute provisions apply. It is a different question whether a soldier who is a convicted deserter is within the provisions of the statute, and can have acquired a military settlement thereby, or whether he is one of the class excepted from its benefits, although he had, before the enlistment, during the period of which his desertion occurred, faithfully served a previous enlistment for the required time; which service, but for his misconduct under the later enlistment, would have entitled him to a settlement in the town with whose quota he originally served. The 3d section of the Act of 1865, chap. 230, was certainly intended to exclude certain persons from the benefits which had been provided by the earlier sections for soldiers who had served the required time during the civil war. While, in distributing the public burden of supporting the poor, it was undoubtedly thought proper by the Legislature to impose upon the town in whose quota certain soldiers had served the expense of supporting them, as the towns to this extent had thus been relieved of an onerous duty, the right to a settlement is a valuable privilege which the Act intended to confer on a faithful soldier. *Lunenburg v. Shirley*, 132 Mass. 500. The words of the section are: "The provisions of this Act shall not apply to any person who shall have enlisted and received a bounty for such enlistment in more than one town, unless the second enlistment was made after an honorable discharge from the first term of service; nor to any person who has been guilty of willful desertion, or who shall have left the service otherwise than

by reason of disability or an honorable discharge." Hastings is therefore a person to whom, by the terms of this section, the Act does not apply. He has been convicted of willful desertion by a competent court. The language excluding such a person is not limited to the offense of desertion committed by him during the term of service upon which it is sought to base a settlement, but is general. The argument that, having once faithfully served, he acquired a settlement which could not be taken away by his misconduct under a second enlistment, assumes that the statute is retroactive as to those persons to whom its provisions do not apply. The Legislature was not ignorant that many men had served under more than one enlistment, and that some had been guilty of misconduct. It did not intend to confer the benefit upon any but those who had, throughout, served meritoriously, and it therefore defines certain classes who should not receive it. The first clause of the section quoted expressly excludes a soldier from the settlement which he might otherwise acquire from a second enlistment, unless that enlistment were made after an honorable discharge from the first. When the statute enacts that its provisions shall not apply to a soldier guilty of willful desertion, we must hold conversely that when a soldier, during his second enlistment, is guilty of willful desertion, the Act does not enable him to gain the settlement which, but for this, he might have acquired by virtue of his first enlistment. His misconduct does not defeat any settlement he had acquired, or deprive him of anything he had gained. It simply places him within a class for whom the Act is not intended. Hastings not having gained a settlement in Paxton, the entry must be—

Judgment affirmed.

CONNECTICUT.

SUPREME COURT OF ERRORS.

Frederick W. WARNER

v.
William L. WILLARD.

1. Where a testator, by his will, gave his wife the use of his real estate during her life, and then, after giving some legacies, gave all the residue of his estate, after payment of his debts and funeral charges, to his wife,—*Held*, that she took the fee of the real estate.
2. When a party makes a will, the presumption is that he intends to dispose of all of his property, and not to die intestate as to any part of it.

(Hartford—Filed February, 1887.)

CASE reserved.

Amicable submission to the Superior Court in Hartford County, of the question as to the construction of a will, reserved for the advice of this court.

The facts appear from the opinion.

Mr. Edward D. Robbins, for plaintiff:

It may be, as defendant claims, that when the testator wrote the first clause he had not determined to give his wife anything more than what he therein disposes of. Yet, after making all the other gifts which he desired to make, he certainly came to the conclusion to give her also all that there should be left. The later clause of the will expresses his final intention; and, even if there were a contradiction, the later clause would prevail.

Chappel v. Avery, 6 Conn. 81, 84; *Minor v. Ferris*, 22 Conn. 371, 378.

In general, implication is admissible only in the absence of, and not to control, an express disposition. An express and positive devise cannot be controlled by the reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will.

3 *Jarm. Wills*, ed. by Rand. & T. p. 706.

The presumption of the law is against partial intestacy.

Higgins v. Duen, 100 Ill. 554, 556; *Irwin v. Zane*, 15 W. Va. 646; *Smith v. Smith*, 17 Gratt. (Va.) 268; *Booth v. Booth*, 4 Ves. 407.

Mr. C. M. Joslyn, for defendant.

Granger, J., delivered the opinion of the court:

This is an amicable suit to obtain a construction of the will of William Willard. The first clause of the will is as follows:

"I give and bequeath to my beloved and faithful wife, Jane G. Willard, the use and improvement of the real estate of which I may die possessed, during her natural life. I also give to her, the said Jane G., all my household furniture of every name and kind."

The testator then gives to one daughter \$2,500; to another \$2,000; to his son \$2,000 and his gold watch, gold-headed cane, and wardrobe; and to an adopted son \$1,000. Then follows the sixth clause of the will, which is as follows

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"All the residue of my estate, of whatever name or kind, after payment of my debts and funeral charges, I give and bequeath to my wife, Jane G. Willard."

The residue of the estate, of course, includes the fee of the real estate, of which only the life use had been given by the first clause, and which had not been disposed of by any other clause of the will, unless, from the whole will, we can gather the intent of the testator not to include it.

The defendant contends that, taking this clause in connection with the first, it is evident that the testator intended to give his wife only a life use of the real estate, and that this gift of the residue must therefore be regarded as intended to embrace only the personal estate. The facts are found with regard to the amount of the testator's personal and real estate; but they throw no light upon this question.

It is difficult to discover any reason why the testator should have given his wife a life estate only in the first clause of the will, and the fee of the same real estate by the residuary clause. But the question for us to consider is not why he did what he did, but simply, What has he in fact done? We must look for his intention only in the will itself; and in that he has expressed himself in language free from all ambiguity. He not only speaks of "all the residue," but of "all the residue of my estate of whatever name or kind." It would hardly be possible for language to be more comprehensive.

Were the matter left in any doubt, there is a further consideration that would be decisive. If the fee of the real estate does not pass by the residuary clause, then it is not disposed of, and becomes intestate estate. But there is always a presumption that when a party makes a will he intends to dispose of all his property, and not to die intestate as to any part of it. "Every intendment is to be made against holding a man to be intestate who sits down to dispose of the residue of his property." *Booth v. Booth*, 4 Ves. 407. To the same effect are *Higgins v. Duen*, 100 Ill. 554, 556; *Smith v. Smith*, 17 Gratt. 268; *Irwin v. Zane*, 15 W. Va. 646.

Our conclusion is that the widow took the fee of the real estate, and the Superior Court is so advised.

In this opinion the other Judges concurred.

Annie E. BRONSON

v.

Borough of WALLINGFORD.

1. Section 32 of the charter of the borough of Wallingford (Special Laws of 1881, p. 117), authorizing the borough to construct sewers and provide for the outflow of waste water, drainage, and sewage, and providing a method of compensation for damages to private property, refers to ordinary sewerage from houses, and to such surface waters as may be drained into sewers; but has no reference to surface waters passing off upon the surface of the ground.

2. A complaint against a municipal corporation for damages, alleging a cause of action resulting from the disposition, by defendant, of surface water from a highway, in the discharge of its duty in caring for the highways, causing surface water to flow upon private property,—is not sufficient where it fails to allege special facts showing that the act complained of was wanton or unnecessary, or that the water was drained into some place prohibited by statute (Sess. Laws 1881, p. 34, § 65).

(New Haven—Filed February, 1887.)

CASE reserved. *Complaint insufficient.*

This action was brought by Annie E. Bronson against the defendant borough to recover for an injury to her land by the turning upon it of water and sewage from the street. The action was brought in the Superior Court of New Haven County, and, upon demurrer to the complaint, was reserved for the advice of this court.

The facts appear from the opinion.

Mr. J. W. Alling, for defendant, demurrant:

1. Municipal corporations in the discharge of a governmental duty are exempt from responsibility for the acts of their agents, unless such liability is imposed by statute, and to the extent only of such statutory liability.

Jones v. New Haven, 84 Conn. 13; *Judge v. Meriden*, 88 Conn. 90; *Hewison v. New Haven*, 84 Conn. 136, 139; *S. C.* 37 Conn. 482; *Torbush v. Norwich*, 88 Conn. 228; *Jewett v. New Haven*, 88 Conn. 372; *Mead v. New Haven*, 40 Conn. 74; *Fellows v. New Haven*, 44 Conn. 240; *Cooney v. Hartland*, 95 Ill. 516.

2. The repair of highways is everywhere regarded as a governmental duty.

Chidsey v. Canton, 17 Conn. 478; *Weed v. Greenwich*, 45 Conn. 170, 182.

In all civilized countries the duty of providing safe and convenient highways to facilitate trade and communication between different parts of the State or community is considered a governmental duty.

Chicago, etc. R. R. Co. v. Atty-Gen. 9 West. Jur. 847; 2 Morawetz, Corp. 1073.

3. The repair of highways is cast upon the boroughs, not as a privilege, not because it is sought for, but because it is the general law of the State that boroughs should be responsible for the repair of highways within their limits.

Hill v. Boston, 122 Mass. 379.

The case of *Weed v. Greenwich*, *supra*, turned upon the point that the act done in that case was done under the special powers and privileges conferred by the borough charter, and that the governmental duty of repairing highways was, whether correctly or not, supposed to be upon the town. But the duty of repairing highways is no less of a governmental character, though imposed upon the borough by its charter as well as by general law. The burden of this duty was upon this borough before these provisions in its charter, which have not, in this regard, made that duty more onerous.

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Hill v. Boston, and *Mead v. New Haven*, *supra*.

4. The acts of the borough complained of were authorized by statute. An ancient statute provided that "persons authorized to repair highways may make or clear any watercourse, or place for draining off the water therefrom, into or through any person's land, so far as necessary to drain off such water." Gen. Stat. p. 233, § 16. This statute was amended in 1881 so as to read as follows; "Persons authorized to construct or repair highways may make or clear any watercourse, or place for draining off the water therefrom, into or through any person's land, so far as necessary to drain off such water; and when it shall be necessary to make any drain upon or through any person's land for the purpose named in this Act, it shall be done in such way as to do the least damage to such land; provided nothing in this Act shall be so construed as to allow the drainage of water from such highways into or upon any dooryard, in front of any dwelling-house, or into or upon yards and enclosures used exclusively for the storage and sale of goods and merchandises." This statute justifies the acts of the borough, it not being charged or claimed that the borough was guilty of any negligence in the matter, or that the exceptions of the statute apply to the case.

Mr. W. L. Bennett, for plaintiff:

1. A person has no right, by grading the surface of his land, to turn the surface water which ordinarily falls upon or flows over it upon the adjoining land of another.

Adams v. Walker, 84 Conn. 466.

A municipal corporation has no greater right than an individual to collect the surface water from its lands and streets into an artificial channel, and to discharge them upon the lands of another.

Byrnes v. Cohoes, 87 N. Y. 204; *Noonan v. Albany*, 79 N. Y. 470; *Field v. West Orange*, 86 N. J. Eq. 118; *West Orange v. Field*, 87 N. J. Eq. 600; *Manning v. Lowell*, 180 Mass. 21; *Brayton v. Fall River*, 118 Mass. 226; *North Vernon v. Voegler*, 89 Ind. 77; *Crawfordsville v. Bond*, 96 Ind. 236; *Arn v. Kansas*, 14 Fed. Rep. 236; *Inman v. Tripp*, 11 R. I. 520; *Ashley v. Port Huron*, 35 Mich. 296.

This proposition of law is well established in other States.

It was, however, urged in the court below that the injuries complained of must have been caused by servants of the borough in the performance of a public duty, and that for the consequences of such acts the law is so in this State that the defendant is not liable. But it has been directly decided, upon a state of facts almost identical with that set up in the complaint, that a municipality is not exempt from those liabilities for malfeasance for which individuals and private corporations would be liable in a civil action by the party injured.

Danbury & N. R. R. Co. v. Norwalk, 37 Conn. 119; *Weed v. Greenwich*, 45 Conn. 170; *Moolry v. Danbury*, 45 Conn. 550.

In the last case the court lay down this proposition (p. 556): "A principle of universal application—that every man shall transact his lawful business in such a manner as to do no unnecessary injury to another—compels towns to do what they are required to do, in a proper

manner. In other words, towns will not be justified in doing an act, lawful in itself, in such a manner as to create a nuisance, any more than individuals; and if a nuisance is thus created, whereby another suffers damage, towns, like individuals, are responsible." The court also hold (p. 557) that there is nothing in the opinion in the case of *Judge v. Meriden*, 38 Conn. 90, inconsistent with this view.

See also *Healey v. New Haven*, 47 Conn. 314; *Morse v. Fair Haven East*, 48 Conn. 222.

2. This case, however, need not be governed by the rule of liability applicable to towns. By an Act revising and amending its charter, passed in 1881, the borough of Wallingford is given special powers to lay out drains and sewers in the borough.

Special Acts 1881, p. 116, §§ 30, 32, 33.

Its charter is its only authority. The duty to lay out such drains is not, strictly speaking, a public one; it is a special power or privilege conferred on the borough at its request.

Jones v. New Haven, 84 Conn. 12; *Danbury & N. R. R. Co. v. Norwalk*, 37 Conn. 119; *Wood v. Greenwich*, 45 Conn. 170.

If acts of the character now in question are performed under this charter, no exemption from liability by the borough can be interposed when, from negligence or willfulness, they are so performed as to produce unnecessary damage to other parties.

Danbury & N. R. R. Co. v. Norwalk, and *Wood v. Greenwich*, *supra*.

3. But it is said that the defendant has power to do the act complained of, under Gen. Stat. p. 233, § 16. This statute has no application to this case. As has been said, the borough acts under the powers conferred upon it by its charter. The charter authorizes its court of burgesses to "provide for the outflow and disposal of any waste water, drainage, or sewerage from any public or private sewer or drain, in such manner and upon such places as it shall determine; provided that suitable compensation shall be made for any damage to private property;" and provides how the amount shall be determined by appraisers.

It was the duty of the borough to have the compensation determined.

Healy v. New Haven, 49 Conn. 401.

However it may be with other persons authorized to repair highways, the officers of the borough may not dispose of waste water and drainage upon the lands of individuals, without first paying compensation for damages. Moreover, it nowhere appears that the acts complained of were in any sense occasioned in the repair of highways, or by persons authorized to repair highways. The duty of providing sewerage and drainage is distinct from the duty to keep highways in repair, as has already been shown.

Jones v. New Haven, 84 Conn. 12.

Carpenter, J., delivered the opinion of the court:

The complaint in this case, after alleging that the plaintiff was the owner of certain real estate, alleges that "on the 1st day of July, 1884, all that part of the territory of said borough of Wallingford which is situate on Main Street, Center Street, and Hall Avenue, in said borough, and adjacent to said highway, was

drained, and, for a period of time whereof the memory of man runneth not to the contrary, had been drained, of surface waters and sewerage, through open gutters and drains along said Center Street and said Hall Avenue, and past and away from the said land of the plaintiff. On the day and year last aforesaid the defendant, by grading and the construction of covered drains, sewers, and culverts, changed the course and direction of the flow of said waters and sewerage, with the intent so to do, in such manner that the same ran, and have ever since flowed and run, and still do flow and run, along a certain other highway known as Cherry Street, and under said Cherry Street by a culvert, over and upon the said premises of the plaintiff, and in such manner as to constitute a nuisance, whereby the premises of the plaintiff are, at times of rain, flooded with filthy waters and with sewerage, and are kept damp, unhealthy, and malarious; at all times are worn into gullies and carried away by the force of said floods; and the plaintiff has been and is deprived of the enjoyment of said property, and the value of the same has been greatly diminished."

The second count refers to another portion of the territory of the borough, and alleges a diversion of the surface water thereon,—omitting the word "sewerage,"—so as to cause it to flow on and across the land of the plaintiff; alleging the damage in the same way as in the first count.

To this complaint the defendant demurred, alleging that, on the facts stated, the plaintiff is not entitled to the relief therein sought.

The complaint is not entirely free from ambiguity. It speaks of surface water and sewerage. The defendant, by the 32d section of its charter (Special Laws of 1881, p. 117), is authorized to construct sewers and drains, and to "provide for the outflow or disposal of any waste water, drainage, or sewerage from any public or private sewer or drain, etc.; provided that suitable compensation shall be made for any damage to private property; the amount, if the parties cannot agree, to be determined in the manner specified in §§ 33 and 36 of this Act."

This refers to ordinary sewerage from dwelling-houses and other buildings supplied with running water, and to such surface waters as may be drained into sewers; but has no reference to surface water passing off upon the surface of the ground. The general supervision of its system of sewers is given to the borough, so far at least as to enable it to provide for the outflow and disposition of waste water and sewerage from drains and sewers; a power conferred on it at its own request, not for the benefit of the public at large, but for the special benefit of the inhabitants of the borough. In exercising this power, damage to individuals must be paid for; and the mode of payment is provided for.

A general statute imposes upon the borough the duty of maintaining highways within its limits. That makes it necessary for the borough to dispose of all surface water falling or coming upon the highways.

Were the acts of the defendant, of which the plaintiff complains, done in the exercise of powers conferred upon it by its charter, or in

the discharge of duties imposed upon it by the general statute? We think the defendant was caring for the highways under the general statute. If the suit is for acts done under the charter, it is questionable whether the plaintiff has any remedy except that which the charter provides. But, passing that, the complaint is not adapted to a cause of action the gist of which is an omission of the borough to provide for the appraisal of damages. On the other hand, it is apparent that surface water is the principal thing of which the plaintiff complains, and that the sewerage mentioned in the complaint is such sewerage as may have been discharged upon the surface and mingled with water passing thereon.

We interpret the complaint, therefore, as alleging a cause of action resulting from the disposition, by the defendant, of surface water on the highways, in the discharge of its duty in caring for the highways. We come, then, to the main question: Does the complaint disclose a good cause of action?

The defendant is accused of no negligence resulting in an injury to the plaintiff; it is not accused of a faulty construction or repair of the highway, by reason of which the plaintiff has been injured, as in *Mootry v. Danbury*, 45 Conn. 550; it is not accused of improperly discharging the surface water on the plaintiff's premises in such a manner as to expose her property unnecessarily to special damage, as in *Danbury & N. R. R. Co. v. Norwalk*, 37 Conn. 109; nor is it accused of a direct trespass upon the plaintiff's land, as in *Weed v. Greenwich*, 45 Conn. 170. But in its general features this case is very much like that of *Judge v. Meriden*, 38 Conn. 90, in which the superintendent of streets, with a view to protecting them from damage, changed the course of the water so that it flowed on the plaintiff's premises, to his injury; and this court held that the city was not liable. The defendant so graded the streets and constructed its drains, sewers, and culverts (presumptively in the best manner) as to cause the water to flow on the plaintiff's land. The intent charged we consider as an intent simply to change the grade, and not a malicious intent to injure the plaintiff. Surface water must be turned from the road-bed into drains and gutters, and at times will flow in considerable quantity. It would be practically impossible for towns, cities, and boroughs, in most cases, to prevent such water from flowing on to the lands of the adjoining proprietors. To hold them responsible for not doing so in all cases would be unreasonable. It is only in special cases, where wanton or unnecessary damage is done, or where damage results from negligence, that they can be held responsible. It logically follows that the special facts which show that the act was wanton or unnecessary must appear in the complaint. Nothing of the kind appears in this complaint.

We have a statute which recognizes this distinction. Gen. Stat. p. 233, § 16. It provides that "persons authorized to repair highways may make or clear any watercourse, or place for draining off the water therefrom, into or through any person's land, so far as necessary to drain off such water." In 1881 this statute was re-enacted, with the further proviso that

the work should be "done in such a way as to do the least damage to such land," and with a proviso that such water should not be drained into any dooryard, in front of any dwelling-house, or into any enclosure used exclusively for the storage and sale of merchandise." Sess. Laws 1881, p. 84, § 65. Clearly, this statute exempts the defendant from liability, unless it appears that the work was done in such a way as to do unnecessary damage, or that the water was drained into some place prohibited by the statute. Nothing of the kind appears.

The complaint is insufficient.

In this opinion the other Judges concurred.

Frank L. PALMER *et al.*

v.

HARTFORD FIRE INSURANCE CO.

1. A policy of insurance may be reformed, although the insured has held the policy until after a loss, in silence and in ignorance, from the omission to read the policy or a careless reading, of the necessity for such reformation.
2. Where an insurance company agrees to renew an insurance upon the same terms and conditions as those of a policy previously issued by it upon the same property, which had expired, and solicits the renewal of the insurance; and a material and variant condition is by mistake inserted in the policy issued by it in pursuance of such contract of renewal; and the stipulated premium is received and retained,—in an action to reform the last policy the court will not hear the claim of the company that it is entitled to the benefit of the variant condition, where the other party had neither actual nor imputed knowledge of the change.
3. In the company's promise to renew the insurance upon the same terms and conditions as those of the previous policy, there is a legal justification for the omission of the insured to examine the new policy delivered, and for his assumption that there is no designed variance.
4. The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted is subject to this limitation, namely, that it is not to be applied in behalf of any person who by word or act has induced the omission to read.

(New London—Filed February, 1887.)

APPEAL by plaintiffs from a judgment of the Superior Court of New London County in favor of defendant, sustaining a demurrer to a complaint in an action to reform a policy of fire insurance, and to recover the amount due thereon. *Reversed.*

The facts and questions raised appear from the opinion.

Mr. S. Lucas, for plaintiffs, appellants:

It is alleged in the plaintiffs' complaint that

there was an agreement between the parties as to the specific terms of the policy to be issued; for it is alleged that the defendant proposed to the plaintiffs to renew said insurance (*Vide* Bouv. L. Dict. *Renewal*) of \$5,000 for the same premium, on the same terms and conditions as contained in the first policy. The specific terms of the policy to be issued were definitely determined; and the proposition made by the defendant, having been accepted, became the original contract of the parties.

1 Pars. Cont. p. 483; May, Ins. § 45.

The complaint of the plaintiffs sets up a contract of insurance with the defendant, and states, by reference to the old policy and otherwise, fully what that contract was, and then adds that the defendant was to issue a policy therefor. It follows that that policy should contain the contract as made.

It was not necessary to aver that there was a mutual mistake between the parties as to the terms of the policy of insurance to issue, for the simple reason that there was no mistake on that point on the part of either. It stands uncontradicted in the case at bar, that the insurance sought by the plaintiffs is the one the defendant by its contract had agreed to give, and hence there could be no mistake in regard to that on the part of either party.

The cause of complaint is that the defendant has not performed the contract admitted by the demurrer.

The defendant had agreed to deliver to the plaintiffs a policy of a certain character. It has not done it, but has delivered a policy of an entirely different character. Does it make any difference whether the defendant failed to do that, either by mistake or design? The effect is the same in either case.

If the defendant delivered the policy by design, in violation of its contract, without disclosing its true character, then it was guilty of a fraud; and if guilty of a fraud, it is without excuse, and the contract should be enforced.

Story v. Norwich & W. R. R. Co. 24 Conn. 113; 1 Story, Eq. Jur. § 187; *Essex v. Day*, 52 Conn. 496, 1 New Eng. Rep. 188.

The rule that a mistake must be mutual, or a court will not reform a contract, within the limits of its proper application, is founded in reason; and the reason is this: If a contract is corrected by a court of chancery, to make it conform to the intention of one of the parties, it is of course forcing a contract upon the other party which he never intended to make, unless his own intent concurred with that of the other party.

Essex v. Day, *supra*.

But that is not this case. The plaintiffs are not seeking to force a contract on the defendant which it never made, but to enforce a contract it did make, and which became obligatory before a policy was delivered.

Sheldon v. Conn. Mut. Ins. Co. 25 Conn. 207; May, Ins. § 14.

If, upon an agreement for insurance, a policy be drawn by the insurance office, in a form which differs from the terms of the agreement, and varies the rights of the parties insured, equity will interfere, and deal with the case on the footing of the agreement, and not on that of the policy.

Kerr, Fr. 423.

CONN.

The plaintiffs were not guilty of such laches as deprive them of equitable relief. It comes with a poor grace from the defendant, who committed the error or fraud, to blame the plaintiffs for trusting to the defendant to do as it agreed, and not detecting the error. This was not an instrument signed by the plaintiffs or given by them. It was simply received by them under the misapprehension that it was right, which misapprehension was induced by the confidence they put in the defendant. And then it should be kept in mind that they had made a contract with the defendant whereby the defendant was legally, as well as morally, bound to issue the proper policy. It would seem this objection is without force. Courts have granted relief in cases very much stronger for defendant than this; and that, too, when there was no prior agreement on which to base the claim for relief.

Wooden v. Haviland, 18 Conn. 101; *Essex v. Day*, 52 Conn. 492, 1 New Eng. Rep. 188.

If the defendant was deprived of any right of rescission, it was caused by its own neglect or wrong. If it delivered the policy by mistake, it was its mistake; if by design, it was its own fraud. What claim on the plaintiffs has the defendant, simply because they omitted to detect its own mistake, or fraud, by reason of the confidence they reposed in the defendant?

Mr. Charles E. Perkins, for defendant, appellee:

The general rule is well settled that, where parties have once reduced their agreement to writing, and it has been delivered and received, no evidence of previous negotiations or arrangements, whether verbal or in writing, can be received to add to, alter, or contradict the terms of the written instrument. This is the well-settled rule, both at law and in equity. The rule is uniform at law, but there are certain exceptions to it in equity. These are, that if one party to the contract has been guilty of fraud, by which the contract is made different from what it was agreed to be; or if it is so made by the mutual mistake of both parties,—equity will interfere and make the contract what it should have been; but these are the only grounds.

1 Story, Eq. Jur. §§ 154, 155, *et seq.*; *Hearne v. New England Mut. Mar. Ins. Co.* 20 Wall. 488, 490 (87 U. S. bk. 22, L. ed. 395).

As to fraud: It is evident that no claim can be made under this head, for no fraud is alleged.

Crocker v. Higgins, 7 Conn. 846.

As to mistake: In the first place, it is not alleged anywhere in the complaint that there was any mistake of any kind by either party; or that there was an accidental mistake of the scrivener or clerk in drawing the policy; or that there was a mutual mistake of both parties.

The complaint is clearly defective in this particular, in point of form; and the plaintiffs, though warned by the demurrer that this was the ground of objection, have not seen fit to set up mistake as a ground of relief, thereby impliedly admitting that there was none.

The defendants have a right to know what kind of claim they are called upon to meet, so as not to be surprised upon the trial. If fraud

is claimed, they should be informed of that; if mistake, they should have an opportunity to prepare that issue; but here, in this part of the complaint, all that is alleged is merely that there was an agreement to renew the insurance by issuing another policy on the same terms and conditions as the former one, and that the defendants did not perform that agreement. If this was all there was in the complaint, it would be clearly bad.

The real ground of the plaintiffs' claim appears from the latter part of the complaint, where the plaintiffs allege that there was a mistake on their part alone. They allege that they received the policy as it is, but did not look at or read it, and if they had done so, they would not have received it, but would have refused to take it, and applied elsewhere for other insurance; that thereby they were mistaken as to what the policy really was, received it under such mistake, and now, after the fire, want the policy reformed to make it what they supposed it was going to be.

The mistake must be a mutual one; both parties must have done what neither intended to do.

German American Ins. Co. v. Davis, 181 Mass. 316; *Hearne v. New England Mut. Mar. Ins. Co. supra*; *Bishop v. Clay, F. & M. Ins. Co.* 49 Conn. 167; *Spare v. Ins. Co.* 13 Ins. L. J. 286.

To the same effect are the cases of *Brugger v. State I. Ins. Co.* 5 Sawyer, 310; *Brainerd v. Arnold*, 27 Conn. 624; *Paine v. Jones*, 75 N. Y. 593.

In *Woodbury Sav. Bank Building Assn. v. Charter Oak F. & M. Ins. Co.* 31 Conn. 517, and *Malleable Iron Works v. Phoenix Ins. Co.* 25 Conn. 465, both parties supposed that the answer to the application conveyed the idea which they both had in their minds and intended to convey, but by mutual mistake it was stated incorrectly. The only real question in both of those cases was whether the mistake of the agent of the insurance company was the mistake of the company.

An additional reason for not granting the relief asked for is in the gross negligence and laches of the plaintiffs in not looking at or examining the policy when given them, until after the fire.

It is a well-settled principle that equity will not relieve where the applicant has been guilty of negligence or laches, and this principle has often been applied to this question of the necessity of reading contracts received from another. It has many times been set up as a defense that the party did not read the contract delivered to him in performance of an agreement, but not successfully.

Bishop v. Clay F. & M. Ins. Co. 49 Conn. 167, 172; *Ryan v. World Mut. L. Ins. Co.* 41 Conn. 172; *Grace v. Adams*, 100 Mass. 507; *Monitor Mut. F. Ins. Co. v. Buffum*, 115 Mass. 345; *Ins. Co. v. Swank*, 12 Ins. L. J. 625; *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519 (Bk. 29, L. ed. 934); *American Ins. Co. v. Neiberger*, 74 Mo. 167; *Richardson v. Maine Ins. Co.* 46 Me. 894.

It is not claimed that the mere fact that the plaintiffs did not look at the policy is, in all cases, conclusive evidence of laches, as a matter of law. It may be explained; sickness, false statements by the other party, and other

circumstances, may excuse it, but here the plaintiffs allege no such facts, as it was their duty to do if there were any. This court takes the case just as the court below did, that the plaintiffs accepted this policy without looking at it, and kept it until after the fire, never objecting to it, or giving the defendants an opportunity to cancel if there was any objection made; and now, after the loss, come to a court of equity, admitting that they were guilty of gross negligence, and ask the court on that ground alone to change a contract which is just what the defendant intended that it should be, so far as any allegation or claims of the plaintiffs go.

Again, the plaintiffs were bound to know, from the fact that a new policy was given to them, that it was not a mere renewal of the old one. It is not alleged, nor is there any pretense, that in fact the old policy was renewed with all its specific terms and conditions. The allegations relative to the preliminary negotiations, which are only formally admitted to be true by the demurrer, for purposes of pleading, without reference to their actual truth, do not claim that.

I presume that the learned counsel for the plaintiffs will rest his case principally upon the late decision of *Eseex v. Day*, 52 Conn. 483. 1 New Eng. Rep. 183, and will claim that that case changed the law, not only as to laches, but also as to the necessity of mistakes being mutual; but I submit that it was not the intention of the majority of the court to do either, but merely to say that, in the peculiar circumstances of that case, they did not find ground for the application of either of those principles, or found other facts which took the case out of such application.

Pardee, J., delivered the opinion of the court:

The complaint in this case is in effect as follows: Prior to May 15, 1884, the defendant had issued to the plaintiffs a policy of insurance against loss by fire upon merchandise; on that day it expired; on that day the defendant proposed to them to renew the insurance upon the terms and conditions of the expiring policy; the plaintiffs accepted the proposition; the defendant wrote a policy, delivered to, and received the premium from, the plaintiffs; they, relying upon the fidelity of the defendant to its promise, and supposing the last written policy to contain the same stipulations and conditions as were in the first, omitted to read it. The merchandise was damaged by fire on August 17, 1884; subsequently the plaintiffs, for the first time, discovered that the last policy contained this condition, which was not in the first: "Co-insurance clause. If the value of the property at the time of any fire shall be greater than the amount of the insurance thereon, the insurer shall be considered as co-insurer for such excess, and all losses shall be adjusted accordingly." In this respect the last policy materially differs from the first. The plaintiffs would not have accepted the policy and paid the premium if they had known that it contained this clause; and if the defendant had notified them of its refusal to perform its agreement, they could and would have obtained elsewhere, at the same price, the desired

insurance upon the stipulated terms. The defendant refuses either to correct the policy or perform the agreement. The plaintiffs ask that the policy may be reformed so as to express the agreement, and that the defendant be compelled to perform the agreement and pay the indemnity promised by it. The defendant answers by demurrer, assigning therefor the following reasons: "That, upon the facts stated, the plaintiffs are not entitled to the relief sought; that the complaint does not aver that there was a mutual mistake between the parties as to the terms of the policy, or as to the agreement for one; and that the plaintiffs were guilty of gross laches in not reading the policy, and in not notifying the defendant of their claim, so that it might have exercised its right of rescission before loss."

The superior court held the complaint to be insufficient. The plaintiffs appeal, assigning the following reasons:

1. The court erred and mistook the law in rendering judgment in favor of the defendant to recover costs.

2. In not holding that the plaintiffs were entitled to recover at least the amount of loss covered by the policy as delivered to the plaintiffs by the defendant.

3. In holding that, upon the facts stated in the complaint, the plaintiffs were not entitled to the relief sought.

4. In holding that the plaintiffs should have averred in their complaint that there was a mutual mistake between the plaintiffs and defendant as to the terms of said policy.

5. In holding that there was no allegation in the plaintiffs' complaint of an agreement between the parties as to the specific terms of the new policy that was to be issued.

6. In not holding that, as the defendant had agreed to renew said insurance on the same terms and conditions as stated in the old policy, for the same premium, and issue a policy therefor, it was immaterial, under the circumstances in this case, whether the failure to perform said agreement on the part of the defendant was by mistake or design.

7. In holding that the plaintiffs were guilty of such gross laches in not examining the new policy that they are not entitled to relief; and in holding that the defendant was excused in the performance of its contract because the plaintiffs did not detect its omission to deliver such a policy to the plaintiffs as it agreed to, till after the fire.

8. In holding that it was the duty of the plaintiffs to detect and notify the defendant of an alteration which the defendant made, and, in the very nature of the case, must have had knowledge of, to wit, the changes in the terms and conditions of the new policy from those in the old.

9. In not holding that the plaintiffs were entitled to a correction of said last-named policy in the manner sought, and to specific performance of the agreement stated in paragraph 10, and to judgment for the amount that would be due by said policy, when corrected, by reason of said loss by said fire.

For the purpose of testing the sufficiency of the pleadings, we are to assume that the defendant admits that an agreement between it and the plaintiffs for indemnity against loss

by fire, containing every stipulation and condition which should enter into or affect it, was reduced to writing, and that the defendant agreed to make and sign a copy thereof, except as to the dates of commencement and termination of risk, and deliver the same to the plaintiffs; that it wrote and signed a policy of insurance, and delivered it to the plaintiffs as and for a performance of its promise, and received the stipulated premium, without notice to them that an important and variant condition had been added to those contained in the first written agreement; and that the plaintiffs, trusting to the defendant's fidelity to its undertaking, omitted to examine the policy for the purpose of discovering variances from the written draft, and did not in fact discover the variance until after damage to the property, for which indemnity had been sought.

The presence of the variant clause in the delivered instrument is of necessity due either to intention or mistake upon the part of the defendant. To attribute it to the former is to charge constructive fraud at least; and, inasmuch as the plaintiffs have not charged this specifically, if we accede to the rule of law invoked by the defendant,—that unless fraud is so charged it is excluded from the case,—there remains the other and only possibility, namely, mistake; and upon a fair interpretation of the allegation, this, the only possible legal meaning, is to be attributed to it, namely, that the writing, which, by the agreement of the parties, should have been a copy of a previously-written draft, did, in fact, contain a variant and material clause which neither of them desired or intended that it should contain, and which neither party would knowingly have permitted to be in it. This meaning the defendant should have found therein, and to it made answer.

That it is a most frequent and useful office of a court of equity to reform written contracts, and make them conform to the verbal agreement or written draft which of necessity precedes them, is in the knowledge of all; and it is sufficiently accurate to say that no writing is beyond its reach, if the prayer for relief is presented in due season and supported by convincing evidence. Of course the presumption in favor of the written over the spoken agreement is almost resistless; and the court has wearied itself in declaring that such prayers must be supported by overwhelming evidence, or be denied. But in the case at bar the defendant volunteers to lift this burden from the plaintiffs, and upon the pleadings admits that the delivered policy is materially variant from the precedent written draft agreed upon.

There are many precedents for the reformation of policies of insurance in cases where the insured has held the policy until after a loss, in silence and in ignorance of the necessity for such reformation,—ignorance because of the omission to read the policy, or of a careless reading. A few are cited.

In *Andrews v. Essex F. & M. Ins. Co.* 3 Mason, 10, Story, J., said: "There cannot at the present day be any serious doubt that a court of equity has authority to reform a contract, where there has been an omission of a material stipulation by mistake. And a policy of insurance is just as much within the reach of the

principle as any other written contract. But a court of equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence,—that parol evidence ought not to be admitted to vary a written instrument. It ought therefore in all cases to withhold its aid where the mistake is not made out by the clearest evidence, according to the understanding of both parties, and upon testimony entirely exact and satisfactory. There is less danger where the instrument is to be reformed by reference to a preliminary written contract which it was designed to execute. But even here there is abundant room for caution, since the parties may have varied their intentions, or the clause may not have been originally understood by either party to go to the extent now required. And these considerations acquire additional force where circumstances have occurred in the intermediate time which give an increased importance to the asserted mistake. Under these limitations the doctrine of courts of equity on this subject does not seem at variance with general convenience or justice."

In 1 Story's Equity Jurisprudence, § 159, it is said as follows: "The relief granted by courts of equity in cases of this character is not confined to mere executory contracts, by altering and conforming them to the real intent of the parties; but it is extended to solemn instruments which are made by the parties in pursuance of such executory or preliminary contracts; and indeed, if the court acted otherwise, there would be a great defect of justice, and the main evils of the mistake would remain irremediable. Hence, in preliminary contracts for conveyances, settlements, and other solemn instruments, the court acts efficiently by reforming the preliminary contract itself, and decreeing a due execution of it as reformed, if no conveyance or other solemn instrument in pursuance of it has been executed. And if such conveyance or instrument has been executed, it reforms the latter also by making it such as the parties originally intended."

In *Oliver v. Mut. Commercial Mar. Ins. Co.* 2 Curtis, 277, the marginal note is as follows: "If a policy, when drawn and received, does not correctly express a previously-concluded agreement for insurance which it was designed by both parties to execute, equity will reform it. If underwriters conclude an agreement for insurance with one known to them to be merely an agent, and nothing is said as to whose account the insurance is to be made upon, the agent has a right to a policy insuring him as agent, or for whom it concerns. If the agent makes a mistake in declaring the interest, equity requires it to be corrected, and the policy reformed. There is a distinction between the correction of a mistake in a written contract and in the execution of a power. In the latter case courts interpose more willingly. But if the agent did not declare the interest in the wrong person by mistake, but through a fraudulent design, equity will not relieve the principal. If a party fails through mistake to obtain such a policy as he is entitled to by an existing valid contract, equity will relieve,

though the mistake arose from ignorance of law."

In *North American Ins. Co. v. Whipple*, 2 Biss. 419, the court says: "It is easy to see how, in the filling up of printed blanks, a mistake like that alleged by the complainant might happen; and the policy clerk says that it occurred from the fact that he was accustomed, in the majority of instances, to fill up yearly policies. All the other policies were made out for two months; that is, they expired on the 22d of December, 1864, instead of the 22d of December, 1865. This is not contradicted by the defendant. The defendant himself, who personally procured this insurance, has no recollection, or does not testify to any, in regard to what transpired at the time he applied for the insurance. He admits that he obtained the insurance at the time mentioned, but does not profess to remember the time the policies were to run, from anything he can now recall of the transaction. It is shown in the proofs,—and I presume it would be taken notice of without proof,—that fourteen months is an unusual time for the life of an insurance policy. The usual time is two, three, four, six, and twelve months, and if for any reason the defendant had had occasion to apply for a policy so much out of the usual course of business, it would have made some impression upon his memory and that of the clerks and agents of the insurance company who participated in the transaction. So, also, the fact that only so small an amount was paid for a policy having so long a time to run would seem to be a circumstance calculated to excite attention and impress itself upon the memory. It is true that the defendant testifies that he afterwards sent his policies to the insurance agents to have them looked over and mistakes corrected; but both the agents deny that they ever saw this policy, and assert positively that they supposed the same had expired on the 22d of December, 1864, and had so entered the same on their books, and so informed the complainant, and had no knowledge that the policy in question was claimed to be in force until after the fire. Under the evidence in this case I can but conclude that the substantial allegations in the bill are made out by the proofs, and that the complainant is entitled to the relief prayed for."

In *Phoenix Fire Ins. Co. v. Gurnes*, 1 Paige 278, the marginal note is as follows: "A court of chancery has jurisdiction to correct mistakes in policies of insurance, as well as in all other written instruments. The evidence of the mistakes in all cases should be clear and satisfactory." Chancellor Walworth said in this case: "It is well settled that a court of equity has jurisdiction to correct mistakes in policies of insurance, as well as in all other written instruments. Phill. Ins. 14. But the evidence of such mistake, and that both parties understood the contract in the manner in which it is sought to be reformed, should be clear and satisfactory. In policies of insurance, the label or written memorandum from which the policy was filled up is always considered of great importance in determining the nature of the risk and the intention of the parties. Thus, in *Motteaux v. London Ins. Co.* 1

Atk. 547, *Lord Hardwicke* held that a policy ought to be rectified agreeably to the label; and in the issues which he directed in that case the label was treated as the real contract between the parties. In this case there is a substantial difference between the policy and the written memorandum on which it is founded."

In *Wood on Fire Insurance*, § 484, it is said as follows: "When an application for insurance is made and accepted, and a policy is issued, which, either by mistake or fraud on the part of the insurer, essentially varies from the contract made, and the policy is not seen or examined by the assured until after the loss thereunder occurs, he is not estopped from seeking a reformation of the contract, upon the ground that he accepted the policy. Thus, where the plaintiffs entered into a contract for insurance with the defendant's agent, and paid him the premium, and took from him a receipt stating that the insurance was for \$10,000 upon 'merchandise, generally contained in their three-story brick building, metal roof, and occupied by them as a commission house,' and a policy was issued containing all the provisions of the contract except the words 'as a commission house,' and the policy was received by a clerk of the plaintiffs, and its terms were not known to the assured until the loss, it was held that, 'inasmuch as the insurer refused to pay the loss upon goods held by commission, the assured were entitled to have the policy made to conform to the agreement, and could not be said to have accepted the change in the contract as indicated in the policy. The fact that proceedings are not instituted for its reformation until after a loss does not, of itself, bar the remedy. It is a circumstance to be taken into consideration in connection with other circumstances in determining whether the plaintiffs waived the variance, but, if the delay is excused, the remedy remains.'"

In *Van Tuyl v. Westchester Fire Ins. Co.* 55 N. Y. 657, the plaintiffs procured insurance upon their stock and materials in their manufactory. One of the printed conditions declared it void in the case of the establishment running, in whole or in part, over or extra time, or running at night, without special agreement. The plaintiffs gave evidence to show that they previously insured with the defendant, but had the policy cancelled because of the condition above mentioned being in it; that the plaintiffs' agent informed the defendant that the United States Insurance Company of Baltimore was writing on the property, and that their policy did not contain that clause; that the defendant thereupon agreed to write as the other companies did, and to follow the form of the United States policy, which the plaintiffs were to and did furnish for the defendant to copy. The plaintiffs thereupon produced a blank form, which the witness testified was a blank policy of the latter company. This was offered in evidence, and was objected to upon the ground that the copy shown the defendant should be produced, and that a blank form not filled up was not proper evidence. The objection was overruled, and the defendant excepted. The plaintiffs also gave evidence tending to show that they did not discover that the per-

mission required was not in the policy, until after the fire. The evidence as to the agreement was denied by the defendant's agent who effected the insurance. It was held that the plaintiffs were entitled to have the policy reformed. See also *New York Ice Co. v. Northwestern Ins. Co.* 23 N. Y. 857; *National Fire Ins. Co. v. Crane*, 16 Md. 280; *Harris v. Columbiana Mut. Ins. Co.* 18 Ohio, 116; *Weed v. Schenectady Ins. Co.* 7 Lans. 452; *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 263; *Brisco v. Pacific Mut. Ins. Co.* 4 Daly, 246; *Buntin v. Orient Mut. Ins. Co.* 3 Keys, 667; *Malleable Iron Works v. Phoenix Ins. Co.* 25 Conn. 465; *Bennett v. City Ins. Co.* 115 Mass. 241; *Molere v. Pa. Fire Ins. Co.* 5 Rawle, 342; *National Traders Bank v. Ocean Ins. Co.* 62 Me. 519; *Lippincott v. Ins. Co.* 3 La. 546; *Franklin F. Ins. Co. v. Hewitt*, 3 B. Mon. 281; *Law v. Warren*, 6 Irish Eq. 299.

In *National Traders Bank v. Ocean Ins. Co.* 62 Me. 519, it is said as follows: "This is a bill in equity asking the court to reform an insurance policy. The authority of the court to grant the relief prayed for is conceded. The only question is whether the evidence of mistake is such as to justify the court in exercising its authority. * * * As there can be no recovery upon the policy as it is now written, for the reason that, between the voyage insured and the one actually made by the vessel, there would be apparently a fatal deviation, the plaintiffs ask to have the policy reformed so that it will describe the voyage correctly. We think the relief prayed for should be granted. Where, as in this case, an insurance company undertakes to insure the charter of a vessel, after being informed that no copy of the charter has been received, and it is not known how many ports she will be required to use, and, through mistake, the policy is so written as to limit the vessel to the use of one port, when in fact her charter requires her to use two, we think a court of equity should order the policy reformed so as to make it describe the voyage correctly. The mistake in this case seems to be established beyond the possibility of doubt. The policy and the charter are both written instruments. A comparison of the two demonstrates that the voyage described in the charter is misdescribed in the policy. Can there be any doubt that this misdescription was the result of mistake? We think not. It is impossible to believe that the applicant for insurance knowingly paid the premium for a void policy. Nor would it be just to the officers of the insurance company to suppose that they took a premium for a policy known to them to be of no value. The conclusion is therefore inevitable that the misdescription was the result of a mistake,—a mutual mistake,—a mistake in which both parties participated; and we think equity and good conscience require that it should be corrected."

In *Buckland v. Adams Express Co.* 97 Mass. 182, the court said: "On a consideration of the facts stated, it does not appear to us that the plaintiffs ever did agree that the merchandise in question should be transported on the terms set forth in the receipt which was delivered to the workman at the manufactory when the package was delivered to the defendant's agent. It is not stated that the plaintiffs, or either of

them, ever read the paper containing the alleged regulations, or one similar to it. It is agreed that the defendants received and carried like packages of merchandise for the plaintiffs, at or about the time the one in controversy was delivered for carriage, without giving the plaintiffs any receipt whatever therefor, and that this was the course of dealing between the parties in a large majority of the instances in which the defendants had been employed by the plaintiffs. From this it would appear that the ordinary course of business was for the defendants to receive merchandise from the plaintiffs, without attempting to limit their liability as carriers in any manner whatever. Under these circumstances we cannot fairly infer that the plaintiffs understood that, by the delivery of a receipt for the merchandise, the defendants intended to limit the liability which they ordinarily assumed in their dealings with the plaintiffs; or that the latter understood and assented to the contents of such receipt as fixing the terms on which the defendants were to transport the merchandise."

In *National Fire Ins. Co. v. Crane*, 16 Md. 295, the court said: "Whatever effect the want of such an indorsement may have at law in an action on the policy, we think it cannot be urged in a court of equity, in a cause otherwise free from objection. The judge below has correctly stated the law on the subject. The indorsement could have been made only by the company. If it be omitted, who is to blame? Certainly not the assured. These policies contain many stipulations, some of them operating as conditions precedent for the benefit of the company, and few for that of the assured. It is too common for applications to be met and adjustment refused on frivolous and unjust pretenses, in order to defeat fair claims on contracts of which good faith is the very essence; and we think it would promote the interest of insurance companies, and tend to a higher state of morals in business transactions, if they would exhibit more readiness to settle demands upon them than, as we discover from the numerous reported cases on the subject, appears to be usual with them. In this case the president of the company dictated the application himself; the prior insurance was made known to him; the parties relied upon him; they never went to the office of the company; he came to the counting-house of the complainant, seeking the risk; and after hearing all they had to say on the subject he departed, and soon after sent the policy and received the premium, his clerk saying that it was all right, the only defect, however, being that the company had omitted part of its own duty in not indorsing the former insurance. In such a case we are called upon to say that the party is without remedy. On the contrary, we think it would be a reproach to the jurisprudence of the State if this company were discharged from their contract on any such grounds. There is a distinction in cases where the preparation of an instrument belongs to the party to become liable under it; he ought in that case to be dealt with more strictly. 19 Ves. 257. Insurance contracts are within this principle; and equity will interpose, not only in cases of fraud, but also of mistake, where a policy is drawn up in a form different from

the application, or anything is omitted which it is the duty of the company to insert or indorse on the instrument. *Collett v. Morrison*, 9 Hare, 162; 21 L. J. Ch. 878."

In *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 266, it is said: "That the contract of insurance agreed to be made by the defendants was such in its character as the plaintiffs have alleged in their complaint, has been found by the judge, and is conclusive upon us. The fact on which the appellants rely—that the policy actually made out was in the plaintiffs' hands for a considerable time and until the loss had occurred—was a circumstance to be weighed by the judge as bearing upon the truth of the plaintiffs' allegation that the policy did not pursue the contract. It has undoubtedly been considered by the judge, and his judgment has been given, notwithstanding that circumstance, in favor of the plaintiffs. There is no rule of law which fixes the period within which a man may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights, short of the period fixed by the Statute of Limitations. *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige, 278."

It is a matter of common knowledge that a policy of insurance against fire, at the present day, is a lengthy contract, which, after specifying the main things, namely, the subject, its location, the owner, the amount, the time, and the price, embodies very many stipulations and conditions for the protection of the underwriter. If a person desiring indemnity against loss applies to the underwriter, and states the main things above enumerated, and says no more, he has knowledge that he has asked for and will receive a contract which, in addition to those, will contain many limiting conditions in behalf of the party executing it; and when he receives the policy he cannot avoid seeing and knowing that there are many more stipulations in it than were covered by his verbal request. It may well be that a due regard for the rights of others requires him to examine those stipulations, and express a timely dissent, or be held to an acceptance thereof. Nothing which has previously transpired between him and the underwriter furnishes justification for omission to read them. The underwriter has not invited his confidence by any promise as to what the writing shall contain or omit.

But if the underwriter solicits a person to purchase of him indemnity against loss by fire; and if they unite by making a written draft of all the terms, conditions, and stipulations which are to become a part of or in any way affect the contract; and if the underwriter promises to make and sign a copy thereof, and deliver it as the evidence of the terms of his undertaking; and if a material and variant condition is by mistake inserted, and the variant contract is delivered, and the stipulated premium is received and retained,—the court will not hear the claim that he is entitled to the benefit of the variant condition, where the other party had neither actual nor imputed knowledge of the change. In his promise to make and deliver an accurate copy, there is justification before the law for the omission of the other party to examine the paper delivered, and for his assumption that there is no designed variance. A man is not,

for his pecuniary advantage, to impute it to another as gross negligence, that the other trusted to his fidelity to a promise of that character.

The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted is subject to this limitation, namely, that it is not to be applied in behalf of any person who by word or act has induced the omission to read. The defendant has brought to our notice a few of the many cases in which the rule has been plainly declared; but we think that in few or none of these did the party seeking to enforce it subject himself to this limitation.

There was, in the first written draft agreed upon by the plaintiffs and defendant, the contract between them; in all its terms and conditions it became, and has hitherto continued to be, operative. The draft of another and variant one has not annulled or affected it; because he last has not, in the eye of the law, been accepted by, or become obligatory upon, the plaintiffs. That contract the defendant had the right to rescind,—a right which it has possessed in its fullest measure, because it was not affected by the delivery of the variant one not accepted by the plaintiffs; and if, because of its own negligence in omitting to execute and deliver a true copy of the original agreement, it resulted that it was induced to refrain from exercising its right of rescission, it must accept the consequences rather than cast the burden upon the plaintiffs.

There is error in the judgment complained of, and it is reversed.

In this opinion the other Judges concurred.

Valentine B. CHAMBERLAIN, State Treasurer,

CONNECTICUT CENTRAL R. R. CO.

In a suit to foreclose a mortgage made by the Connecticut Central Railroad Company to the State treasurer as trustee, the New York & New England Railroad Company, which owned all the mortgage bonds, and at whose request the suit was brought, was made a codefendant. The latter company had for some time had exclusive possession of the mortgaged property, under a lease which contained an agreement to the effect that the net income derived from the property should be applied to the payment of the interest coupons, upon the non-payment of which the foreclosure suit was based. The Connecticut Central Railroad Company filed an answer and answer-bill setting up that the New York & New England Railroad Company was the real plaintiff; that it was bound to account in this action for its receipts and expenses while in possession of the mortgaged property; and that on a just accounting it would appear that the net earnings had been enough to pay, and in equity had paid, the defaulted cou-

pons upon which the complaint for foreclosure was based. *Held:*

(a) While the mortgage was to the State treasurer as trustee, yet in effect it was a contract between the mortgagor and the holders of the bonds, and in equity the case stands as it would had the present bondholders been named in the deed as mortgagees.

(b) A mortgagee in possession, whether acquired by actual entry or by attornment of the tenants, will be subject, not only to the equity of redemption, but to the duty of applying the rents and profits in discharge of the debt, and rendering an account of their receipt and application.

(c) An equitable mortgagee is as liable to account as a legal mortgagee.

2. It was claimed by the New York & New England Railroad Company that it was in possession under the lease from the Connecticut Central Railroad Company; that the lease is a separate and independent contract from the mortgage; that it covers property not included in the mortgage; and that it provides for an arbitration in case of difference, and no arbitration has been had or asked. *Held:*

(a) That the contract of lease, instead of being independent, has an intimate connection with the subject-matter of the suit, in that it provides for the application of the net income of the leased property first of all to the coupons claimed to be in default.

(b) If the possession and use of mortgaged premises by the owner of the mortgage debt, without any agreement at all respecting the matter, imperatively demands an accounting and the application of rents and profits to the payment of the debt, the duty can be no less on the party who has agreed to do that very thing.

(c) The leasehold estate and the mortgage estate are substantially identical.

(d) The New York & New England Railroad Company, having caused this suit to be instituted for its sole benefit, is in no position to make the objection that the lease provides for an arbitration, if the objection were otherwise good; for, having invoked the jurisdiction of a court of equity to pass upon its allegations, it cannot limit that jurisdiction till it has determined all the equities between the parties, relative to the subject-matter.

(e) An agreement to submit to arbitration will not be held valid, either in law or equity, when its effect is to oust the court of jurisdiction.

3. *Held, finally,* that it is the duty of the New York and New England Railroad Company to account in this action, and that the defense founded upon the anticipated results of such accounting is one the defendant should be allowed to make.

(Hartford—Filed February, 1887.)

APPEAL by defendant from a judgment of the Superior Court of Hartford County, sustaining a demurrer to defendant's answer in an action to foreclose a mortgage. *Reversed.*

The action was brought by plaintiff as treasurer of the State and *ex officio* trustee for the holders of certain coupon bonds of the Connecticut Central Railroad Company, to foreclose a mortgage of the property of such railroad company, made to plaintiff's predecessor. After the suit came into court, the New York & New England Railroad Company, which owned all the mortgage bonds, was made a party defendant. The case was heard before Andrews, J., on demurrer to the defendant's answer and cross-complaint. The court sustained the demurrer, and entered a decree of foreclosure, and defendant appealed.

The case is stated in the opinion.

Mr. Lewis Sperry, for defendant, appellant:

As a question of equity pleading, both the trustee (the State treasurer) and the *cestui que trust* (the bondholders) are necessary parties.

Goddard v. Prentiss, 17 Conn. 555; Dan. Ch. Pl. 4th ed. 220 and note, 221, 259.

It is undoubtedly true, under the terms of the mortgage, and under the Practice Act, that the trustee could maintain an action in his own name. It is also undoubtedly true that if the trustee refuses to act, a single bondholder may maintain an action in his own name, for his own benefit and the benefit of others who may wish to join with him.

Alexander v. Central R. R. Co. 3 Dill. 487; *Sage v. Central R. R. Co.* 98 U. S. 412 (Bk. 23, L. ed. 988).

If it be true that the *cestui que trust* has all his common-law rights of action preserved to him,—the terms of the mortgage or a code practice to the contrary notwithstanding,—it ought to be equally true that the *cestui que trust* will be liable to all equitable common-law defenses.

In a mortgage obligation the security is incidental to the debt. An assignment of the debt conveys the security with it. If a mortgagee assign the debt without transferring the security, he retains a naked legal title only. He becomes a trustee for the benefit of the holder of the debt. He cannot release the security without rendering himself personally liable to the holder of the debt. The holder of the debt is the only actual party in interest.

Ely v. Stannard, 46 Conn. 124.

The New York & New England Railroad Company has held all the mortgage bonds since about June 1, 1890, and now holds them all. It appears, therefore, that this suit of foreclosure is instituted solely for the benefit of that company. That company is a party to the record, and it is the only party having any actual interest as a plaintiff. And the Connecticut Central is the only party having any interest as a defendant.

Mervin v. Richardson, 52 Conn. 223.

A suit in the name of a plaintiff having a legal title only is ordinarily open to all of the defenses which could be urged against the actual party in interest.

The New York & New England Railroad Company has been in possession of all the mortgaged property since about June 1,

1880. During all that time it has also been the owner and holder of all the mortgage bonds. It follows, therefore, that during all that time it has been a mortgagee in possession. It is well-established law in this State that a mortgagee in possession is bound to account in a court of equity for rents and profits.

Kellogg v. Rockwell, 19 Conn. 446; *Harrison v. Wyee*, 24 Conn. 1.

It went into possession under a lease. It was therefore a lessee in possession. The leasehold property and the mortgaged property are identical. It has held the mortgage as long as it has held the lease. In other words, the company presents a dual character—lessee and mortgagee. The lessee character was created by agreement of parties. The acquirement of the mortgage bonds by it was a matter over which the Connecticut Central had no control. It comes into a court of equity and asserts its rights as mortgagee. Upon such a declaration it ought to be governed in that court by the law applicable to mortgagees. Although both equitable and legal title may be acquired by the same person, a court of equity will not allow the two titles to merge, as long as the ends of justice require that they should be kept separate.

Bassett v. Mason, 18 Conn. 187; *Goodwin v. Keney*, 47 Conn. 486.

This court has already decided that a mortgagee in possession is still bound to account to any person having an interest in the property, notwithstanding he may also hold possession under the mortgagor by an assignment of the equity (*Harrison v. Wyee*, 24 Conn. 1); and is bound to account, even though he enter into possession under an agreement not to account (*Anderson v. Lanterman*, 27 Ohio St. 104; *Moore v. Degraw*, 1 N. J. Eq. 346).

This is the case of a lessee acquiring the mortgage debt while in possession under a lease which reserves no stated rent, but provides in terms that the lessee shall apply the entire income to certain uses, and, among the rest, the payment of interest. The New York & New England Railroad Company, as lessee and mortgagee in possession, has received the entire income of the mortgaged property. The income so received is more than sufficient to pay the alleged overdue interest, over and above all other charges. No account has ever been rendered. The defendant asks for an account. Will the court grant it?

The plaintiff alleges, by way of demurrer, several reasons why an account should not be given:

1. That they are in possession under a lease which covers rights not covered by the mortgage, and that it is a separate contract and provides for arbitration, which has not been had.

These statements are true only in part. The leasehold estate and the mortgage estate are identical. The mortgage conveyed all lands, franchises, "materials, privileges, appurtenances, and property, real and personal, which now belongs to, or hereafter may be acquired by, said company." It is difficult to see how a subsequent lease could convey any more than that. As lessor and lessee, the interest of the two parties was the same—to preserve the equity. When the lessee became a mortgagee,

—which was not contemplated by the lease,—the interest of the parties was adverse. It then became of interest to the New York & New England Company to conceal the earnings, or in some other way to depreciate the value of the property, so as to acquire the equity on the mortgage. The lease is not a separate contract in any such sense as the plaintiff claims. The lease is subsequent to the mortgage, but it relates to the same subject-matter. The mortgage relates to certain property upon which are predicated certain bonds with interest coupons; the lease relates to the same property, contemplates a large income, which has in fact been realized, and provides for the application of the income to the payment of interest. The complaint counts upon overdue interest coupons in possession of the New York & New England Railroad Company. The cross-complaint counts upon accrued earnings in possession of the New York & New England Railroad Company, which it wrongfully refuses to apply to the payment of interest, although sufficient for that purpose.

The lease provides for arbitration as a final settlement of all differences which may arise. The effect of that provision of the lease, if it has any binding effect, is to oust the court of jurisdiction, and it is therefore void as against public policy.

Pearl v. Harris, 121 Mass. 390; *Tobey v. Bristol*, 3 Story, 800; *Horne Ins. Co. v. Morse*, 22 Wall. 445 (87 U. S. bk. 22, L. ed. 865).

2. That the cross-complaint is in the nature of a bill of discovery, but does not contain averments to justify its maintenance. The cross-complaint alleges that the New York & New England Railroad Company is in possession of more than sufficient money, derived from the Connecticut Central, to pay the interest; that the money accrued under the exclusive management of the New York & New England; that, when received, it ought to be applied to certain uses; that it is mingled with their own money, and is received in a fiduciary capacity; that all books, vouchers, and accounts are in its exclusive possession and control; and that the Connecticut Central is unable to establish its claim except by an accounting. It is clearly within the rule in equity. It asks for an account so far forth as the same may be necessary to show that the alleged over-due interest has in fact been paid, and it counts upon "matter already in litigation" between the same parties. A court of equity will grant relief in a case of mutual debts and credits.

Story, Eq. Pl. 9th ed. §§ 398, 399.

The rule is extended under the Practice Act so as to allow such set-off in a suit at law, when pleaded.

Practice Act, § 5, p. 2; § 6, p. 3; § 7, p. 15; *Leavenworth v. Packer*, 52 Barb. 136; *Clinton v. Eddy*, 1 Lana. 61; *Vassar v. Livingston*, 13 N. Y. 248; *Boston Mills v. Bull*, 6 Abb. N. S. 319; *S. C.* 87 How. 299; *Waddell v. Darling*, 51 N. Y. 327.

A suit to foreclose a mortgage given to secure a bond, wherein judgment is asked against the obligor for any deficiency, is subject to a counterclaim of any other cause of action on contract which the obligor had against

the plaintiff at the time of the commencement of the suit.

Hunt v. Chapman, 51 N. Y. 555; *Allen v. Maddox*, 40 Iowa, 124; *Goodwin v. Keney*, 49 Conn. 563.

3. That the cross-complaint attempts to shift the burden of proof.

In a court of equity both parties are reciprocally required to furnish and use such evidence as the court may need. The plaintiff must carry the burden of establishing his bill; but, that being done, the defendant must carry the burden of furnishing to the court such evidence, pertinent to the issue, as lies peculiarly within his knowledge.

2 Story, Eq. Jur. 13th ed. p. 855.

4. That the bonds and coupons, being negotiable, are liable to be transferred. It is sufficient for the purpose of this case to know that they have not been transferred. The judgment appealed from shows that. The cross-complaint claims that they have been paid. If that be true, the subsequent transfer of the overdue coupons would not affect the defense. And this suit has to do with overdue coupons only.

5. That the lease contemplates the operation of an entire road between Hartford and Springfield, and that collateral issues are thereby brought into the case. The lease does not in terms pretend to convey anything in addition to what had been previously conveyed by the mortgage, as before stated. The operated road has been more extended than the leased road. But, as alleged in the cross-complaint, it has all been operated on account of the Connecticut Central, producing a gross income. It is further alleged that the sums paid for track rentals and terminal facilities are proper charges against that gross income, in determining the net income applicable to interest and dividends.

It is no defense to a bill in equity praying for an account of a particular stage line, to say that the line in question has been operated as part of a more extended line, and that the accounts are in the hands of agents and have never been adjusted.

Newton v. Thayer, 17 Pick. 129.

It is no defense that the accounts are intermingled with those of third parties.

Butler v. Cornwall Iron Co. 22 Conn. 359.

Mr. S. E. Baldwin, for plaintiff, appellee:

1. This suit is not the place for an accounting under the lease. This is a simple action for a foreclosure of certain real estate in Connecticut, brought by the mortgagee, who holds in trust for those who may, from time to time, be owners of certain negotiable bonds and coupons. They may belong to A to-day, and to B to-morrow, and the plaintiff's accountability to the owners will change as often. The present ownership of these bonds is in a railroad company, which is also in possession of the mortgaged property, and of certain other property in Massachusetts, under a lease made five years after the mortgage. The lease contains full provisions for the determination of all rights under it. The plaintiff has nothing to do with it. His title is paramount to it. The equitable rights of the bondholders are paramount to it, and are expressly reserved in

the covenants of the lease. The lease requires no accounting except to the State. In lieu of any rendition of accounts to the lessor, it provides that the lessor may itself have free access at all times to the lessee's books, papers, and accounts relating in any manner to the operation of the leased property, and fully examine the same. Should the lessee fail to state or apply the net earnings as required by the lease, the lessor may, after sixty days' notice, re-enter, and if the parties "differ as to whether any act or payment ought to be done or made under the provisions of this lease, then such matter of difference shall be submitted to and fairly decided by such person as arbitrator as the parties may agree upon" or a judge of this court appoint.

The Connecticut Central Railroad Company has exercised its right, under the lease, of inspecting the books of account of the New York & New England Railroad Company. It did this through a committee in 1884, and does not claim that it has ever given notice that it claimed any default under the lease, or asked to have any matter of difference submitted to arbitration.

The answer and cross-complaint are attempts to substitute, for an investigation as to the execution of one contract between A and B, an investigation into the execution of another contract between B and C.

An account is not demandable here, where the mortgage security is a negotiable one, which is designed to pass from hand to hand in the market, like money. It is certainly no answer to the plaintiff's complaint that his *cestus que trust* owe an independent and unliquidated claim, and ought to render an account of it.

So far as the cross-complaint is concerned, it can have no wider scope than a cross-bill in equity, but must be confined to "matter in question in the original complaint," even if it makes new parties.

Practice Book, p. 15, § 8; Id. p. 18, §1; Pub. Acts 1877, p. 170, chap. 45; Story, Eq. Pl. 401; *Harral v. Levery*, 50 Conn. 46, 68.

An accounting for an unliquidated demand for breach of covenant under a collateral contract embracing different property, executed subsequently to the mortgage, and to which the plaintiff is no party, is not a matter brought in question by the complaint.

An accounting would be useless unless it can be made the basis of a set-off. But there can be no set-off save of mutual debts.

Gen. Stat. 424, § 18; Practice Book, p. 2, § 5; *Gaylord v. Couch*, 5 Day, 228; *Fitch v. Gates*, 39 Conn. 369; *Meeker v. Thompson*, 43 Conn. 80.

And there can be no set-off of unliquidated claims. *Waterman*, Set-off, §§ 297, 298; *Jennings v. Webster*, 8 Paige, 508; *Knox v. Protection Ins. Co.* 9 Conn. 483; *New Haven Pipe Co. v. Work*, 44 Conn. 230, 237; *Drew v. Towle*, 27 N. H. 412; *Duncan v. Lyon*, 3 Johns. Ch. 357.

In *Goodwin v. Keney*, 49 Conn. 563, there was an admitted and definite claim of the sole owner of the equity against the sole plaintiff, who was insolvent.

Even if an account could be demanded in this action, the account in fact demanded was plainly unreasonable. It asks for every item, explained in minute detail, of the business of

four years, over a railroad in two States. The lease does not require any such account to be kept. No railroad's books contain such entries. In order to avoid the necessity of any such explanations, the lease guarantees free access to the lessee's original books, papers, way-bills, contracts, etc. The lessee accepted the lease, knowing that it was under this liability and no other. The account asked for is for the whole line from Springfield to Hartford, as an entirety, though the mortgage covers only a separate part of it. The lessee has had ample opportunity since 1880 to re-enter, or ask an arbitration, or bring a bill to redeem, setting up the receipt of net earnings under the lease as payment.

Loomis, J., delivered the opinion of the court:

This is a complaint in the name of the State treasurer against the Connecticut Central Railroad Company for the foreclosure of a mortgage executed by the latter upon all its estate, present and prospective, to secure an intended issue of bonds, which were afterwards in fact issued to the amount of \$325,000, payable in 1895, or, at the election of the holder, at any earlier time after six months' default on the interest coupons annexed to the bonds. The interest was paid to October 1, 1878, and coupons to the amount of \$136,500 have since matured, and are in default, unless the defense set up is true and sufficient.

Ordinarily the contention in such an action is reduced to narrow limits, and can easily be determined; but here the proceedings are much more complicated.

The New York & New England Railroad Company, which, during the pendency of the action, was, upon application of the plaintiff, made a codefendant, is the owner and holder of all the bonds and coupons constituting the mortgage debt; and this suit was instituted by the plaintiff as treasurer of the State, by request of the New York & New England Railroad Company, for its sole benefit; and the latter, since June 1, 1880, has had exclusive possession of all the property mortgaged, under an agreement contained in a lease reserving no rent, but stipulating that the net income derived from the use of the property should be applied to the payment of the identical coupons which in this suit are alleged to be due and unpaid.

Upon these facts the Connecticut Central Railroad Company insists that the real plaintiff in the suit is the New York & New England Railroad Company, and upon this assumption the answer and cross-complaint as contained in the record were filed, which in substance contain the single defense that the New York & New England Railroad Company is bound to render an account in this action of its receipts and expenses while in possession, since June 1, 1880, and that, on a fair and just accounting, it would appear that the net earnings of the property have been enough to pay, and in equity have paid, all the defaulted coupons upon which the complaint for foreclosure is based. On demurrer to the answer and cross-complaint, the trial court rendered judgment for the plaintiff, and passed an absolute decree of foreclosure.

The main question presented by the appeal for review in this court is whether the defense referred to was sufficient. We think it was, and that the technical objections upon which the demurrer was based ought not to prevail.

The objections seem to assume that the proposed defense could not be entertained without improperly shifting both the parties and the issues in the suit. But reference to the well-settled principles of equity applicable to the subject-matter will show that these objections have no foundation. It is true that the mortgage sought to be foreclosed was to the treasurer of the State (as a mere trustee); yet in effect it was a contract between the Connecticut Central Railroad Company and the holders of the bonds; and in equity the case stands precisely as it would had the present bondholders been named in the deed as mortgagees. *Jones, R. R. Securities*, § 68; *Butler v. Rahm*, 46 Md. 541.

It is difficult to conceive how the New York & New England Railroad Company could have been regarded as a stranger to the suit, in view especially of the distinct admissions contained in the pleadings that it owns, and has owned since June 1, 1880, all the bonds and coupons secured by the mortgage, and that the suit was brought by its request and for its benefit.

But it is said that these bonds and coupons were negotiable, and that the State treasurer, as trustee, must account to one bondholder to-day, and to another to-morrow, in case of a transfer. This is true, and it is easy to suppose a very complicated case; but such is not this case, because the bonds have not been negotiated, and there is no divided interest or ownership.

The fundamental doctrine of equity is that the owner of the debt is the real mortgagee; the debt is the principal thing; the conveyance is a mere incident: it therefore follows that an assignment of the debt carries the security along with it, and that an extinguishment of the debt is an equitable determination of the estate conveyed. These principles are equally applicable whether the debt is represented by negotiable or non-negotiable securities. We conclude, therefore, that in the case at bar there was no objection to the defense on account of the parties; the defense was aimed at the real and only party in interest, and so far was legitimate.

But it is said that an issue was presented foreign to the matter of the complaint. The matter in question was whether a foreclosure ought or ought not to take place. It ought not to take place if there was no debt due. This the defendant attempted to show by offering to prove that all the matured coupons had been paid. The mode of payment was immaterial,—whether in cash, or in rents and profits received by the owners of the mortgage debt, and agreed to be applied in payment of it.

The accounting prayed for was in aid of the defense, and was based on a duty incumbent upon the New York & New England Railroad Company, under the circumstances, to render it. The doctrine is elementary that a mortgagee in possession, whether acquired by actual entry or by attornment of the tenants, will be subject, not only to the equity of redemption, but to the duty of applying the rents and profits in discharge of the debt, and rendering

an account of their receipt and application. *Saunders v. Frost*, 5 Pick. 260; *Moore v. Cable*, 1 Johns.Ch.885. And an equitable mortgagee is as liable to account as a legal mortgagee. *Brayton v. Jones*, 5 Wis. 117. An assignee of the mortgagee in possession stands in the place of his assignor in respect to the account. 2 Jones, Mort. § 1118.

But it is further said that, in this case, the New York & New England Railroad Company were in possession under a lease from the defendant, and upon this fact a threefold objection is based, namely: That the lease is a separate and independent contract; that it covers property not included in the mortgage; and that it provides for an arbitration in case of difference; and no arbitration has been had or asked for.

If we may adopt somewhat the manner of a pleader, our general reply would be that the first two parts of the objection are not true in any such sense as the argument for the plaintiff assumes, and that the last is insufficient.

The contract of lease, instead of being entirely independent, has an intimate connection with the subject-matter of the suit, in that it provides for the application of the net income of the leased property, first of all, to pay the coupons claimed to be in default.

The lease, too, took effect June 1, 1880, and that is also the alleged date of the purchase of the bonds in question. The latter, by their terms, all become due in 1895—the same year the lease is to terminate. This is quite suggestive that the purchase of the bonds and the taking of the lease were parts of one and the same scheme. But we do not rely upon this last suggestion to show that the lease is not a separate contract in such a sense as the demurrer assumes.

The case may well stand on this proposition: That if the possession and use of mortgaged premises by the owner of the mortgage debt, without any agreement at all respecting the matter, imperatively demands an accounting, and the application of rents and profits to the payment of the debt, the duty surely can be no less on the party who has agreed to do that very thing.

Then, as to the point that the lease covers more property than the mortgage, it has much less truth than the first. The leasehold estate and the mortgage estate are substantially identical. The mortgage conveyed all lands, franchises, "materials, privileges, appurtenances, and property, real and personal, which now belongs to, or hereafter may be acquired by, said company." The difficulty of conveying anything more than this, by any subsequent lease, is quite apparent without further argument.

The color of a foundation which this point has to rest upon is the paragraph in the lease which reads "together with any right it" (the defendant) "has or may hereafter acquire to use in any manner" certain terminal facilities and connecting roads, which are named. The language is that of a mere quitclaim; no rights are described as existing, and if they did exist, the sweeping language of the mortgage would seem broad enough to include them. There may have been some remnant of a lease or license for the defendant to use the connecting roads referred to; but whatever may be the

right referred to, it furnishes no obstacle at all to accounting, for the lease expressly provides for deducting, from the gross earnings of the entire line operated solely on account of the Connecticut Central, whatever is paid on account of those connections and advantages; and there can be no uncertainty, on that account, in ascertaining the net income to be applied on the mortgage debt. It may be well here to add that the directions contained in the lease respecting the mode of ascertaining the amount, if any, to be applied on the mortgage, should be followed.

Another objection attempted to be drawn from the lease is that, as it provides for arbitration in case of a difference between the parties, the defendant is restricted to that remedy alone. But the New York & New England Railroad Company, having caused this suit to be instituted for its sole benefit, is in no position to make such an objection if it was otherwise good; for, having invoked the jurisdiction of a court of equity to pass upon its allegations, it cannot limit that jurisdiction till it has determined all the equities between the parties, relative to the subject matter.

Moreover, it seems to be well settled that an agreement to submit to arbitration will not be held valid, either in law or equity, when its effect is to oust the court of jurisdiction. *Wood v. Humphrey*, 114 Mass. 185; *Tobey v. Bristol*, 3 Story, 800; *Thompson v. Charnock*, 8 T. R. 199; *Jones v. St. Johns College*, L. R. 6 Q. B. 115; Russ. Arb. 61-63, and cases there cited.

Our reasoning has brought us to the conclusion that it is the duty of the New York & New England Railroad Company to account in this action, and that the defense founded upon the anticipated results of such accounting is one the defendant mortgagor should be allowed to make.

The further objection that the account demanded is in some of its details unreasonable, and that no railroad company's books contain such items, we do not deem it necessary to pass upon. There is nothing on record to show whether this point is well founded or not; and in the brief of counsel it is stated in the most general terms without argument. We think, therefore, it is better to leave the details to the trial court, that can act upon fuller information and argument. It is quite obvious that the details will depend much upon what the plaintiff is willing to disclose. If it refuse or neglect to give, as the answer and cross-complaint allege, an account of the actual freight, tolls, and income of the Connecticut Central Railroad Company, and insist on prorating all such items with what it receives for the same things upon the entire mileage of its own road, then many of the details asked for would become both reasonable and necessary. We observe, near the conclusion of the cross-complaint, and in one place in the answer, that the demand for special details referred to is subject to a qualification in these words: "So far forth as the same may be necessary to show that the New York & New England Railroad Company * * * have received, previous to the commencement of this suit, sufficient moneys belonging to the Connecticut Central Railroad Company to pay said alleged overdue interest, over and above all other lawful

charges against the same." Applying this qualification to all the details asked for, there is surely nothing unreasonable in the account demanded.

There was error in the judgment complained of, and a new trial is ordered.

In this opinion the other Judges concurred.

TOLLE'S APPEAL from Commissioners.

1. An appeal from the doings of commissioners on an insolvent estate carries up the whole subject of the appeal upon the single issue raised before the commissioner, viz.: whether the claim ought to be allowed against the estate; and the appellate court, in acting upon the matter, exercises only its ordinary law and equity powers; and there is no propriety in the appellant filing any reason of appeal.
2. If the claim as presented to the commissioners does not show with sufficient definiteness what it is, the other party can move for a bill of particulars; but such bill of particulars does not become itself the ground of any new or different pleadings.
3. Where the appellee in such a proceeding files, as one of his defenses, the averment that the claim ought not to be allowed against the estate, the natural general issue is raised; and the case thus standing upon an issue of fact, either party desiring that it be placed on the jury docket should (under § 22 of the Practice Act) make his application for that purpose at the first term of court. After that term the matter rests, as in other cases, upon the agreement of the parties or the order of the court.
4. Without intending to say that any formal pleadings that parties may file in such a case will be regarded as irregular and inadmissible,—*Held*, that no such pleadings are necessary, and that an issue of fact raised upon them is not to be regarded as such a new issue as to revive the right of either party to put the case on the jury docket.
5. *Held*, that an instrument under seal, whereby the maker conveyed to a person named therein all his real and personal estate, etc., to have and hold the same in trust to so manage and dispose of as to raise a certain sum therein mentioned as owing from the maker to the grantee, the amount of such debt and interest to be retained by the grantee, and the residue of the transferred property to be returned by him to the maker of the instrument,—was intended only as a bill of sale, and not an obligation on the part of the maker to pay the amount of the debt mentioned therein; and that, if regarded as an acknowledgment of a pre-existing indebtedness, the fact that it is under seal gives it no additional effect for the

purpose of saving it from the operation of the **Statute of Limitations**.

(Hartford—Filed February, 1887.)

APPEAL by appellant from a judgment of the Superior Court of Hartford County in favor of appellee in an appeal from the doings of commissioners upon the insolvent estate of Edwin M. House, deceased, disallowing the claim of appellant as assignee of Milo W. Pember. *Affirmed*.

The case is stated in the opinion.

Mr. W. F. Henney, for appellant.

Mr. George G. Sill, for appellee:

The court was right in refusing this request for a jury trial, and the appellant has not been injured.

The Practice Act, p. 6, § 22, provides that the following-named classes of cases shall be entered on the jury docket, at the request of either party made to the clerk during the first term, to wit: appeals from probate involving the validity of a will, and appeals from the doings of commissioners on insolvent estates, etc., and civil actions involving questions not cognizable in equity. If, in any of the above-named classes of cases, an issue of fact is joined after the first term, then, at request of either party, it may be entered on the jury docket; and at any subsequent time it may be so entered by consent of both parties or by order of court.

During the whole first term the appellant sat idly by, and waited through the second term till the jury was discharged, before he asked for a jury trial. He had the whole of the first term to put the case on the jury docket, without regard to any issues whatever. Having neglected or waived that right, he now claims it on the ground that an issue of fact was joined after the first term, and thereby his right revived.

Was there any joinder of an issue of fact, within the meaning of the Practice Act above quoted? Are there any pleadings, in an appeal like this, required either by statute, decision of any court, or grown up by practice? On a trial before the commissioners themselves, there are no pleadings of any sort; and upon the trial of the same claim before the appellate tribunal there is no law or practice which requires or demands any pleadings. The commissioners sit as a court of law and equity, and the appellate court has the same powers. The appellant files no complaint or declaration, and hence there is no foundation for any pleadings. The appellee can neither plead in abatement nor demur,—a right which always belongs to a defendant where pleadings are allowed or required. In Massachusetts, proceedings before commissioners are like ours, but on appeal the claimant files a statement in the nature of a declaration, and the pleadings, trial, and determination of the cause proceed as in an action at law prosecuted in the usual manner.

Du Vrier v. Hopkins, 116 Mass. 125.

But we have no statute making appeals like ordinary actions at law. They are *not* *generis*; and the appellate court has no greater or lesser powers than the commissioners, and parties can proceed in the like way in the trial of the claim.

It was long since decided (*St. Leger's App.* 34 CONN.

Conn. 434) that there were no pleadings in an appeal from the probate of a will. Though issues of fact may be raised and determined, yet there can be no joinder of an issue of fact in any technical sense; and in an appeal from the doings of commissioners, while issues of fact are raised and determined, there is no joinder of issue of fact within the spirit and intent of the Practice Act.

The only issue before the commissioners is: Ought the claim presented to be allowed or disallowed?

Granger, J., delivered the opinion of the court:

This is an appeal from the doings of commissioners on the insolvent estate of Edwin M. House, deceased, in disallowing a claim presented against the estate by the appellant.

The appeal came into the Superior Court for Hartford County at its October Term, 1885, and at that term the appellant filed, as his reason of appeal, the statement that the commissioners had disallowed his claim, and that it should have been allowed. At the January Term, 1886, an order was made that the appellant file a bill of particulars on or before the first Tuesday of April. The bill of particulars was filed within the time limited, and consisted of a claim of \$680, upon an instrument under seal, executed by the deceased in his lifetime to one Pember, and by Pember assigned, during the lifetime of the deceased, to the appellant; with a further statement of the same amount due on an account stated.

The appellee, during the same term, filed a defense, first, denying that the claim ought to be allowed against the estate; and, secondly, stating that it did not accrue within six years before the death of the deceased. The appellant, at the same term, filed a reply to the appellee's second defense, alleging, first, that the instrument in question, which contained the account stated, was under seal; and, secondly, that the deceased, within six years before his death, paid the sum of \$6 to be applied on the claim. The appellee in his rejoinder, filed at the same term, denied the truth of both the above replies.

On the same day that the appellee filed his denial of the appellant's reply, the appellant moved that the cause be entered on the jury docket; which motion the court denied. And this ruling of the court is made the first ground of error.

The appellant claims that he was entitled to an entry of the case on the jury docket at the time his motion was made, under the following provision of the Practice Act: "The following-named classes of cases shall be entered on the jury docket, at the request of either party made to the clerk during the first term, to wit:" * * * appeals from the doings of commissioners on insolvent estates. * * * Where, in any of the above-named classes of cases, an issue of fact is joined after the first term, the case may, within three weeks from such joinder, be entered on the jury docket for the trial of such issue, upon request of either party, made to the clerk; and any of such cases may at any time be entered on the jury docket by consent of both parties, or by order of the court." Practice Act, § 22.

We have never adopted the practice, which prevails in some of the other States, of requiring the appellant from the rejection of a claim presented by him against an insolvent estate to file a statement, like a declaration at common law, setting out his claim in the same manner as in an ordinary declaration in a suit at law. Where such a declaration is filed, it opens the way for all the pleadings in an ordinary suit. It presents the claim in such a form that the declaration could be demurred to. Under our practice a claim is presented to the commissioners on an insolvent estate in such form that it can be understood what it is, but not in such form as to call for, and hardly to admit of, any pleadings before the commissioners. The single issue before them is whether the claim ought to be allowed against the estate. *Mills v. Wildman*, 18 Conn. 124; *American Board of Comrs. App. from Probate*, 27 Conn. 344; *Mead's App. from Probate*, 46 Conn. 417.

An appeal from the allowance or the disallowance of a claim by the commissioners carries the case into the appellate court precisely as it stood before the commissioners. The question there is, as before, whether the claim is one that should be allowed against the estate. The object is not to get a judgment upon the claim, but to get a dividend from the estate. The party appearing and making defense against the claim is generally not the original debtor, who, even if living, may be taking no further interest in the matter, but the administrator or trustee in insolvency. And it will be readily seen that many questions may arise with regard to the liability of the estate to pay the claim, which could not arise in an action at law upon such a claim. For instance, the claim may not have been presented in due season against the estate, or it may not have been presented in such a form as to cover the claim made on the appeal. The relation of the claim to the estate is as essential an element of the case as its intrinsic character and merits.

An appeal from commissioners is a different thing from an appeal from a decree of a court of probate. In the latter case the decree stands until reversed, and the appellate court, in acting upon the matter, is exercising probate powers. Commissioners are a common-law tribunal, exercising no probate powers, but the law and equity powers of ordinary tribunals. An appeal from their doings carries up the whole subject of the appeal, and the appellate court, in acting upon the matter, is exercising only its ordinary law and equity powers. On such an appeal there is no propriety in the appellant filing any reason of appeal. If the claim as presented to the commissioners does not show with sufficient definiteness what it is, the other party can move for a bill of particulars; but this bill of particulars does not become itself the ground of any new or different pleadings. The appellee in the present case filed, as one of his defenses, merely the averment that the claim ought not to be allowed against the estate. This is the natural general issue in such appeals, and the law presupposes and implies it in every case.

The case thus standing upon a presumed issue of fact, either party desiring that it be

placed on the jury docket should make his application for that purpose at the first term of the court. After that term the matter rests, as in other cases, upon the agreement of the parties or the order of the court.

We do not intend to say that any formal pleadings that the parties may file will be regarded as irregular and inadmissible, but that no such pleadings are necessary, and that an issue of fact raised upon them is not to be regarded as such a new issue as to revive the right of either party to put the case on the jury docket. Nor do we intend to say that, if a claim should be so presented as to be open at once to a demurrer, and a demurrer should be filed, the case must, on such an issue, be put at once on the jury docket, before the issue of law is decided. We only decide that, in a case which, like the present, is so presented as to necessitate an issue only of fact, the party who desires a jury trial is bound at the first term to have the case put on the jury docket.

The appellant offered in evidence the following document executed by Edwin M. House, the deceased, under seal, and delivered to Pember, the assignor of the appellant:

"Know all men by these presents that whereas I, Edwin M. House, am justly indebted to Milo W. Pember in the sum of \$680, and am desirous to secure the payment thereof with lawful interest: Now, therefore, I, the said Edwin M. House, in consideration of the premises, and for the purposes aforesaid, and in further consideration of \$1 to me in hand paid by said Pember, receipt whereof is hereby acknowledged, and in further consideration of the uses and trusts hereinafter conferred upon and assumed by said Pember, do hereby give, grant, sell, convey, transfer, and assign to said Pember all my real and personal estate, debts, demands, claims, and choses in action of every kind whatsoever, and wheresoever the same may be situated, to have and to hold the same to him, the said Pember, in trust for the purposes following, viz.: To be held, managed, and disposed of in such ways as, without unnecessary sacrifice and with reasonable dispatch, to raise the sum of \$680 aforesaid, with lawful interest, to be retained by said Pember in satisfaction of my indebtedness to him, and to reimburse himself for any sums he may at any time have paid at my request; and to render his account of his doings under this trust; and to assign back to me all the rest and residue of said estate, real and personal, debts, demands, claims, and choses in action hereby conveyed to said Pember, which shall remain in his hands after he has been paid said sum of \$680 with the interest thereon, and after said indebtedness to said Pember has been satisfied. In witness whereof I have hereunto set my hand and seal, this 16th day of July, 1878. [L. s.] Edwin M. House."

The appellant claimed that this document constituted a covenant on the part of House to pay to Pember the \$680 named in it, or, at least, might be treated as an account stated between them of an indebtedness of that amount.

It is found that Pember never took possession of, or in any way appropriated any of, the property mentioned in the document.

It is very clear that this document was in-

tended to be only a bill of sale of the property mentioned in it, and not an obligation on the part of House to pay the \$680. It clearly creates no such obligation.

The appellant also claimed that this document, being under seal, was to be regarded not only as an acknowledgment of the indebtedness of House for \$690, but that, by reason of being under seal, it stood as such acknowledgment for the term of seventeen years, instead of only six, as in the case of an ordinary acknowledgment. But it is very clear that no such effect can be given to the document. If it is to be regarded as an acknowledgment of a pre-existing indebtedness, it could have no more effect than any other form of acknowledgment, by reason of its being under seal. If it were an obligation under seal, it could of course be enforced as such for the ordinary term of such obligations; but as a mere acknowledgment of a debt, for the purpose of saving it from the operation of the Statute of Limitations, it can have no additional effect from the fact that it is under seal.

There is no error in the judgment complained of.
In this opinion the other Judges concurred.

F. A. BARTRAM

v.

City of BRIDGEPORT.

By the charter, the members of the court of common council of the city of **Bridgeport** lawfully assembled have power to make a valid assessment for benefits accruing from the pavement of a street; and the vote of the council to adopt the apportionment recommended by a committee, although such report may be nothing more than an expression of opinion by individuals without authority, constitutes an order or decree fixing the amount assessed. Whether that which went before was valid or void is of no moment. The assessment came into existence by virtue of the creative power of the vote adopting the apportionment.

(Fairfield—Filed May, 1887.)

CASE reserved. *Demurrer to the complaint sustained.*

Complaint for the annulment of an assessment for benefits accruing from the pavement of a street of the defendant city.

The facts material to the question decided appear from the opinion.

Messrs. Stoddard, Bishop, & Haviland, for plaintiff:

The charter and ordinances (§ 86, p. 88; § 89, p. 37; § 1, p. 88; § 40, p. 87), particularly and specifically direct in what manner and by whom the benefits arising in cases similar to the present shall be assessed.

The charter says that the common council, by themselves, or by a committee appointed by them for that purpose, may assess, etc.

The committee, when appointed, is an arbitrary body, with full power and authority to make such division of the amount to be raised from the various property-owners in interest as

it deems proper. There is no hearing; it is a close board, clearly *ex parte*, with no review except for informalities. Such a committee should be appointed in full and exact conformity with the law authorizing it to act.

The common council could not delegate its authority to appoint them.

Dill. Mun. Corp. 3d ed. §§ 96, 357; *Day v. Green*, 4 Cush. 488; *Coffin v. Nantucket*, 5 Cush. 271; *Ruggles v. Nantucket*, 11 Cush. 433; *Birdsall v. Clark*, 78 N. Y. 78; *S. C.* 29 Am. Rep. 105, and note; *State v. Jersey City*, 25 N. J. L. 311; *State v. Jersey City*, 26 N. J. L. 447; *State v. Paterson*, 84 N. J. L. 168, 170; *East St. Louis v. Wehrung*, 50 Ill. 28; *Foss v. Chicago*, 56 Ill. 854; *State v. Fiske*, 9 R. I. 94; *Gregory v. Bridgeport*, 52 Conn. 40.

The powers given to the common council by the sections of the charter above named involve and include a branch of the taxing powers; it is, in effect, a delegation to the common council of the right of eminent domain, and must be strictly followed.

Cooley, Tax. p. 464; *Judson v. Bridgeport*, 25 Conn. 429; *Bellinger v. Gray*, 51 N. Y. 610-618; Dill. Mun. Corp. 3d ed. § 91, note 8, § 770, note and authorities; *Re Douglass* 46 N. Y. 44; Cooley, Tax. 418, and authorities; *Hydes v. Joyes*, 4 Bush. 464; *Doughty v. Hope*, 3 Denio, 599; *Willard v. Killingworth*, 8 Conn. 247.

The plaintiff, appellant, is entitled to have whatever assessment he may be liable for apportioned to him by an officially responsible body—one clothed with full authority of the law, and legally using the discretion and judgment invested in such a body.

The irregularity is fatal, and no act of ratification or confirmation can cure the defect.

Cooley, Tax. 49, note 1, 227; *Hydes v. Joyes*, *supra*; *Whyte v. Mayor, etc. of Nashville*, 2 Swan, 364; Dill. Mun. Corp. 3d ed. § 77; *Doughty v. Hope*, 3 Denio, 599; 1 N. Y. 78.

Mr. Curtis Thompson, for defendant:

We deny that there was any irregularity in the appointment of the committee; but even if there was, still, the adoption of the assessments by the common council made such assessments the act of the common council acting by themselves.

28 Conn. 192, 195, 218.

The common council of this city is called upon to do a large amount of work; it requires many select committees, as well as standing committees, to obtain the necessary information for their use, and to enable them to act intelligently.

Like all legislative assemblies, the members have the right to get this information from any and all sources; and they would have the right to adopt assessments made by any persons, whether by their committee or other persons, if they deemed the assessments right and adopted them as their own.

We claim that this was a literal compliance; but the law requires only a substantial compliance with the provisions of the charter.

Nichols v. Bridgeport, 23 Conn. 212, 213; *Clapp v. Hartford*, 35 Conn. 78; *Kirtland v. Meriden*, 39 Conn. 107; *Dann v. Woodruff*, 51 Conn. 208; *Sorchan v. Brooklyn*, 62 N. Y. 889; *Gregory v. Bridgeport*, 52 Conn. 44; *Winchester v. Hinsdale*, 12 Conn. 95.

The common council, by its action, adopted and confirmed the appointment of the committee, and such appointment was its own act.

Winchester v. Hinsdale, supra.

The principle that power cannot be delegated applies only to powers of a judicial nature, and does not apply to powers like this, of a ministerial and administrative nature.

Crane v. Camp, 12 Conn. 467; *Betts v. Dimon*, 8 Conn. 107; *Fox v. Hills*, 1 Conn. 295; *Norwich Sav. Soc. v. Hartford*, 48 Conn. 576; *Dill. Mun. Corp.* § 618, and note, citing 26 N. J. L. 57.

Story, on Agency, at § 52, says: "As the appointment of an agent of a corporation may not always be evidenced by a written vote, it is now settled doctrine, at least in America, that it may be inferred and implied from the adoption or recognition of the acts of the agent by the corporation."

See *Dill. Mun. Corp.* §§ 58, 62, 385; *Johnson v. Smith*, 21 Conn. 635; *New Haven v. Fair Haven & W. R. R. Co.* 38 Conn. 432.

Pardee, J., delivered the opinion of the court:

This is a complaint for the annulment of an assessment for benefits accruing from the pavement of a street of the defendant city.

The plaintiff was assessed in the sum of \$161.26, as his proper proportion of benefits resulting from the pavement of Water Street, in the city of Bridgeport. He asks an annulment of the assessment, saying that it is illegal and void for the reason that it was neither made by the court of common council acting by themselves, nor by a committee appointed by the council for that purpose. The defendant demurs to the complaint. The case is reserved for the advice of this court.

On January 4, 1886, the common council of the city of Bridgeport, upon the recommendation of the board of public works of that city, authorized that board to perform the work of paving Water Street with stone block pavement, from Fairfield Avenue to South Avenue. On October 13, 1886, the board reported to the common council the completion of the work, and that it was desirable that the proper amounts should be assessed upon property benefited by the improvement as soon as possible; and it was recommended that the mayor be authorized to appoint a committee for that purpose.

Thereupon, on motion of some member of the council, the report was accepted, and the recommendation adopted.

Some time between October 13 and December 6, 1886, the mayor appointed Franklin Sherwood, John Sexton, and William H. Lacy, to make the assessment. On December 6, the mayor announced to the common council that he had appointed such persons assessors on the Water Street pavement.

The committee, having meantime made the assessment, on December 6, 1886, made report of their doings to the common council. The report was read, and continued until the next regular meeting of the common council, and was published in its proceedings. At the next regular meeting, held on January 3, 1887, the minutes of the previous meeting were approved, and the report was taken up, read,

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and accepted, and the assessments contained therein confirmed, adopted, and duly recorded; and due notice was given to the property-holders of the sums assessed upon them respectively, and of the time when the same became due. In that report the committee said that the plaintiff had been benefited to the extent of \$161.26 by the laying of the pavement.

The charter of the city of Bridgeport provides as follows:

"Section 36. Said common council may, whenever in its opinion the public good shall require, order that any street or streets, highway or highways, now or hereafter existing in said city, shall be paved, * * * and may, upon the execution of any such order, assess upon the persons whose property is especially benefited thereby, one half of such expense, and may estimate and assess the particular amount of such expense to be paid by every such person; and notice of such improvement shall be given, and the assessments therefor shall be made, published, collected, or secured, as the case may be, in the same manner as herein-after provided and required in the case of sewers."

"Section 39. And in all proceedings concerning the construction or purchase of sewers, and assessments of costs, damages, and benefits, said common council may act by themselves, or by a committee by them appointed for that purpose."

By the charter, therefore, the members of the court of common council lawfully assembled have the power to make a valid assessment; each one may act upon his individual judgment; that judgment may rest upon knowledge acquired by separate investigation, upon knowledge acquired at any time, in any manner, and in any degree, according to his conscience in the matter. Assuming the report of the so-called committee to be nothing more than an expression of opinion by individuals without authority, each member of the council could lawfully adopt its conclusions, give them a controlling effect upon his mind, make them his own, and embody them in his vote. He was under no obligation to push investigation further. Although each member had joined in a void vote to raise a committee to make the assessment; although each member believed that a committee had been lawfully appointed, and that its assessment was valid; and although the vote of each member to adopt the assessment of the committee against the plaintiff was given in the belief that whatever the committee had done was in conformity to law,—yet the vote of the council to adopt the apportionment recommended in the report, constituted an order or decree which it had power to make, that the plaintiff should be assessed and should pay \$161.26 for benefits received.

Whether that which went before was valid or void is of no moment. The assessment came into existence by virtue of the creative power of that vote alone. Each member formed an opinion, and expressed it officially in due form; and the plaintiff is entitled to nothing more.

The Court of Common Pleas is advised that the complaint is insufficient.

In this opinion the other Judges concurred.

MAINE.

SUPREME JUDICIAL COURT.

Ellen THOMPSON

v.

Henry THOMPSON.

1. The declarations of an agent of the husband, when persuading the wife to return, are **admissible** at the hearing upon the wife's libel for divorce, upon the question of condonation, as showing the circumstances which induced her return.
2. Cross-examination of the libelee in relation to acts of cruelty not set out in the libel is **admissible** as showing disposition and feeling, and tending to prove the cruelty charged.
3. Evidence of failure to provide needed medicine is **admissible** under an allegation of failure to provide proper support.
4. A motion for a new trial in a divorce case heard by a single justice cannot be granted.

(Knox—Decided March 10, 1887.)

ON exceptions and motion for new trial by the libelee. *Overruled.*

Libel for divorce. The hearing below was by the presiding justice, without the intervention of a jury. The divorce was decreed, and defendant alleged the exceptions stated in the opinion, and filed a motion for new trial.

Mr. C. E. Littlefield, for libelee:

We believe that the declaration of the agent, "I know that he has illtreated you," etc., comes within the rule established by the following authorities, and is clearly inadmissible:

Hyland v. Sherman, 2 E. D. Smith, 234, where the court held that an agent to receive money only has no authority to make any declaration in relation thereto which could affect his principal; and *Bynum v. Southern Pump Co.* 63 Ala. 462, where the court held, in an action of detinue to recover a mule, that the defendant could not introduce as evidence admissions or declarations of a party who was the plaintiff's agent merely to demand and get the mule, in disparagement of the plaintiff's rights to the mule.

All the evidence excepted to was prejudicial to the defendant, and he is entitled to the benefit of his exceptions in their full weight, as though the case had been tried to the jury.

Slade v. Slade, 58 Me. 157.

The evidence as to a pretended refusal by *Mr. Thompson* to procure medicine and exercise proper care toward the libellant when she was suffering from the effect of a fall, as given by the libellant and the witness *Marshall*, is inadmissible, as there was no allegation in either the libel or bill of particulars under which such evidence could be introduced. No allegation contains any hint that the libelee would need to be prepared to meet such a charge.

Ford v. Ford, 104 Mass. 198.

This court has distinctly held that "when a statute has received a judicial construction

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of the court in the State where it was in force, and the same statute has been enacted in this State, with the same provision which has been the subject of judicial discussion and decision, the Legislature are understood to have adopted the construction given.

Myrick v. Haasey, 27 Me. 17; *Gregory v. Gregory*, 76 Me. 535.

This is precisely in point, and we must look to the Massachusetts decision for the construction or definition of "extreme cruelty" and "cruel and abusive treatment." This is the rule: "A reasonable construction of the statute requires that it shall appear to be at least such cruelty as shall cause injury to life, limb, or health, or create danger of such injury, or a reasonable apprehension of such danger, upon the parties continuing to live together. This is broad enough to include mere words if they create a reasonable apprehension of personal violence, or tend to wound the feelings to such a degree or to affect the health of the party, or create a reasonable apprehension that it may be affected."

Bailey v. Bailey, 97 Mass. 880.

Mr. J. E. Moore, for libellant:

In *Ford v. Ford*, 104 Mass. 198, 205 (cited by respondent), the court says: "As tending to show the *animus* and the hostile state of feeling on the part of the libelee, and as affecting his conduct in evidence on the particular day named, we think the judge had discretionary power to exclude it;" implying, also, that he had discretionary power to admit it.

The exclusion of testimony tending to raise collateral issues, "in the discretion of the judge, is no ground for exception."

Mayhew v. Sullivan Mining Co. 76 Me. 100; *Commonwealth v. Bean*, 137 Mass. 570.

The libellant testified in part, but was stopped. She was cross-examined on the subject, and she subsequently gives the whole conversation without objection. If libelee had any valid objection to libellant's testimony, he waived it.

Oakland Ice Co. v. Mazey, 74 Me. 294.

If the admission was erroneous, exceptions would not be sustained, as the respondent does not show that he was aggrieved by it, but the reverse.

Tarr v. Smith, 68 Me. 97; *Harriman v. Sanger*, 67 Me. 442; *Millett v. Marston*, 62 Me. 477.

Whenever the agent's acts are so admissible, then his contemporaneous declarations explanatory of these acts are admissible; nor, in proving such declarations, is it necessary that he should be himself called.

2 Whart. Ev. § 1173. See *Oakland Ice Co. v. Mazey*, *supra*; Story, Ag. § 451.

Testimony relating to general misconduct, and being, as they all say, in the summer of 1873, after she had left and returned to her husband under a promise, express or implied, that he would treat her better, was admissible to show that he did not, if for nothing more; and that therefore acts of cruelty occurring before that time would be revived for causes for divorce.

Robbins v. Robbins, 100 Mass. 150; *Gardner v. Gardner*, 2 Gray, 434.

The object of a specification is to guard the defendant against any surprise, and give him an opportunity to prepare his defense; and the

court in its discretion may refuse to order specifications.

Gardner v. Gardner, supra.

"Plaintiff's testimony alone may, in the discretion of the court, in a perfectly clear case, be sufficient, if other evidence does not exist or cannot be obtained."

Abb. Tr. Ev. 747; *Robbins v. Robbins, supra.*

"The presumption is in favor of a ruling, and it is necessary, in order to sustain exceptions to the admission of evidence, that the excepting party should make it appear that there was nothing in the case, as presented at *nisi prius*, which would justify the admission."

Fairfield v. Oldtown, 78 Me. 573.

As applicable to all the exceptions, and to the point that defendant was not aggrieved, I again call attention to—

Tarr v. Smith, 68 Me. 97; *Harriman v. Sanger*, 67 Me. 442; *Millett v. Marston*, 62 Me. 477.

In *Haskell v. Hervey*, 74 Me. 192, 197, the court says the evidence "was admitted *de bene*. If not forming the basis of his judgment, it did no harm. Whether it was considered by him nowhere appears. If not regarded by him as evidence, and constituting no ground for his decision, there is no cause for exception; for this would be tantamount to its rejection."

In Massachusetts, under a similar statute, the court thought a persistent refusal to speak to the wife, on the part of the husband, worthy of attention. They call it "persistent and enduring unkindness and ill temper."

Robbins v. Robbins, supra.

In *Maglathlin v. Maglathlin*, 138 Mass. 299, 300, the court says condonation "was a question of fact for his (the judge's) determination, and we cannot say, as matter of law, that his finding was not justified by the evidence."

Sparhawk v. Sparhawk, 120 Mass. 890; *Edmondson v. Bric*, 136 Mass. 189; *Mason, Mass. Prac.* 429, § 11; *Haskell v. Hervey, supra.*

Danforth, J., delivered the opinion of the court:

This is a libel for divorce, and comes before the court upon exceptions and a motion.

1. The first exception is to the declarations of one Pinkham, claimed to be admissible as an agent of the defendant. What particular declarations were objected to does not appear from the objections, but the objection covers all. Therefore, by a well-known rule of practice, if any of them were admissible, the exception must be overruled.

We learn from the testimony reported, which is made a part of the exceptions, that the libellant had left her husband on account of alleged cruelty, the result of personal violence, and that the declarations in question were made by Pinkham to her during a negotiation between them to induce her to return to her husband. In this negotiation he assumed to act for and in behalf of the husband, and there is evidence in the case tending to prove such authority.

It further appears that an important question involved in the issue was whether the previous alleged violence had been condoned by her return. Hence the circumstances under which she returned, and the inducements held out to secure that return, were material upon this question of condonation; and upon this

question such declarations as were a part of the act were admissible, though not for the purpose of proving the previous acts of the defendant. The particular declaration objected to in the argument, standing by itself, was of no use whatever, and would undoubtedly have been excluded. But it was a part of a transaction which was material, and could not easily be separated from it. Nor was the presiding justice asked to do so. The motion made was to strike out all the declarations.

The agency of Pinkham was both asserted and denied, and there was evidence on both sides. It was a question of fact for the court to decide, and what that decision was nowhere appears. It may be, therefore, that the decision was such that the testimony was rejected, and no use made of it. So that, in any event, the libellee fails to show that he was aggrieved by the doings of the presiding justice in this respect.

2. The libellee was examined on cross-examination as to certain acts of alleged cruelty not found in the libel or bill of particulars. These acts could not be proved as an independent cause of divorce. The divorce, if granted, must be for some cause alleged in the libel. Other acts can only be considered so far as they tend to prove such as are alleged. But this comes from a cross-examination of the defendant for the purpose of showing his disposition and feeling, and thus testing his credibility as a witness. Its limits, therefore, even in matters collateral, are within the discretion of the court, and not subject to exception. *Ford v. Ford*, 104 Mass. 198. But the evidence here objected to would be admissible as tending to prove the cruelty charged as the foundation for the divorce, even if drawn out in the direct examination. It would render such a charge more probable, and gives force to such other testimony as may bear upon the cause alleged. This practice is allowable even in criminal cases. *State v. Plunkett*, 64 Me. 534; *State v. Neagle*, 65 Me. 468.

In this libel there are three causes of divorce—and three only—set out, such as the law now recognizes as such, viz., extreme cruelty, cruel and abusive treatment, and—being of sufficient ability,—a gross, wanton, and cruel refusal to provide for the wife. Whether these causes are sufficiently set out is not a question raised by any pleadings in this case. After these allegations, under another complaint the libel sets out a series of acts which may or may not be cruel, according to the circumstances connected with them; and the bill of particulars is of a similar character. It is not clear whether these acts were set out as distinct causes of divorce, or as the foundation for the three charges. If the latter, it would be necessary to prove a sufficient number of them connected with such circumstances as would sustain one or more of the three charges alleged. If the former, it would certainly be very doubtful if they are sufficiently set out to authorize a decree of divorce. But in either case we cannot consider these specifications as details of the evidence, to be relied upon and to which the party is to be confined in her proof. To sustain her libel she must prove at least one of the sufficient causes of divorce therein alleged. This she may do by any competent evidence she may have.

3. The plaintiff, under objection, was allowed to prove a refusal on the part of the libellee, without cause, to furnish medicine when needed. The suggestions under the last head will apply to this. But, in addition to that, this clearly comes within the specification both in the libel and bill of particulars. The supplying of proper and needful medicine is as much required for a proper support and comfortable home as any other article of maintenance.

4. The plaintiff was allowed to prove the improbability that the parties would ever again live together, under objection. The exceptions do not show what this testimony was. All we can find in the report of the evidence comes from the cross-examination of the defendant, and is in substance an opinion expressed by him that it would be of little use for them to try to live together again. This was a matter of cross-examination, and within the discretion of the court. It may have been of some use as expressing the present state of the defendant's feeling, or it may have turned out, like the most of the testimony elicited upon cross-examination, of no use whatever, or harmful to the party calling it out. It could only be used as bearing upon the past, or in some way throwing light upon testimony the witness had previously given. The casual remark made by the judge—that it might influence his decision—might be true in a proper sense, as it might very properly have some influence in interpreting the other testimony. As the law allows no discretion outside of a judicial judgment, in granting divorces, the court could not legally consider the evidence as bearing upon the future. There is not the slightest evidence that he did so, and we cannot infer that an error was committed. Besides, the remark was not a ruling, and is not subject to exception.

There is also a motion for a new trial for various causes set out, both of fact and of law. This is somewhat of a novel proceeding in divorce, or any other cases tried by a single judge. It has usually been considered in such cases that the finding in matters of fact is conclusive, and that errors of law must be presented by exceptions. Our attention has not been called to any case in which such a motion has been entertained. In *Starbird v. Henderson*, 64 Me. 570, the court refused to entertain such a motion, holding that "the evidence cannot properly be reported for the revision of the law court as to the correctness of his decision upon the facts. His adjudication upon them is final." In *Haskell v. Hervey*, 74 Me. 195, the same doctrine is announced.

In *Sparhawk v. Sparhawk*, 120 Mass. 390, Gray, Ch. J., says: "But we are unwilling * * * to imply that in any case of divorce or alimony a party has the right to have the evidence reported, or the decision of a single justice revised in matters of fact." In *Edmundson v. Bric*, 186 Mass. 191, it is said: "What was the real transaction * * * was a question of fact to be determined by the judge upon his view of the credibility of the witnesses, the consistency of their testimony as to the transaction, with their subsequent dealings with the property, and all the evidence in the case; and we have no right to revise his findings." *Sheffield v. Otis*, 107 Mass. 282; *Backus v. Chapman*, 111 Mass. 886.

In matters of law the proper practice is to take the case up by exceptions, even though the objection is to the final ruling granting the divorce, in which case the presiding justice reports the facts as he finds them, or, in some cases, the testimony upon which he grounds his conclusion; and thus is distinctly presented the question whether, as a matter of law, he has committed an error. *Robbins v. Robbins*, 100 Mass. 150; *Maglathlin v. Maglathlin*, 138 Mass. 290.

In this case we have no report of the facts found by the judge, and no report of the testimony upon which he relied; nor is there any exception to his ruling in granting the divorce or fixing the alimony. We have no means of ascertaining, any farther than the exceptions go, whether he has made any error of law in his final adjudication; nor can we, from the report of the evidence, revise his findings to ascertain whether he has made an error in fact. But from a somewhat careful examination of the testimony, and applying that to the law as interpreted in *Holyoke v. Holyoke*, 78 Me. 404, we perceive no error, either in law or in fact, in his conclusions.

Exceptions and motions overruled.
Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, JJ., concurred.

Vesta I. BROMLEY *et al.*

v.

Lorinda GARDNER *et al.*

1. A devise in a will executed in Maine prior to the Statutes of 1841, without words of inheritance, gave only a life estate, unless it could be gathered from the whole will that a fee was intended.
2. In this case the testator, after giving small sums to each of his heirs, devised one half of all his estate, real and personal, to his widow during widowhood, and he devised the other half of all his estate to a daughter, and the remainder in the half given the widow to the same daughter. Held, that the daughter took a fee in the whole estate subject to the devise to the widow.
3. Though it may be competent to show by the written admissions of a devisee that he took the property in trust, such proof cannot affect the title of a third party purchasing the property without notice of any trust.

(Penobscot—Decided March 5, 1887.)

ON report of a bill in equity by the heirs at law of Jacob Stevens against the grantee of a devisee under the last will of said Stevens for construction of the will. *Bill dismissed.*

The opinion states the facts.

Mr. Robert B. Caverly, for plaintiffs:

The will (as of course) is in writing by the testator, and its intent in creating the trust is confessed in writing signed by the trustee herself, who also has sanctioned it by a part performance.

Barrell v. Joy, 16 Mass. 221.

In this the court says: "But though the conveyance be absolute, any declaration in writing made by the grantee or assignee, at any time after the conveyance, is competent proof of the trust."

Also see *Bates v. Hurd*, 65 Me. 180, 181.

Again, the trust is fortified by the implications of law, which arise from the words and obvious intent of the will itself, apparent upon its face.

Baker v. Bridge, 12 Pick. 81.

In this last case Shaw, *Ch. J.*, says: "It is not enough that the court may conjecture that the testator intended to pass a fee, and failed of doing so from ignorance of the rules of law or otherwise; but it must appear satisfactorily and affirmatively that such was his intention from a construction of the will itself;" and, "in putting such construction upon any particular clause, it is allowable to consider any other part of the will, to ascertain the testator's intent."

See also *Cook v. Holmes*, 11 Mass. 581.

In 21 Me. 340, Tenney, *J.*, says: "If the intent be wanting, no fee passes." This was the law of Massachusetts and Maine when this will was made, January 18, 1838. And this law is the law which, as we submit, is to settle this question of intent.

There is a statute, since passed (in 1841), to the reverse of the above, which provides that "a devise of land is to be construed to convey all of the estate of the deviser therein, unless it appears by the will that a less estate was intended."

Me. Rev. Stat. chap. 92, § 26.

But plaintiffs submit that neither this Act nor the decisions under it can in any way affect this will made in 1838.

A trust being established, and a breach of it being thus fully proved and confessed, this court has the power to grant to these lady heirs adequate relief,—just what justice requires.

1 Story, Eq. chap. 4, § 98; chap. 18, § 781.

That this court has jurisdiction in cases of partition is, as we submit, very clear. Be this as it may, it is enough that this is a court of law, as well as a court of equity.

1 Story, Eq. chap. 14, §§ 646-658; 59 Me. 482.

Mr. E. W. Whitehouse, for defendants:

An examination will show conclusively that placing upon the statute book the enactment of 1841 was but the embodiment, under the form of statute law, of what had already existed as the law of this State as expounded, interpreted, and ruled by this honorable court.

Butler v. Little, 8 Me. 289; *Ramsdell v. Ramsdell*, 21 Me. 288; *Godfrey v. Humphrey*, 18 Pick. 537; *Carter v. Horner*, 4 Mod. 89; *S. C. 1 Eq. Cas. Abr.* 177.

When the deviser gives or devises all his estate, it passes in fee by virtue of the word "estate."

Baker v. Bridge, 12 Pick. 81; *Bridgewater v. Bolton*, 6 Mod. 109; *Murry v. Wise*, Finch, Prec. Ch. 284; *S. C. 2 Vern.* 564, and notes; *Kellogg v. Blair*, 6 Met. 322; *Godfrey v. Humphrey*, 18 Pick. 537; *Putnam v. Emerson*, 7 Met. 383; *Randall v. Tutchin*, 6 Taunt. 410; *Brown v. Wood*, 17 Mass. 73; 55 Me. 287; 107 Mass. 590; 3 Cush. 557; 21 N. Y. 423; 5 Cowp. 221; 18 Ves. 193; 2 Jarm. Wills, p. 326; 1 Jarm. 416

Wills, p. 33, and note; 2 Redf. Wills, p. 327, § 13; 1 Washb. Real Prop. 59. See also *White v. White*, 21 Reporter, No. 19, p. 578; *Shep. Touch. p. 439*, note 1, citing *Lord Mansfield's* decision in *Right v. Sidebotham*, Doug. 759; *Fogg v. Clark*, 1 N. H. 163; *Leland v. Adams*, 9 Gray, 171; *Josselyn v. Hutchinson*, 21 Me. 339; 2 Redf. Wills, 323, 324, §§ 4, 5; *Doe v. Snelling*, 5 East, 87; *Matthews v. Windross*, 2 Kay & J. 406.

Parol evidence may be introduced to show what person was meant or who was intended.

See *Miller v. Traveres*, 8 Bing. 244.

But in case the terms of the devise can be applied to the person or subject-matter intended, with legal certainty, without the aid of such evidence, then it is not admissible.

Greenl. Ev. §§ 289, 290; *Madden v. Tucker*, 46 Me. 387; *Howard v. American Peace Soc.* 49 Me. 288.

In construing a will, the general rule is that the intent of the testator is to govern, but it is the intent expressed by the will, and not otherwise.

66 Me. 360; 49 Me. 295. Also 5 Co. Litt. 86 b.

In construing a will, parol evidence to show the intention of the testator is admissible only in case of latent ambiguity, and then only from necessity, for the purpose of preventing the devise from being declared void for uncertainty.

Cotton v. Smithwick, 66 Me. 365. Also Greenl. Ev. §§ 289, 290.

Peters, Ch. J., delivered the opinion of the court:

Jacob Stevens, in 1838, made his will, in which he gave to his wife the use of one undivided half of his estate, to be held during her widowhood. He then makes this provision: "I give, devise, and bequeath unto my daughter, Lucy Stevens, one undivided half of all my estate, both real and personal, of every description, consisting of the farm on which I now live, stock, farming tools, money, debts due, etc.; and I also give to her, the said Lucy, the other half of my said real and personal estate when my said wife ceases to be my widow."

One question of the case is, whether Lucy Stevens received a fee or only a life estate in the real estate.

By a statute passed in 1841 (Rev. Stat. chap. 92, § 20) it was provided that a devise of land shall be construed to convey all of the estate of the deviser therein, unless it appears by the will that a less estate was intended. Prior to that time the rule was reversed. A devise of land, without words of inheritance, conveyed a life estate only, unless from the whole will it affirmatively appeared that a fee was intended by the testator. The will therefore is to be construed as the law stood before the Act of 1841.

We think the meaning of Jacob Stevens, as manifested from the whole will, was to give his daughter a fee in half the farm at his own death, and in the other half upon the death or marriage of his wife. Several features of the will taken singly have much force, and taken together are of abundant authority, to warrant such a conclusion.

The testator proposes to make a disposition of his "estate," meaning his whole estate. He fails to do so unless his daughter takes a fee.

There is no general residuary clause. In many cases the word "estate" implies a fee. *McLellan v. Turner*, 15 Me. 436; *Joselyn v. Hutchinson*, 21 Me. 339; *Leland v. Adams*, 9 Gray, 171. It is a striking evidence of the intention of the testator to give a fee when, in clauses 2 and 3 of his will he uses the phrase, "all of my estate, real and personal, of every description." Inasmuch as the widow takes a life interest in half the estate, the daughter might never obtain any interest in that half unless she took a fee. She might die while the mother remained a widow.

It appears that the testator appreciated the nature of a life estate, as he limited an estate to his wife in appropriate terms; and he could have devised a limited estate to his daughter had he designed to do so. And he no doubt understood the nature of a residuary clause, making a particular one to the daughter, and none for the benefit of his heirs generally, although not omitting any of his heirs from some benefit under the will, naming them all. He provides for them out of the estate which he first devises to his wife and daughter, a significant fact in collecting the intention of the testator. *Butler v. Little*, 8 Me. 289.

The complainants further contend that, if the devisee took a fee, she took it under an oral trust for the benefit of all the heirs, and that she has sufficiently confessed the trust by her conduct and by a writing signed by her.

If the question were between the complainants and Lucy Stevens alive, there would be much force in the complainants' position. But as between her heirs and her father's heirs, it is doubtful if equity should interfere, since she has made equitable provision for the complainants by her own will; and certainly, as between the complainants and the principal defendant equity cannot afford the relief asked for. She purchased the premises for a fair consideration, without notice of any trust. Rev. Stat. chap. 78, § 12, protects her as an innocent purchaser. The will on its face furnishes no indication of any trust. Its whole drift is the other way.

Bill dismissed.

Danforth, Virgin, Libbey, Foster, and Haskell, JJ., concurred.

George W. BROWN

v.

Inhabitants of WINTERPORT.

1. In order to recover of a town on a town note given by the selectmen for borrowed money, it must appear that the money borrowed went into the town treasury, or had been applied to a legal liability of the town, and that the town had ratified the action of the selectmen.
2. An article in a warrant calling a town meeting to see if the town would vote to pay certain notes given by a majority of the selectmen, describing each by giving its date, amount, and to whom payable, is sufficiently explicit.
3. Where the officers and members of a town meeting, without formal action,

adjourn to the open air, in front of the place of meeting, for convenience, and there vote upon a question pending before the meeting, without objection, the action is valid.

4. When a town has voted to ratify the action of the selectmen in borrowing money and giving a town note therefor, it cannot rescind the ratifying vote at a subsequent meeting.

(Penobscot—Decided March 10, 1887.)

ON report. *Judgment for plaintiff.*

Action to recover on a note given for moneys loaned to defendant town.

The case is stated in the opinion.

Messrs. Barker, Vose, & Barker, for plaintiff:

The object of calling voters together in town meetings is to ascertain the popular will on the questions to be submitted, and when that is ascertained, the design of the law is accomplished; and mere irregularities which concern the conducting of it will not avail to avoid it, unless it be shown that legal votes had been rejected, or illegal votes received, and that, because of the one or the other, or both, the result does not conform to the will of the voters, or uncertainty has been cast upon the result. And especially is this true where no proper motive is shown, no objection made at the time, no right of any voter abridged. Such seems to be the rule of the law.

21 How. 42 (62 U. S. bk. 16, L. ed. 61); 51 Am. Rep. 88; 78 Ill. 170; 47 Miss. 24; 51 Miss. 805; 82 Pa. 297; 59 Am. Dec. 451; *Hodge v. Linn*, 100 Ill. 897; 25 Alb. L. J. 37; *State v. Rogers*, 26 Alb. L. J. 336.

It is a canon of election law that irregularities which would not change the result will not be rectified in the courts.

4 Cow. 297; 8 Cow. 102; 20 Wend. 14; 8 Hill, 42; 5 Denio, 409; 20 Pick. 484.

The town had used the money for municipal purposes. The vote of the town to pay could not be rescinded.

7 Pick. 18; 116 Mass. 172; 122 Mass. 270; 40 Vt. 171; 41 Vt. 28, 418; *Hunneiman v. Gratton*, 10 Met. 454; 42 Vt. 485; 44 Vt. 87, 584.

"Whatever may be authorized by a corporation to be done may be ratified when done by an agent, even in excess of his authority," is a principle too well settled to require any citation of authorities to support it (8 Mich. 100), and the ratification relates back to the time when such acts were performed.

Lawrence v. Taylor, 5 Hill. 107; Ang. Corp. 9th ed. § 804; 1 Potter, Corp. 211; 1 Dill. Mun. Corp. 385.

Mr. W. H. Fogler, for defendants:

The right of towns to grant or raise money, so as to bind the property of the inhabitants, or subject their persons to arrest for nonpayment, is derived solely from statute. They have no authority to grant or raise money except for the purpose provided by the statute of the State.

Bussey v. Gilmore, 8 Me. 191; *Hooper v. Emery*, 14 Me. 375; *Opinion of Justices*, 52 Me. 598; *Westbrook v. Deering*, 63 Me. 231; *Lincoln v. Stockton*, 75 Me. 145; *Luques v. Dresden*, 77 Me. 186; *Stetson v. Kempton*, 18 Mass. 272;

Parsons v. Goshen, 11 Pick. 396; *Anthony v. Adams*, 1 Met. 284; *Minot v. West Roxbury*, 112 Mass. 1; *Van Sicklen v. Burlington*, 27 Vt. 70.

A vote of a town to raise or pay money for any purpose not authorized by the statute is void, as stated in *Anthony v. Adams*, 1 Met. 286: "For it is now well settled that a town, in its corporate capacity, will not be bound, even by the express vote of a majority, to the performance of contracts or other legal duties not coming within the scope of the objects and purposes for which they are incorporated."

The warrant calling a town meeting shall specify the place at which the meeting shall be had.

Rev. Stat. chap. 3, § 5.

The place appointed for holding this meeting was at Union Hall basement. This means within the walls of said basement. It could not meet and organize at any other place.

Chamberlain v. Dover, 13 Me. 466; *Sherwin v. Bugbee*, 16 Vt. 439; Dill. Mun. Corp. 8d ed. 267.

Even if all the voters of the town assent to and are present at a place other than that at which the meeting is called, the doings will have no validity.

Moor v. Newfield, 4 Me. 44; *Jordan v. School Dist. No. 3*, 88 Me. 170; *Sherwin v. Bugbee*, 17 Vt. 337; Dill. Mun. Corp. 2d ed. § 266.

Dillon (§ 269) says that the majority may adjourn to another place within the corporate limits, "if fairly done."

In *Chamberlain v. Dover*, *supra*, it is said: "We do not say that they may not have the right to adjourn to another place. But there should be limitations to the exercise of such discretion."

"The law is strictly held as to the important particulars of time and place."

Dill. Mun. Corp. § 267.

That a town may, at any time before the rights of third parties have intervened, lawfully rescind previous votes is too well settled to require argument.

Dill. Mun. Corp. § 290, and notes 2 and 3; *Hunnenman v. Grafton*, 10 Met. 456; *Wilkinson v. Harvard*, 8 Cush. 68; *Getchell v. Wells*, 55 Me. 433; *Belfast & M. L. R. Co. v. Unity*, 62 Me. 148.

A vote by a municipal or other corporation to ratify the unauthorized acts of its officers must be as explicit and clearly expressed as would be required in a vote granting previous authority to the officers to perform such acts.

Salem Bank v. Gloucester Bank, 17 Mass. 29.

The cases in which a vote of a town to pay or refund money has been held not revocable are not applicable to the case at bar. The vote in that class of cases is like that in *Nelson v. Milford*, 7 Pick. 18, to indemnify officers of the town, who acted illegally, but in good faith; or like that in *Hall v. Holden*, 116 Mass. 172, to pay money which, through the acts of its agents, has been paid wrongfully into the treasury of the town.

If the plaintiff has the right, under the vote, to rely upon the original transaction between Arey and Ritchie and the lender of the money, and upon the disposition of the money borrowed, the facts disclosed by the testimony are not sufficient in law to render the town liable, even if the vote of December 6 shall be regarded as a ratification of the act of the selectmen in

borrowing the money. Assuming that the parties to that transaction have testified truthfully in relation thereto, it appears that the Mining Company, through Mr. Fernald, its treasurer, loaned to Arey and Ritchie, the selectmen of the defendant town, the sum of \$550 upon the supposed credit of the town, but without the authority of the town. Such loan is the basis of the plaintiff's suit.

His case comes precisely within the decision of several recent cases in this State, in which the law applicable to such a state of facts has been so thoroughly discussed, and so explicitly, decidedly, and deliberately stated by this court, as to hardly require further discussion or citation of authorities.

Parsons v. Monmouth, 70 Me. 262; *Billings v. Monmouth*, 73 Me. 174; *Belfast Nat. Bank v. Stockton*, 72 Me. 523; *Lincoln v. Stockton*, 73 Me. 141; *Otis v. Stockton*, 76 Me. 506; *Atkins v. Minot*, 75 Me. 189.

"An absolute excess of authority by the officers of the corporation, in violation of law, cannot be upheld."

Dill. Mun. Corp. § 463.

"Transactions which are absolutely illegal or *ultra vires* cannot be ratified."

Green's Brice, *Ultra Vires*, 550.

"No sort of ratification can make good an act without the scope of the corporate authority."

Peterson v. Mayor of N. Y., 17 N. Y. 449.

Emery, J., delivered the opinion of the court:

This action, though in the name of the nominal assignee, Brown, is in fact brought by the Mineral Hill Mining Company to recover of the town of Winterport money alleged to have been loaned to the town by that company. Two of the three selectmen of the town, Arey (chairman) and Ritchie, assuming to act in behalf of the town, borrowed of the plaintiff company \$550 as for the town, and gave what purported to be a town note therefor, signed by them as selectmen. This was May 1881.

This transaction alone of course does not imply a promise by the town to repay the money. To imply such a promise, the plaintiff must establish by evidence two other propositions of fact: (1) That the money so obtained was either paid into the town treasury, or was applied in fact to the discharge of lawful liabilities of the town to that extent; (2) that the town ratified the action of the selectmen in borrowing and applying the money. *Lincoln v. Stockton*, 75 Me. 145; *Otis v. Stockton*, 76 Me. 506.

I. Ritchie, one of said selectmen, testified that all the money thus borrowed was at once used to pay off and take up outstanding orders previously given for and representing legal liabilities of the town for ordinary municipal purposes, such as schools, streets, poor, etc. He does not now profess to remember the dates, numbers, amounts, payees of each, or many of these orders; for what purpose each was given. He states quite fully as to some of them. He testifies, however, that all the orders were produced at the time by Mr. Arey, the chairman; that he and Mr. Arey examined them; that he

satisfied, at the time, of their authenticity, and that they were regularly issued for the usual municipal purposes; that they were recorded with dates, numbers, and amounts, etc., upon the book used by the town officers to record paid town orders. The amount was \$558. He says that, after being thus recorded, they were cancelled on the spot by burning. The book was left with Arey, the chairman, and it is claimed it was afterward burned in the fire that consumed Arey's store.

Ritchie further testifies that a list, or memorandum of all the orders was read to the town meeting held December 6, 1884,—a meeting called to consider the question of repaying this money, and which voted to do so. Mr. Ritchie is not contradicted; and although the evidence is not wholly satisfactory, and is not so clear and full as we could wish, we think it fairly sustains the proposition that the money was in fact applied to the discharge of the town's legal indebtedness to that extent.

Mr. Arey was the holder of these orders, and the defendants urged that the money could not lawfully be applied to the orders held by him, as he was (as the defendants say) indebted to the town at the time in a much larger sum,—indebted not simply as a debtor, but as town officer, for money of the town wrongfully appropriated to his own use. Much evidence is in the case upon this question of Arey's indebtedness to the town. We do not think it matters whether and how he was indebted. The plaintiff, in the absence of fraud (and no fraud upon his part is suggested), would not be affected by the state of the accounts between Arey and the town. If Arey was indebted to the town, even for money wrongfully appropriated, the town was also indebted to him. Each indebtedness was distinct and of a different nature. Each was outstanding. Neither had been applied toward liquidating the other. He was the holder of certain audited claims against the town, and the plaintiff's money extinguished them. The town thus had the benefit of the money.

II. Two of the selectmen for the year 1884 gave the plaintiff company a town order for \$618.13, dated July 7, 1884, to take up the original note; that sum being the amount with interest. They afterward called a town meeting, to see if the town would vote to pay this order among others. At this meeting, held December 6, 1884, it was voted that the treasurer hire money to pay the various notes and orders named in the warrant, including the order to the plaintiff company. This official vote, if valid, would seem to be an effectual ratification of the act of the selectmen in borrowing the money and giving the town order.

The defendants contend that the article in the warrant was too indefinite and general to authorize such a vote. Instead of a separate article for each note or order to be submitted to the town, there was one article naming distinctly and separately all the notes and orders to be acted upon. This particular order was named in the article by date, amount, and name of payee. We think the warrant gave a notice sufficiently specific.

The defendants further contend that the vote was illegal, for the reason that it was not

passed within the walls of the room named in the warrant as "Union Hall basement," but was passed just outside in the open air, in front of the building. It seems there was, by reason of the crowd, considerable difficulty in ascertaining the will of the meeting, while within the room; and calls were made from the floor that the decision be had outside the building. These suggestions seem to have met with general approval and no opposition. The people at once all passed out of doors, the moderator and clerk with them. The meeting then divided, and the count was made in the open air, close to the building. There was no formal adjournment from the room to the open air; but what was done seems to have been done spontaneously and by unanimous consent. There was no abridgment of freedom of speech or of vote. No person was misled. No person was prejudiced. The effect was to obtain greater freedom and more certain expression of the real will of the meeting. The act now complained of was not complained of then. It was not the omission of any necessary step in the procedure, or the interpolation of any illegal restrictive step; but simply the well doing outside the walls what could not have been well done inside the walls. It is a maxim of parliamentary law that anything as to the mode of action may be done by unanimous consent.

It will be seen, by a careful examination of the cases cited by the defendants to this point, that they do not conflict with our reasoning. In those cases it appeared that some persons' rights were abridged, or that the meeting itself was unauthorized. The following authorities cited by the plaintiff sustain the vote: *Dale v. Irwin*, 78 Ill. 170; *People v. Kniffin*, 21 How. Pr. 42. See also 82 Pa. 297.

The defendants again claim that, if we find there was a valid ratification, it was effectually rescinded by a subsequent vote at a legal meeting, August 15, 1885, passed before the treasurer had obeyed the former vote. The act ratified, however, was the borrowing the plaintiff's money by the then selectmen. That act had been done. The vote of ratification at once applied to the act, and adopted it as the act of the town. The act was then as binding on the town as if the vote was prior in time to the act. It was then the town's act. The town had borrowed the plaintiff's money. A ratification after the act is as potent as authority before the act. The act is equally binding upon the principal in either case, and in neither case can the principal, after the act, relieve himself by a simple declaration of his change of mind. The cases cited by the defendants do not hold to the contrary.

We think the evidence fairly establishes the propositions that the money was borrowed for the town; that it was used by the town in payment of proper municipal charges; that the town has ratified the borrowing, and has ratified the giving the order declared upon.

Judgment for the plaintiff for \$618.13, with interest from December 9, 1884, the date of demand.

Peters, Ch. J., Walton, Virgin, and Haskell, JJ., concurred.

Libbey, J., concurred in the result.

Carrie M. GILLEY

v.

Frank E. GILLEY & Trustee.

A divorced wife may maintain an action against her former husband for expenses incurred in the necessary support of their minor children after the decree of divorce on her libel, when no decree as to alimony or custody of the minor children is made.

(Kennebec—Decided March 10, 1887.)

ON exceptions by the subsequent attaching creditor who appeared, by leave of court, and defended. *Overruled.*

The case is stated in the opinion.

Messrs. S. & L. Titcomb, for subsequent attaching creditor:

In *Mortimore v. Wright*, cited in 8 Law Reporter, 222, the court says: "In point of law, a father who gives no authority, and enters into no contract, is not liable for goods supplied to his son while under age, any more than an uncle, a brother, or a stranger would be."

The later view, according to Tyler on Infancy, pp. 107-109, 111, is that the liability of a father, even for necessities, is a matter depending wholly upon contract.

The statutes provide a way in which a parent can be made liable; and third parties, by the later cases, are restricted to that.

Tyler, *Inf. supra*; 60 N. H. 197; 1 Add. Cont. Smith's ed. 202.

"There appears to be no responsibility on the part of a father, even for necessary goods supplied to his son, unless there be some proof of a contract, express or implied; and there must be a prior authority or a subsequent recognition of the claim."

Chitty, Cont. Perkins' ed. 117. To the same effect *Raymond v. Loye*, 10 Barb. 438.

This case contains no allegation which can bring it under Rev. Stat. chap. 24 § 16 (case of paupers); and if it did, by that section the mother herself is liable. Nor can it come under Rev. Stat. chap. 59, § 30, which authorizes towns only to recover.

The law raises no promise of payment where a child is supported by its mother.

Cummings v. Cummings, 8 Watts. 366.

In *Duffey v. Duffey*, 44 Pa. 399, it was held that the relationship excludes the implication of a promise. A grandparent cannot recover for the maintenance of grandchildren.

In *Pauling v. Willson*, 13 Johns. 192, the mother is under equal natural obligation with the father to support her children. There is no legal ground to authorize the recovery by the mother against the father for the maintenance of children; at most she could have a right to sue for contribution only. There is doctrine something like this in *Harris v. Harris*, 5 Kan. 46.

In a later Connecticut case, *Finch v. Finch*, 22 Conn. 411, the court refuses to sustain an action of book account brought by a wife, after divorce, against the father, for cost of maintaining children.

Messrs. Baker, Baker, & Cornish, for plaintiff:

At common law, a father is bound to sup-

port and provide for his children; and if he deserts his infant children, he is liable to a party supplying them with the necessities. Chitty says that this is *voxata questio*, and *dicta* to the contrary may doubtless be found in the decisions of some of the States and of England. But the greater weight of authority, as well as the better reason, sustains the proposition we have made.

1 Chitty, Cont. 218; 2 Kent, Com. *191; 1 Pars. Cont. 807; 2 Bish. Mar. & Div. § 538; *Stanton v. Willson*, 3 Day, 37; S. C. 3 Am. Dec. 255.

The early cases in Massachusetts assumed this doctrine (*Benson v. Remington*, 2 Mass. 115; *Whipple v. Dow*, 2 Mass. 419; *Nightingale v. Withington*, 15 Mass. 274); and in *Dennis v. Clark*, 2 Cush. 352, the court announces the principle squarely in these words: "By the common law of Massachusetts, and without reference to any statute, a father, if of sufficient ability, is as much bound to support and provide for his infant children, in sickness and in health, as a husband is bound by the same law, and by the common law of England, to support and provide for his wife." The recent Massachusetts cases reaffirm the same.

Reynolds v. Sueselzer, 15 Gray, 78; *Brow v. Brightman*, 136 Mass. 187.

In the absence of statute, the common-law rule above declared is adopted and enforced here, and our decisions recognize the same.

State v. Smith, 6 Me. 462; *Garland v. Dover*, 19 Me. 441.

In an early case in Connecticut (*Stanton v. Willson*, 3 Day, 37), the wife was divorced by the General Assembly, was decreed a certain sum in lieu of all claims of dower, and was made sole guardian of the youngest children. It was held that the father was still liable for their support furnished, in the first place, by her as guardian, and then by a stranger with whom she intermarried. In a subsequent case in the same State (*Finch v. Finch*, 22 Conn. 411), where the custody and control of the children had been expressly decreed to the wife, it was held (two out of the five judges dissenting) that she could not maintain such action.

The Massachusetts court also held that a father is not liable for the support of his minor children after their custody has been given to the mother.

Hancock v. Merrick, 10 Cush. 41; *Brow v. Brightman*, 136 Mass. 187.

Such is also the law in Indiana (*Husband v. Husband*, 67 Ind. 583; S. C. 33 Am. Rep. 107); and in New York (*Burritt v. Burritt*, 30 Barb. 124).

The courts of several States, however, hold the contrary doctrine,—that, although the custody of minor children is given to the mother, the father is still liable for their support. So held in Arkansas (*Holt v. Holt*, 43 Ark. 495); in Michigan (*Courtright v. Courtright*, 40 Mich. 633); and in Illinois (*Plaster v. Plaster*, 47 Ill. 290). We are inclined to believe that the Massachusetts doctrine is the sounder and the more reasonable.

2 Bish. Mar. & Div. § 557.

"In case of either separation or divorce without orders of custody, the obligation in general continues as before."

Schoul. Dom. Rel. 322.

In the case at bar, however, the question has no such complications. The court granting the divorce undoubtedly had the power, under the statute, to take the care and custody of the children from the father, and give them to the mother; and then her liability for their support might have followed; but she did not ask for that, and the court did not decree it.

"By the divorce the relations of husband and wife are destroyed, but not the relation between the father and his children. His duty and liability as to them remained the same, except so far forth as he was incapacitated or discharged by the terms of the decree."

Stanton v. Willson, 8 Day, 37. See also opinion of Ellsworth, J., in *Finch v. Finch*, 22 Conn. 411.

It has been held that a woman, after a divorce *a vinculo*, may maintain an action against her former husband for personal services performed for him before her marriage (*Carlton v. Carlton*, 72 Me. 115); also on a promissory note given by him to her during coverture, for money borrowed of or belonging to her (*Webster v. Webster*, 58 Me. 189. See also *Blake v. Blake*, 64 Me. 177).

Virgin, J., delivered the opinion of the court:

Assumpsit by the mother against the father, for their young children's necessary support, furnished after a divorce *a vinculo* decreed to her for his "desertion and failure to support," he having been absent from the State several years prior to the decree, and never having returned or furnished any support whatever during the time, and no decree for alimony or custody of the children having been made.

It is a matter of common knowledge that a father is entitled by law to the services and earnings of his minor children. It is equally well known that this right is founded upon the obligation which the law imposes upon him to nurture, support, and educate them during infancy and early youth, and which continues until their maturity, when the law determines that they are capable of providing for themselves. *Benson v. Remington*, 2 Mass. 113; *Daves v. Howard*, 4 Mass. 98; *Nightingale v. Withington*, 15 Mass. 274; *State v. Smith*, 6 Me. 462, 464; *Dennis v. Clark*, 2 Cush. 352, 353; *Reynolds v. Sweetser*, 15 Gray, 80; *Garland v. Dover*, 19 Me. 441; *Van Valkenburgh v. Watson*, 13 Johns. 480; *Furman v. Van Sise*, 56 N. Y. 435, 439, 445, 446; 2 Kent, Com. *190 et seq.; Schoul. Dom. Rel. 321.

In *Dennis v. Clark*, *supra*, the court said: "By the common law of Massachusetts, and without reference to any statute, a father, if of sufficient ability, is as much bound to support and provide for his infant children, in sickness and in health, as a husband is bound by the same law, and by the common law of England, to support and provide for his wife. And if a husband desert his wife, or wrongfully expel her from his house, and make no provision for her support, one who furnishes her with necessary supplies may compel the husband, by an action at law, to pay for such supplies. And our law is the same, we have no doubt, in the case of a father who deserts or wrongfully discards his infant children." This upon the ground of agency. *Reynolds v.*

Sweetser, 15 Gray, 78; *Hall v. Weir*, 1 Allen, 261; *Camerlin v. Palmer Co.* 10 Allen, 539. But a minor who voluntarily abandons his father's house, without any fault of the latter, carries with him no credit on his father's account, even for necessities. *Weeks v. Morrow*, 40 Me. 151; *Angel v. McLellan*, 16 Mass. 27. Otherwise a child, impatient of parental control while in his minority, would be encouraged to resist the reasonable control of his father, and afford the latter little means to secure his own legal rights beyond the exercise of physical restraint. *White v. Henry*, 24 Me. 538.

Moreover, in actions for seduction, whereof loss of service is the technical foundation, the loss need not be proved, but will be presumed in favor of the father who has not parted with his right to reclaim his minor daughter's service, although she is temporarily employed elsewhere. *Emery v. Gowen*, 4 Me. 33. "And this rule results from the legal obligation imposed upon him to provide for her support and education, which gives him the right to the profits of her labor." *Blanchard v. Daley*, 120 Mass. 489; *Kennedy v. Shea*, 110 Mass. 147; *Emery v. Gowen*, *supra*; *Furman v. Van Sise*, 56 N. Y. 435, 444.

See also in that large class of cases wherein needed supplies, furnished by the town to minor children between whom and their father, though they lived apart, the parental and filial relations still subsisted, are considered in law supplies indirectly furnished the father,—the reason is because he was bound in law to support them. *Garland v. Dover*, 19 Me. 441.

We are aware that courts of the highest respectability, especially those of New Hampshire and Vermont, hold that a parent is under no legal obligation, independent of statutory provision, to maintain his minor child; and that, in the absence of any contract on the part of the father, he cannot be held except under the pauper law of those States, which is substantially like our own. *Kelley v. Davis*, 49 N. H. 187; *Gordon v. Potter*, 17 Vt. 348.

But, as before seen, the law was settled otherwise in this State before the separation, and has been frequently recognized in both States since; and we deem it the more consistent and humane doctrine.

It is also settled that, at least during the life of the father, the mother, in the absence of any statutory provision or decree relating thereto, not being entitled to the services of their minor children, is not bound by law to support them. *Whipple v. Dow*, 2 Mass. 415; *Daves v. Howard*, 4 Mass. 97; 2 Kent, Com. *192; *Weeks v. Morrow*, 40 Me. 151; *Gray v. Durland*, 50 Barb. 100; *Furman v. Van Sise*, *supra*, both opinions; Rev. Stat. chap. 59, § 24.

This leads to an inquiry into the effect of the divorce *a vinculo* alone, unaccompanied by any decree committing the custody of the children to the mother. For when such a decree is made, then the father would have no right either to take them into his custody and support them, or employ anyone else to do so, without the consent of the mother (*Hancock v. Merrick*, 10 Cush. 41; *Brow v. Brightman*, 136 Mass. 187; *Finch v. Finch*, 22 Conn. 410); although it is held otherwise in some jurisdic-

tions (*Holt v. Holt*, 42 Ark. 495, and other cases in plaintiff's brief).

But a decree of custody to the mother is predicated of its primarily belonging by right to the father, and the granting of it implies that such action on the part of the court is absolutely essential to imposing upon her the legal obligation of supporting their minor children. So long as the father lives, the mother, in the absence of any decree of custody in her behalf, cannot of right claim, as against him, their services, provided he is a suitable person to have the care of them. He may, on *habeas corpus*, obtain custody as against their mother, on satisfying the court that he is a fit custodian. *Commonwealth v. Briggs*, 16 Pick. 203.

It would seem to follow that the divorce alone, while it dissolved the matrimonial relation between the parties thereto, did not affect in any wise the parental relation between them and their children. When the divorce was decreed in behalf of his wife, the defendant thereupon ceased to be her husband; but he still remained the father of the children which had been born to him during his conjugal relation with the plaintiff, with all the father's duties and legal obligations full upon him.

The cases which hold that, in case of a decree for custody, the father is not holden, impliedly hold that, in the absence of any such decree, he is liable. *Brow v. Brightman*, *supra*.

When the bond of matrimony was dissolved, these parties became as good as strangers; and the plaintiff may then maintain an action against the defendant for any cause of action which at least subsequently accrued. *Carlton v. Carlton*, 72 Me. 115; *Webster v. Webster*, 58 Me. 189.

We are of opinion, therefore, that this action is maintainable on the implied promise of the defendant resulting from the circumstance and the law applicable thereto.

Exceptions overruled.

Peters, Ch. J., Walton, Libbey, Emery, and Haskell, JJ., concurred.

NATIONAL BANK OF DERBY LINE

v.

Fred N. DOW *et al.*

On the application of the maker of an overdue note for renewal, the holder replied that he preferred to hold the old note, but would carry it thirty to sixty days "as it is, if nothing materially transpires to change the status of the security and the names," providing the maker immediately remit three months' interest to a time stated, then past. The maker remitted the three months' interest at 7 per cent, and the holder indorsed the payment of three months' interest, without stating the amount, which was not sufficient to pay all the back interest at the legal rate. The transaction was governed by the law of Vermont, which applies all excess above 6 per cent to the contract on which it was paid. *Held*, that the transaction

was not a contract that would discharge the indorsers.

(Cumberland—Decided March 8, 1887.)

ON exceptions by defendants. *Overruled.*
Action on a promissory note.

The facts are stated in the opinion.

Mr. Clarence Hale, for defendants:

It cannot be that the bank intended to say: "We will extend, provided the extension is illegal and inoperative, and of no effect upon the parties to the note."

The language used cannot be construed into an agreement to reserve rights, such as is shown in the following cases, where the court held that a discharge was not effected:

Potter v. Green, 6 Allen, 442; *Hutchins v. Nichols*, 10 Cush. 299; *Sohier v. Loring*, 6 Cush. 587.

A reservation of rights against the sureties must be in "clear and unambiguous terms."

Boulbee v. Stubbs, 18 Ves. 20; *Rees v. Berrington*, 2 Lead. Cas. Eq. pt. 2, p. 974.

When the bank officers took the responsibility of enlarging the time of payment, they altered the contract; they changed the liability of the surety; and that surety has a right to say that this is not the contract into which he entered.

Greely v. Dow, 2 Met. 178; Byles, Bills, 55, §§ 247, 250, 253, and notes, and cases cited.

The promise to extend was based upon a legal consideration,—the usurious interest paid in advance.

Berry v. Pullen, 69 Me. 104.

The case of *Haydenville Sav. Bank v. Parsons*, 188 Mass. 53, will not support plaintiffs' case; the usury law of Vermont is entirely different from the interest law of Massachusetts, any rate being allowed in Massachusetts if expressed in the contract, whereas, in Vermont, any sum over 6 per cent may be recovered back.

The case at bar shows the payment of money not due; and such payment is clearly a benefit to the creditor, and an inconvenience to the debtor; and in both respects is a good consideration for a promise.

Greely v. Dow, *supra*; *Rees v. Berrington*, *supra*; De Golyar, Guarantees, p. 407 *et seq.*, and cases cited; Story, Prom. N. §§ 418-421, and cases cited.

The subject of usury as a consideration for an extension of time is fully considered in—

Vary v. Norton, 6 Fed. Rep. 808; 3 Fed. Dec. p. 614, § 552. See also *Turrill v. Boynton*, 28 Vt. 142; *Burgess v. Dewey*, 33 Vt. 619; *Gardner v. Gardner* (23 S. C.), 25 Am. L. Reg. 412.

Mr. Ardon W. Coombs, for plaintiff:

A mere indulgence at the will of the creditor does not discharge the indorser. A valid and binding common-law agreement to give time to the maker is necessary in order to release the indorser.

Story, Prom. N. § 419, and authorities cited in note 2; *Williams v. Smith*, 48 Me. 188; *Berry v. Pullen*, 69 Me. 108; *Mariners Bank v. Abbott*, 28 Me. 280; *Page v. Webster*, 15 Me. 249; *Freemans Bank v. Rollins*, 18 Me. 207; *Bank of Utica v. Ives*, 17 Wend. 501; *Croath v. Sims*, 5 How. 207 (46 U. S. bk. 12, L. ed. 119).

The indorsers were released, if at all, the very moment the agreement was accepted, January 31, 1885. The forbearance in fact which followed did not make the agreement binding, if it was not so at its inception.

Potter v. Green, 6 Allen, 444.

The test is whether the principal could have successfully defended a suit upon the note if commenced within thirty or sixty days; or whether he could have maintained an action for breach of the agreement.

Berry v. Pullen, 69 Me. 103; *Potter v. Green*, *supra*.

The alleged agreement not being under seal, a sufficient consideration must be proved.

Berry v. Pullen, *supra*; *Williams v. Smith*, 48 Me. 138; *Potter v. Green*, 6 Allen, 444; *Reynolds v. Ward*, 5 Wend. 501; *M'Leomore v. Powell*, 12 Wheat. 554 (25 U. S. bk. 6, L. ed. 726).

Payment of interest due is not a sufficient consideration for a promise to give time, so as to discharge an indorser.

Haltstead v. Brown, 17 Ind. 202.

Indeed, in several cases it has been held that payment of interest in advance is not sufficient to release an indorser (*Oxford Bank v. Lewis*, 8 Pick. 458; *Blackstone Bank v. Hill*, 10 Pick. 133; *Freemans Bank v. Rollins*, 13 Me. 202); and that an agreement to pay more than the legal rate of interest for delay does not discharge the indorser (*Williams v. Smith*, 48 Me. 138; *Whitney v. South Paris Mfg. Co.* 39 Me. 316).

It has been held that, where the law requires the excess of usurious premium to be applied in payment of the debt and interest at a legal rate, then the indorser will not be released by the payment of interest in advance at a usurious rate.

Nightingale v. Meginnis, 34 N. J. L. 461. See *Haydenville Sav. Bank v. Parsons*, 138 Mass. 53.

Indulgence granted will not discharge the indorser unless the creditor has bound himself not to sue for a definite length of time.

Bank of Utica v. Ives, 17 Wend. 501; *Norris v. Crummev*, 2 Rand. 328; *Creath v. Sims*, 5 How. 207 (46 U. S. bk. 12, L. ed. 119).

The agreement must be without reservation of remedy against the indorser.

The indorser can pay at any time, and enforce his remedy against the principal.

Solier v. Loring, 6 Cush. 538; *Hutchins v. Nichols*, 10 Cush. 300; *Potter v. Green*, 6 Allen, 444; *Morse v. Huntington*, 40 Vt. 488; *Passumpscot Bank v. Goss*, 31 Vt. 315; *Dixon v. Dixon*, 31 Vt. 450.

Peters, Ch. J., delivered the opinion of the court:

The defendant Dow, an accommodation indorser of a note, contends that he is released from liability by an agreement between the maker and holder to extend the time of payment of the note without his assent.

The principle involved in such a defense, while clearly logical, is subtle and refined, so much so that persons unlearned in the law rarely suspect the legal consequences that may follow their giving time for the payment of overdue notes. It is the unseen, sunken rock on which thousands of commercial obligations

have been wrecked, to the utter dismay of the losers, and sometimes to their ruin. While the situation of a surety must be carefully scrutinized, so should that of a holder be who is to lose, if he loses at all, about \$7,000 for unwittingly receiving the merest pittance of consideration for extending a note.

Applying to the present case the definition of liability as declared by *Virgin, J.*, in *Berry v. Pullen*, 69 Me. 101, we are convinced that the facts, affected as they are by the finding of the judge, fail to prove any contract of extension which can release this indorser from liability on the note. It is in that case said: "But before a surety whose name was deliberately and understandingly placed upon a note to give it credit can be thus absolved from liability, the law, as well as justice and equity, requires that there shall be a valid, binding contract,—one founded on a sufficient consideration, and the effect of which shall be to give further definite time to the principal without the consent of the surety." We think this plaintiff has escaped from the risk of any such contract; the facts fall short of it.

The maker of the note, in a letter dated January 24, 1885, offers to renew his then overdue paper, asking that the name of one indorser be omitted from the new note. The plaintiffs do not accept the proposition. They are unwilling to lose an indorser. They answer, on January 27, 1885, in these words: "We prefer to hold the note we now have to taking a new one, but will carry it for thirty to sixty days as it is, if nothing materially transpires to change the status of the security and the names; this, however, is only on condition that you remit immediately the interest on the note for three months, to January 15."

All the phrases of this letter are freighted with the idea that the bank was unwilling to lose an indorser from the note. It is the language of caution and self-protection. They were willing to grant indulgence, but at no risk to themselves. They prefer to "hold the note" "as it is," "will carry it,"—not change it,—not for any fixed, definite time, but "for thirty to sixty days." The very indefiniteness of the indulgence shows merely a promise not to press, and not a contract to be bound by.

The maker's reply indicates that he was craving indulgence merely, and not expecting to make any legal contract for delay. "I trust you will give me sixty days," he writes. But the bank was not disposed to grant any indulgence, if thereby anything transpires to change materially the status of the security or of the names. What, from their standpoint, can this mean, unless it is that they would be bound to do nothing which would expose to risk any rights then held by them? They were, in any event, to retain their status both as to the security and the names. And still the defendant assumes the position that, while the plaintiffs were repelling all idea of a contract, they were really making one. We can have no doubt that the plaintiffs intended to reserve to themselves the right to enforce the note or not at their discretion. The learned counsel for the defendant suggests that the bank and its legal advisers well understood the law of the case, and intended to obtain the consent of the indorsers. We do not believe that they intended

to do any act which would require their assent. The paper may not be in all respects worded with exact verbal propriety; but as a whole we think it strongly and impressively expresses a protest against the very misinterpretation now endeavored to be put upon it; the intention shines through it.

We do not say, of course, that there may not be some force in the ingenious argument submitted in behalf of the defendants' position. Truth mixes with error in many cases, the alliance making error only the more difficult to contend against. We do say that the plaintiffs' position is much the most satisfactory.

The plaintiffs asked for nothing as a legal consideration for an extension. Overdue interest, and not all of that, only was required. They did not write for extra interest,—it was "interest" that was wanted. The contention of the defense is that interest at 7 per cent per annum was intended; while there is no evidence in the case to show any such thing. When a settlement was to be made, out of which this note grew, the president of the bank wrote that they would accept notes with interest in advance at "6 per cent." At another time a bank official offered to settle this note by new notes which they would discount at 7 per cent, which would be a legal transaction. The record of the case shows no other instance when interest of any kind was mentioned by the bank. But interest for three months at 7 per cent was remitted by the maker, he supposing, no doubt, that on that account his appeal for lenity would be more likely to prevail. "Which you ask," writes the maker. The plaintiffs had asked of him "interest," and no more; presumptively legal, and not illegal, interest.

The whole amount was kept. Why should it not be? More of legal interest was then due than the amount sent. It was a *pro tanto* protection to the indorser to keep it. The bank indorsed three months' interest, not naming the amount of it. But if they did not appropriate the excess over 6 per cent, the law of Vermont appropriated it upon the note, at the moment it was received. It could not be retained for an illegal purpose,—it was never asked for for any purpose. There is not satisfactory evidence that the bank designed to use the excess illegally, in view of the finding of the judge, upon both law and fact, in favor of the plaintiffs. The judge ruled as a matter of law that the correspondence and the conduct of the parties did not operate to discharge the defendant. His decision of fact implies that the conduct was not incompatible with such finding. The case is before us on exceptions, and not on report of evidence on an appeal from the whole record. The finding at *nisi prius* gives all favorable intendments which the facts can allow to the plaintiffs. If it be necessary to find as a fact that the extra interest was not accepted as a consideration for extending the note, the finding below makes it so. And here it may be forcibly asked how the extra interest could be regarded as the consideration for the promise of the bank, when the promise was made, without such consideration, before it was received.

The question—a doubtful one—whether the payment of usury would be a valid con-

sideration for such an agreement as the defendant depends upon, never decided either in Vermont or Maine, need not now be entertained by us.

There may be stronger ground possibly for contending that the time of payment was not extended to the indorsers than there is that it was not extended to the maker; and this action is against an indorser only. Some distinction of the kind might appear, upon the face of the principal letter, to some persons. It is a well-settled principle, recognized by most courts,—the doctrine of reservation,—that a holder may agree with the maker to extend the contract as to him, and, at the same time, as a part of the same agreement, reserve the right of action against all indorsers or sureties; and in such case those parties are not absolved from liability. Such reservation might prevent much of the expected benefit of an extension to the creditor, but that would not lessen the validity of the qualification annexed to it. In *Bigelow, B. & N. 598, 607*, the leading cases on this subject are reviewed, and an abundance of authorities cited. See also *Haydenville Sav. Bank v. Parsons*, 138 Mass. 53, a case bearing upon the points arising in the case at bar.

Exceptions overruled.

Walton, Virgin, Libbey, and Emery, JJ., concurred; **Haskell, J.**, concurred in the result.

Lewis PIERCE, Admr.,

v.

Catherine A. STIDWORTHY *et al.*

A testator, who died in 1875, after a few small legacies gave his widow the residue of his estate, to use the income and so much of the principal as, in her judgment, she needed; and at her death he gave the remainder to his children. The administrator with the will annexed recovered a judgment in the Court of Commissioners of Alabama Claims for a vessel owned by the testator, which was destroyed by the Confederate cruiser Sumter. Held, that the fund realized from that judgment should pass to the use of the widow; and that she was entitled to the custody of it upon giving a bond to the judge of probate for the faithful management and preservation of the fund, according to the terms of the will.

(Cumberland—Decided March 4, 1887.)

BILL in equity for the construction of a will, brought by the administrator with the will annexed of John Stidworthy, against the widow and children of the testator.

The case is stated in the opinion.

Mr. Lewis Pierce, pro se.

Messrs. Woodman & Thompson, for the widow:

The only question that can arise is as to the power of the testator to dispose of his "claim" by will. If he had the power to dispose of it, there can be no question that the language of the residuary clause is an apt and sufficient

exercise of that power. The intent of the testator must be gathered from the will alone, which is clear and free from ambiguity.

Cotton v. Smithwick, 66 Me. 380.

It is well-settled law that such claims pass to an assignee in bankruptcy, although the bankruptcy occur long prior to the adoption of the treaty or Act of Congress by virtue of which the claims are recoverable.

Comegys v. Vasse, 1 Pet. 210 (26 U. S. bk. 7, L. ed. 108); *Erwin v. United States*, 97 U. S. 392 (Bk. 24, L. ed. 1065); *Phelps v. McDonald*, 99 U. S. 298 (Bk. 25, L. ed. 473); *Leonard v. Nye*, 125 Mass. 445.

That the same rule applies to a devise as to an assignment in bankruptcy, see—

1 Redfield, 4th ed. 388.

A gift of property for life, by will, together with a right to the legatee to appropriate the principal sum thereof at her own pleasure and discretion, amounts to a gift of the entire interest and fee in the property, and, of course, entitles the legatee to the custody of the property, that she may have free scope to exercise the discretion vested in her by the will.

Bacon v. Woodward, 12 Gray. 376; *McCarty v. Congrove*, 101 Mass. 124; *Gifford v. Choate*, 100 Mass. 343.

A mere tenant for life of personal property, although he has no right to dispose of the principal sum thereof, is entitled to its custody.

Sampson v. Randall, 72 Me. 109.

Messrs. Nathan & Henry B. Cleaves, for the heirs:

In the present case no valid claim existed against Great Britain, no claim growing out of and adhering to the property, which would pass by general bequest. In speaking of the treaty with Spain the court says in *Comegys v. Vasse*, 1 Pet. 212 (26 U. S. bk. 7, L. ed. 108): "The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision within the scope of this authority is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it as a decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review in any judicial tribunal."

The claim of John Stidworthy against Great Britain was passed upon by the tribunal of arbitration,—a competent tribunal,—and its decision was conclusive. The case of *Randal v. Cockran*, 1 Ves. 98, holds that the right of indemnity travels with the right of property; and that there can be no doubt that if the party injured dies before or after a treaty is made, and compensation is subsequently made, it would be assets, distributable as such, in the hands of his executors. The decision, however, is based upon an existing, recognized right to compensation under the treaty,—a claim demanded by our government, and as such granted,—not refused,—as in the case of the testator.

In *Leonard v. Nye*, 125 Mass. 455, the court held that the bankrupt had a claim against ME.

Great Britain, through her violation of international duty; that he was justly entitled to compensation from Great Britain, though he could not obtain his rights in the ordinary course of judicial proceedings, but only by petition to the British government, or through the interposition of his own government. His own government demanded compensation for his loss as a matter of right, and it was awarded, under the treaty, by the tribunal of arbitration.

Such an interest might, perhaps, pass under a general clause in a will; but in the present case no claim existed against Great Britain for violation of international duty, and the testator, at the time of his decease, had no vested right or claim against any government for the loss of his property and did not die possessed of any right or claim, growing out of this property, against the United States.

In *Bachman v. Lawson*, 109 U. S. 659 (Bk. 27, L. ed. 1067), the claim is identified as one of the class embraced in the award. In the case at bar, no money was received from Great Britain on account of the destruction of the schooner *Arcade*; no compensation was due from Great Britain; no claim existed.

If it is found that the alleged claim for the loss of the schooner *Arcade* was of such nature, and in such condition at the decease of the testator, that it would be capable of passing under the general clause contained in this will, then the intention of the testator "is to be ascertained from the terms of the will itself, elucidated, if may be, by the light of the circumstances under which it was made, the state of his property, his kindred, and the like."

Dunlap v. Dunlap, 74 Me. 402; *Blaisdell v. Hight*, 69 Me. 306.

If it is said that this supposed claim for the loss of the *Arcade* was constantly on his mind, the fact that no allusion is made to the claim is only additional evidence that he did not intend that it should pass by the terms of his will.

Webster v. Wiers, 51 Conn. 569.

Libbey, J., delivered the opinion of the court:

This is a bill in equity to obtain the true construction of the will of John Stidworthy, who died in April, 1875.

By the second clause in his will he gave small legacies to each of his children. The third clause is as follows:

"All the residue of my estate, real, personal, and mixed, of which I shall die possessed, or which I may be entitled to at my decease, I give, devise, and bequeath to my faithful wife, Katharine A. Stidworthy, for the term of her life, with the right and power to dispose of the income, rents, profits, and interest of the same, and with the further right to apply to her use, if needed, any part of the principal of the personal property, making her sole judge of the need of so doing; and after her death I give and devise the same, or what may be left unapplied and unconsumed, to my children, to be divided equally between them; the children of any deceased child to take the share of their parent. If all my children and grandchildren should die in the lifetime of my said wife, then I will it shall go and belong to her absolutely, to dispose of at her pleasure; and if she

does not dispose of it by gift or otherwise during her lifetime, to descend to her lawful heirs."

In 1861 Stidworthy owned one half of the schooner Arcade, which was destroyed by the Confederate cruiser Sumter, in November of that year. Under the Act of Congress of June 5, 1862, the complainant, as administrator with the will annexed, filed his application for the damage sustained by said Stidworthy, by reason of the destruction of the schooner, before the Court of Commissioners of Alabama Claims, re-established by said Act, which awarded him, in his said capacity therein, \$3,255.21, with interest, amounting in all to \$3,639.54, which was paid him September 1, 1864. After settling his account in probate, there remained in his hands \$2,595.52. Said Stidworthy left a widow and two daughters, named in his will, who are parties to this bill.

Two questions are propounded to the court:

1. "Is the widow of John Stidworthy entitled to the use of the above-mentioned balance of money paid by the United States for the loss of his share of the schooner Arcade, or does it belong to his heirs?"

2. "If the widow is entitled to the benefit and use of said balance, is she entitled to its custody?"

By the third clause in the will of Stidworthy his intention is clearly expressed, that all the residue of his estate, both real and personal, of which he should die possessed, or which he might be entitled to at his decease, should go to his wife "for the term of her life, with right and power to dispose of the income, rents, profits, and interest of the same, and with further right to apply to her use any part of the principal of the personal property, making her the sole judge of the need in so doing." Under this clause all the residue of his property and rights, or claims to property, which he had the power to dispose of by conveyance or assignment, passed to his widow to hold as therein specified. In support of this conclusion authorities need not be cited, as the same question has just been decided by the court in *Grant v. Bodwell*, 78 Me. 460, 3 New Eng. Rep. 247. The case is unlike *Dunlap v. Dunlap*, 74 Me. 402.

This brings us to the question whether the damage sustained by Stidworthy, by the destruction of the Arcade by the Sumter, was a right or claim to personal property before it was recognized by the United States by the Act of 1862, which was the subject of assignment by him. It was a claim for damage to property by a wrongdoer, and partook of the nature of the thing destroyed. The claim existed in equity and justice against someone as soon as the damage was sustained. True, the testator had no legal claim which he could enforce against anyone, because the claim had not been recognized by the government; but admitting responsibility for it and providing for its payment did not create it. It was a property right existing before. It was not a claim created by Congress, but its existence was admitted by it. It was a claim which would pass to the assignee in bankruptcy before it was recognized by Congress. It has long been so settled by the Supreme Court of the United States. *Comegys v. Vasse*, 1 Pet.

198 [26 U. S. bk. 7, L. ed. 108]; *Brown v. United States*, 97 U. S. 392 [Bk. 24, L. ed. 1065]. It is so held in Massachusetts (*Leonard v. Nye*, 125 Mass. 455); and so decided in this State in *Grant v. Bodwell*, *supra*. The question is so thoroughly and ably discussed by Mr. Justice Story, in *Comegys v. Vasse*, and by Gray, Ch. J., in *Leonard v. Nye*, that an extended discussion of it here seems unnecessary.

If the claim existed and was assignable before it was recognized and provided for by Congress, it would certainly pass by devise as a claim to personal estate.

But it is claimed by the learned counsel for the heirs that sums allowed, awarded, and paid under the Act of Congress of June 5, 1862, were not in payment of any claims against the United States for damages done by the Confederate cruisers during the war of the rebellion, but mere donations or gratuities; that the sum of \$15,500,000 awarded against Great Britain by the tribunal of arbitration under the Treaty of Washington was awarded for damages done by the Confederate cruisers Alabama, Florida, and Shenandoah, and their tenders, and that the tribunal determined and adjudged that Great Britain was not responsible for the damages done by the other Confederate cruisers. While this is so, the claims presented to the tribunal embraced the damages done by all the Confederate cruisers; and the tribunal awarded the gross sum of \$15,500,000 "for the satisfaction of all claims referred to the consideration of the tribunal, conformably to the provisions contained in article 7 of the aforesaid treaty;" and declared that "all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled;" that the United States received that sum in full settlement and bar of all the claims submitted. The fund was then in the United States treasury, and it was exclusively within the power and discretion of Congress to determine how it should be distributed. By the Act of June 23, 1874, Congress provided for the allowance and payment of claims for damages done by the Alabama, Florida, and Shenandoah; and after all such claims were paid, it was found that a large part of said fund still remained in the treasury; and by the Act of June 5, 1862, it provided for the allowance and payment, out of said fund, of claims for damages done by other Confederate cruisers during the late rebellion, "including vessels and cargoes attacked on the high seas;" and therein prescribed the rules by which the damages done to property should be measured. This Act provides for the allowance and payment of claims for damages to property, to the persons damaged, and only to the extent of their net damages, deducting what might have been received from other sources, to be proved in the manner provided therein. Is it in the nature of a donation or gratuity to those who had no claim? Or is it a recognition of claims for damages to property, already existing? Upon this point we deem a quotation from the opinion of Mr. Justice Story, in *Comegys v. Vasse*, *supra*, appropriate. In discussing the question whether the claim, before it is admitted, is a right to property, he says: "The theory, too,

that an indemnification for unjust captures is to be deemed, if not a mere donation, as in the nature of a donation as contrasted with right, is not admissible. * * * The very ground of the treaty is,—that the municipal remedy is inadequate; and that the party has a right to compensation for illegal captures, by an appeal to the justice of the government. It was never understood that the case was one to which the doctrine of donation applied. The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal court of justice. * * * It recognized an existing right to compensation, in the aggrieved parties, and did not, in the most remote degree, turn upon the notion of a donation or gratuity." And so, in this case, the idea of a donation or gratuity is nowhere to be found in the Act. The United States had the money in its treasury, which it had no equitable right to retain, and sought to distribute it to those justly entitled to it, in payment of their claims for damages to their property.

The will giving the widow the use and income of the fund during her life, with the right to apply to her use, if needed, any part of the principal, making her the sole judge of the need of so doing, we are of opinion that she is entitled to the possession and management of it; but as she will be charged with the trust of managing and preserving it for the heirs, who are to take what may be left at her death, as well as for herself, we think it but reasonable, under the peculiar circumstances of this case, that, before it is paid over to her, she be required to give a bond to the judge of probate, in the sum of \$5,000, with sureties, to be approved by him, conditioned for the faithful management and preservation of the fund according to the terms of the will.

The court answers the questions as follows:

1. The balance in the hands of the complainant, as administrator, passed to the widow by the third clause of the will.

2. The widow is entitled to its possession and management upon giving bond as herein required.

Bill sustained; costs for complainant to be paid out of the estate. Decree in accordance with this opinion.

Peters, Ch. J., Walton, Virgin, Foster, and Haskell, JJ., concurred.

George H. BENNETT

v.

Roxanna BENNETT.

Where a written promise is made, for value received, to pay a certain sum of money on demand, or guarantee the payee the use of a certain farm during the lifetime of the promisor, an action can not be maintained to recover the money if the promisee left the farm without cause.

(Oxford—Decided March 10, 1887.)

ON exceptions by the plaintiff. *Overruled.* Assumpsit upon a writing, duly assigned to

the plaintiff, which is recited in the opinion. The presiding justice directed a verdict for the defendant, and the plaintiff alleged exceptions.

Mr. S. F. Gibson, for plaintiff:

Choses in action "are such as the owner has not in possession, but merely a right of action for their possession." Chitty defines choses in action to be rights to receive or recover a debt, money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action, and therefore termed choses or things in action."

Bouv. L. Dict. Chose.

Are they assignable?

See Rev. Stat. chap. 82, § 180; 66 Me. 542; 69 Me. 99.

In order for the defendant to have the right to question the validity of the assignment, or its sufficiency, she should have done so by plea or brief statement.

66 Me. 545; 54 Me. 196.

Husbands may sue and maintain actions at law against their wives on any contract or agreement signed by the wife, given for any lawful purpose.

64 Me. 181; 57 Me. 547; 65 Me. 222.

Messrs. R. A. Frye and A. E. Herrick, for defendant:

If the supposed contract was ever executed, it was a contract between husband and wife, payable in the alternative; therefore not negotiable (*Dennett v. Goodwin*, 32 Me. 44; *Bunker v. Athearn*, 35 Me. 364; *Matthews v. Houghton*, 11 Me. 377); and, as between husband and wife, could not in law be enforced by either (*Allen v. Hooper*, 50 Me. 371).

The rule of law which prevails in regard to contracts is,—if a party engages to do two things, the one is cumulative upon the other, and he must perform both; but, if the contract is in the alternative for the performance of one or the other of two different things, the liability is discharged by the performance of one of the acts. If a man granteth a rent for 20s. or a robe, the grantee shall have the election; for he is the first agent by the payment of the one or the delivery of the other. So if a man maketh a lease rendering a rent or a robe, the lessee shall have the election.

2 Add. Cont. 789; *Bryant v. Erskine*, 55 Me. 158.

It matters not whether the election was known by the defendant or the alleged payee. If one was made and acquiesced in by the other party, both parties would be estopped from demanding any other method of performance.

Bigelow, Estop. 503, 507; *Thompson v. Hoop*, 6 Ohio St. 480; *Waterman*, Cont. § 181.

There is no evidence that the alleged payee of the supposed contract ever made a demand on the defendant for a performance of either of the alternatives in the supposed contract mentioned, prior to its assignment to the plaintiff; consequently there was no refusal of performance and therefore no breach, and no cause of action existed.

Stevens v. Adams, 45 Me. 611; *Bethlehem v. Annis*, 40 N. H. 84.

The payee could not receive part performance of one of the alternatives, and then afterwards claim performance of the other. Neither

could he assign his interest in the supposed contract; for there was no breach; consequently he had no assignable interest, and this plaintiff cannot maintain this suit. *Bryant v. Erskine*, supra; *Emerson v. Fisk*, 6 Me. 205; *Eastman v. Bachelder*, 36 N. H. 141; *Inhabs. of Clinton v. Fly*, 10 Me. 292; *Waterman*, Cont. §§ 73, 74, note 8.

Even if the supposed contract be valid, the plaintiff, being the party carrying the burden of proof upon the issue, has not proved any promise to himself from the defendant, or introduced any evidence which, if true, giving to it all its probative force, would have authorized the jury to have found in his favor. Wherefore the judge was justified in directing the jury to return a verdict for the defendant.

Heath v. Jaquith, 68 Me. 433; *Beaulieu v. Portland Co.* 48 Me. 291; *White v. Bradley*, 66 Me. 254.

Emery, J., delivered the opinion of the court:

The evidence for the plaintiff makes out the following case: In June, 1880, Daniel P. Bennett conveyed his farm to the defendant, and in the following August married her. He lived on this farm with the defendant, his wife, till March, 1884. In May, 1883, while thus living on the farm, he gave her his bank-book, and took back from her this instrument, written by himself and signed by her at his request.

"May 11, 1883.

On demand I promise to pay to the order of Daniel P. Bennett \$872, value received, or guarantee to said Bennett the use of the farm, my lifetime, deeded to me by said Bennett.

Roxanna Bennett."

The only question of law is the construction of this instrument. There was no loan to the defendant. Daniel wanted the use of the farm. He transferred the bank-book to obtain such use. He himself framed such instrument as he desired her to execute for that purpose. He asked for no other assurance or guarantee. He accepted this. There is no suggestion that any other was contemplated. This memorandum was to be his evidence of right to the use of the farm. It is evidence of her promise to permit him to use the farm. It provides a penalty for a breach of such promise. She was to allow Daniel the use of the farm, or pay him the sum named. She had the option, not he. 1 Add. Cont. 319; 2 Pars. Cont. 651, 657.

Daniel could not recover the money so long as there was no interference with his use of the farm. There is no evidence of any such interference. So far as the evidence shows, he left the farm in March, 1884, of his own accord, without cause; and he may go back when he will. He cannot, by his own action, fix upon her a liability to pay the penalty,—the money. All the evidence fails to show any such liability. It would not sustain a verdict for plaintiff. The court properly instructed the jury to that effect.

Exceptions overruled.

Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, JJ., concurred.

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Charles L. GORHAM

v.

Aaron B. HOLDEN.

In a written agreement between G and B it was stipulated that G should lease to B a piano, and B should pay for the use of the piano \$200 in advance, and \$50 quarterly thereafter, with 7 $\frac{1}{2}$ per cent interest, until \$500 in all had thus been paid, when G agreed to give B a bill of sale. G was authorized to enter B's dwelling and remove the piano, upon failure to make any payment. The piano was then delivered, and the advance payment made, and other payments followed (the last, October 9, 1874),—though not always at the time or in the amount stipulated,—until the full sum of \$500 had been paid. B continued in the undisturbed possession of the piano till her death in June, 1884. In the meantime G had never made any claim of title, nor demand for further payment. Held, that the pretended lease amounted to a conditional sale, and that the condition had been waived, if it was a condition precedent.

(Cumberland—Decided March 22, 1887.)

ON report. *Judgment for defendant.*

Trover for a piano.

The facts are stated in the headnote and opinion.

Mr. E. S. Ridlon, for plaintiff:

The sum and substance of defendant's brief is based upon the assumption that the performance of the condition of the sale was waived by the vendor. We say assumption, because there is nothing in the case upon which to base a waiver, unless indeed it be that plaintiff's indulgence to Mrs. Barnes, permitting her to continue in possession of said piano, without having paid for it, for so long a time, operates as a waiver of all his rights under said agreement. But does that alone amount to a waiver? I think not. Waiver is the intentional relinquishment of a known right.

Dey v. Martin, 16 Reporter, 443; 33 Conn. 21.

Mere silent acquiescence does not amount to a waiver.

Adams v. Ore Knob Copper Co. U. S. C. Ct. 13 Reporter, 166.

A party shall not be allowed to insist upon a forfeiture arising from nonperformance which is the result of his own acts.

Haynes v. Fuller, 40 Me. 169.

Messrs. Symonds & Libby, and A. B. Holden, for defendant:

We suppose it is well settled that a contract like that in question here, however it may be disguised as a lease, is in fact and in law a conditional sale. See a full review of this subject in a paper on Car Trust Securities, read by Francis Rawle before the American Bar Association in 1885, and published in a report of the proceedings of that association for that year, in which it is said: "Numerous decisions can be found holding that contracts for the lease of chattels, the purchase money or rent to be paid by installments, and the title to remain in the lessor until payment, and then to pass to the

lessee, are, in law, conditional sales, and not bailments. Thus, in case of such a contract for a piano, in Illinois, it was held that the phraseology of a lease was a mere subterfuge, and that the contract was a conditional sale.

Murchv. Wright, 46 Ill. 487."

In *Hervey v. R. I. Locomotive Works*, 93 U. S. 664 (Bk. 28, L. ed. 1003), the contract was for a lease of a locomotive, and the title was to pass to the lessee upon payment of the four installments of rent. The court held that it was a conditional sale.

In *Benjamin on Sales*, § 566, it is said: "The necessity for performing the condition precedent may be waived by the party in whose favor it is stipulated, either expressly or by the implication resulting from his acts or conduct."

"Goods were purchased on credit (the vendee agreeing to give therefor certain bills of exchange), and were afterwards put on board the vessel by the vendee's order, without any objection being made by the vendor that the condition of sale had not been complied with. Held that the goods were liable to attachment as the property of the vendee."

Carleton v. Sumner, 4 Pick. 516.

"A delivery, apparently unrestricted, of goods sold for cash, is a waiver of the condition that payment is to be made before the passing of the property in the goods, although the seller has an undisclosed intent not to waive the condition."

Upton v. Sturbridge Cotton Mills, 111 Mass. 446.

Haskell, J., delivered the opinion of the court:

Trover for a piano. On report. The plaintiff pretended to lease to the defendant's testatrix a piano of the stated value of \$500, for the term of three months, upon a cash payment of \$200, and so long thereafter as payments of \$50 should be made at the end of each ensuing three months, until the full sum of \$500 should be paid, with interest at 7½ per cent, when the testatrix should receive a conveyance of the piano.

The testatrix, at the date of the pretended lease, December 15, 1872, paid \$200, and received the piano. Installments were indorsed upon the pretended lease until October 9, 1874, when, together with the first payment, they aggregated \$500. The testatrix retained the piano until her death in June, 1884,—nearly ten years,—without any request by the plaintiff, either for payments of interest or for surrender of the piano. That came to the defendant as executor of the supposed vendee, and, after demand for the same by the plaintiff, the defendant sold it for \$125.

The pretended lease contains all the necessary stipulations of a conditional sale. The price, and when and in what installments the same was to be paid, are all stipulated; and the property sold was delivered to the vendee, to become hers when she had fully paid for the same. The sale may have been upon condition precedent, but that the plaintiff could waive if he saw fit. Whether he has done so is a question of fact to be determined from the evidence in the case (*Farlow v. Ellis*, 15 Gray, 229); and if the condition has been waived, the

title has passed to the vendee (*Seed v. Lord*, 66 Me. 580; *Stone v. Perry*, 60 Me. 48; *Whitney v. Eaton*, 15 Gray, 225).

For nearly ten years after the plaintiff had received the full price for his piano, he allowed the vendee to retain it without requesting the payment of interest, or pretending any title to it; and not until after the death of the vendee did he make any claim to the same. Considering that indorsements were made by the parties, upon the agreement between them, without any mention of interest, and that the stipulated price for the piano had been fully paid for so long a period prior to the vendee's death, during which time she was allowed to retain it without any suggestion from the plaintiff that it was not hers, the conclusion is irresistible that both parties must have understood that any condition in the agreement requiring payments to vest the title to the piano in the vendee had been waived by the plaintiff; and the court is satisfied that the waiver has been proved, and that the title to the piano came to the defendant as executor of the vendee.

Judgment for defendant.

Peters, Ch. J., Walton, Virgin, Libbey, and Emery, JJ., concurred.

Eben DOW, *Appt.*

v.

L. C. YOUNG.

1. **Objections to the discharge of an insolvent debtor must be filed on the day appointed for the hearing upon the petition for discharge.**
2. **When a statute creates a right or confers a privilege, and declares at what time the right or privilege may be exercised, generally it cannot be exercised at any other time.**

(Cumberland—Decided April 1, 1887.)

ON exceptions by appellant. *Sustained.*

Application for discharge in insolvency.

The facts are stated in the opinion.

Mr. John J. Perry, for appellant:

Any creditor opposing the discharge may file a specification in writing of the grounds of his opposition.

Rev. Stat. chap. 70, § 44.

These "specifications in writing" must be signed by the "creditor opposing the discharge."

Rev. Stat. chap. 70, § 30, says: "A creditor may act at all meetings, by his authorized attorney, as if personally present." This gives the attorney no authority to sign a creditor's name to a paper.

Merriam v. Sewall, 8 Gray, 316.

A declaration by the attorney for someone whom he believed was duly authorized to employ him must be considered as merely *prima facie*; for the defendant may undoubtedly disprove the fact, or show a disclaimer by the plaintiff. To compel a defendant to answer a suit because an attorney thinks he is authorized, is going very far.

Spald. Pr. 29, 30; Mason, Pr. 44, 45; Colby, Pr. 22; Howe, Pr. 82.

Judge Howe says: "The opposite party may prove at any time that the suit is prosecuted or defended without authority, and it will be dismissed."

Howe, Pr. 82.

Judge Colby quotes the above with his approval, in his *Practice*, p. 22; and the same doctrine is cited with unqualified approval both by *Mason* and *Spalding* in their excellent works on *Practice*.

A specification not signed by an attorney legally authorized to act for the creditor is a nullity, and must be disregarded.

Re Mc Vey, 2 B. R. 257.

Specifications not filed within the prescribed time cannot be entertained.

Re Mc Vey, supra; Bump, Bankr. p. 386.

After four months from the commencement of proceedings, the debtor may apply in writing for his discharge from all his debts. The judge thereupon appoints a day for a hearing.

The general principle is that no creditors are recognized as parties, or entitled to be heard on the question of discharge, except those who prove their claims in the mode prescribed by law.

Hamlin, Insolv. 21.

A claim that does not appear upon the debtor's schedules is a doubtful claim, and should be suspended.

Re Walton, Deady, 442; Hamlin, Insolv. 25.

The creditor is bound by his specifications. He cannot go beyond them, or produce evidence outside of them.

Re Rosenfield, 2 B. R. 49.

If any other creditor wishes to have himself substituted for the petitioning creditor, he must appear on the return day and present his petition. If a creditor allows that time to pass, he can no longer rely upon the existing petition as the basis of action, but must begin anew.

Re Olmstead, 4 B. R. 240; Bump, Bankr. 456, note.

Messrs. Frank & Larrabee, for defendant:

If the appellant had any question as to the authority of the attorney, he should have required proof of such authority, and made his objection at the first term; not having done so, the authority is presumed so far as this appellant is concerned.

Prentiss v. Kelley, 41 Me. 436; Penobscot Boom Corp. v. Lamson, 16 Me. 224; Upham v. Bradley, 17 Me. 423.

Walton, J., delivered the opinion of the court:

It appears that *Eben Dow*, an insolvent debtor, applied for his discharge, and had a

day appointed for the hearing, of which due notice was given to the creditors; that on the day appointed for the hearing no one appeared to object to his discharge; that fourteen days afterward a creditor appeared by attorney, and filed objections; that the debtor moved that the objections be dismissed, assigning, among others, as a reason therefor, that the objections had not been seasonably filed; that his motion was overruled, and he appealed; that at the hearing upon his appeal his motion was again overruled, and he filed exceptions; and the question which he now submits to the law court is whether his motion ought not to have been sustained. We think it should have been.

It is a familiar rule of construction that when a statute creates a right or confers a privilege, and declares at what time or under what circumstances the right or privilege may be exercised, it is generally true that it cannot be exercised at any other time, or under any other circumstances than those named. And such exceptions to the rule as exist will be found to rest on some overwhelming necessity, or a strong and controlling equity. The maxim, *expressio unius est exclusio alterius*, supports the rule. Time and manner being expressed, other times and other modes are impliedly excluded. To hold otherwise would make the provisions of the statute nugatory and useless. It is idle to say that one may exercise a right on a given day, if he may exercise it on any day he chooses.

Our insolvent law declares that, when the debtor applies for his discharge, the judge shall order notice to be given to the creditors, by mail or otherwise, to appear on a day appointed for that purpose, and show cause, if any they have, why the discharge should not be granted. *Rev. Stat. chap. 70, § 44.* In this case such a day was appointed, and due notice given; but no creditor appeared. Fourteen days afterward a creditor appeared by attorney, and filed objections to the debtor's discharge. No excuse is offered for the delay. We think the appearance was not in season, and that the objections should have been dismissed.

It is claimed that the appearance was not authorized; and the creditor has given his deposition in which he disclaims all knowledge of the proceeding; but we do not rest our decision on that ground; we rest it on the ground that the appearance and the objections, if authorized, were too late.

Exceptions sustained.

Peters, Ch. J., Virgin, Libbey, Foster, and Haskell, JJ., concurred.

VERMONT.
SUPREME COURT.

Robert MOULTHROP'S ADMR.

v.

SCHOOL DISTRICT in Rutland.

1. By statute (Rev. Laws, § 846) the writ and declaration are blended in one instrument. Thus, in an **action of debt the defendant was designated in the writ** as "School District No. 1," as it existed before its division; the district retained its old name, and by statute its organization and officers continued for closing up its concerns; one man was clerk of the old and new district; and the question was, against which of the two the judgment should be rendered.

Held,—

(a) That a **copy of the original judgment**, where the defendant was properly designated only in the declaration as the old district, was admissible; and,

(b) The **presumption** is that the copy of the writ was served upon the clerk as clerk of the old district.

2. The court will not presume error when none is shown by the exceptions.

(Rutland—Decided June 8, 1887.)

DEBT on judgment. Plea, *nul tiel record*, with notice. Trial by court, September Term, 1886, Rutland County, Veasey, J., presiding. Judgment for the plaintiff for the amount of the former judgment. *Affirmed*.

The case appears in the opinion.

Mr. W. C. Dunton, for defendant:

The judgment in suit is a judgment against District No. 1 as it was constituted at the date of the writ upon which the judgment was rendered, which is School District No. 1 as now constituted; and is not a judgment against the old district.

The designation of a party must be such that the clerk may know against whose property he execution should issue.

Freem. Judg. 3d ed. 50.

It is not the province of the declaration to designate or identify the party. Everything taken most strongly against the pleader.

1 Chitty, Pl. 287; Gould, Pl. 141; Fuller v. Lampton, 5 Conn. 422.

The present district is liable at common law or the order, and, as it got all the property, ought to pay it.

Dill. Mun. Corp. § 128; *Mobile v. Watson*, 16 U. S. 289 (Bk. 29, L. ed. 620).

This case is distinguishable from *Church v. Westminster*, 45 Vt. 380. In that case there was a reference in the declaration to the writ.

Meers. Walker & Swington, for plaintiff:

The declaration is part of the writ.

Rev. Laws, § 846; *Church v. Westminster*, 5 Vt. 380.

It appears clearly from the writ and declaration in the suit in which the judgment sued upon was rendered, that said judgment was against the original School District No. 1.

Rob. Dig. pp. 416, 417; *Mussey v. White*, 58 Vt. 45.

T.

Walker, J., delivered the opinion of the court:

This is an action of debt on judgment, brought in 1884 by Robert Moulthrop, in his lifetime, but who is now represented by his administrator, against School District No. 1 in Rutland, described in the writ as "being a school district duly organized and existing under the laws of the State of Vermont, and being School District No. 1 in said town, as the same was organized and existed at and before the division thereof." The declaration counts upon a judgment recovered by Robert Moulthrop in his lifetime against the defendant at the September Term of Rutland County Court, 1876, for the sum of \$664, and \$18.87 costs. The defendant's plea is *nul tiel record*, with notice of special matter in defense.

Upon the trial, the plaintiff, in support of the declaration, offered in evidence a duly certified copy of the record of a judgment of said Rutland County Court, rendered by default at the September Term thereof, 1876, for \$664 damages, and \$18.87 costs, in favor of the plaintiff's intestate, against School District No. 1, a school district duly organized in Rutland. The defendant objected to the admission in evidence of this copy of record, claiming that the same was not a record of a judgment against School District No. 1 as it existed at and before the division thereof; but a record of a judgment against School District No. 1, in Rutland, as it existed in 1876, at the time the writ set out therein was brought, and after the division thereof. The county court held that it was a record of a judgment against the original School District No. 1, and admitted the copy in evidence, to which the defendant excepted.

It appears from the bill of exceptions that School District No. 1, in Rutland, was duly divided June 27, 1871, at a town meeting warned for that purpose, and that the southern part was set off and designated and known as School District No. 2, and the northern part retained the original designation of School District No. 1. It also appears that Franklin Billings was elected clerk of the original District No. 1, at the annual March meeting in 1871, and that no other clerk was thereafter chosen; and that said Billings was the clerk of the new District No. 1 from its organization until his death in 1885.

By the law of the State (Rev. Laws, § 557), the organization of the original School District No. 1 is continued in force until its debts and liabilities are settled and paid. Rights of action in favor of or against it may be enforced as though no change had been made, and the officers thereof at the time of the division are continued in office with all necessary powers in respect to the service of process, calling district meetings, settling claims in favor of and against the district, assessing and collecting taxes to pay liabilities, and fully closing up the concerns of the district.

It appears from the copy of the record of the judgment received in evidence, that the writ on which the judgment of 1876 was rendered ran against School District No. 1, a school district duly organized in Rutland, and was served upon the defendant therein, by delivering to Franklin Billings, clerk of School

District No. 1, in Rutland,—the defendant named in the writ,—a true and attested copy thereof, etc. In the declaration of the writ set out in the judgment roll, the defendant therein is required to answer to the plaintiff "in a plea of the case for that, on the 20th day of April, 1871, the defendant school district, as then organized and existing and before its division, was indebted to the plaintiff in the sum of \$500, and the defendant school district, by Miner Hilliard, Henry W. Aldrich, and Ruel Todd, prudential committee of said school district, being duly authorized in that behalf, drew an order in writing under their hand, of that date, as prudential committee of said school district, directed to the treasurer of said School District No. 1, and thereby requested him, as treasurer as aforesaid, to pay to the plaintiff or order said sum of \$500, and which was payable on demand, it being for land bought by said School District No. 1, on which to build a schoolhouse, and paid for by plaintiff at defendant's request, as by said writing or order, ready to be produced in court, appears; which order the treasurer, duly authorized in that behalf, on the 21st day of April, 1871, accepted, by means thereof," etc.

When all the facts thus set out in the judgment roll are considered in the light of the rule that the parties for and against whom a judgment is given must be sufficiently designated in the record to enable the clerk to know from an inspection thereof at whose instance to issue execution, and against whose property it may be properly enforced, it is manifest that the judgment recited in the record is a judgment against School District No. 1, in Rutland, as it existed at and before the division thereof. Both the original and new School Districts No. 1 were designated and known as School Districts No. 1, in Rutland, and could be sued only in that name. But as both were of the same corporate name, it was proper that the process should in some way indicate which district was sued. The pleader in the first suit designated the district by setting forth in the declaration that the indebtedness sued for was against School District No. 1, in Rutland, as it existed at and before the division. In this suit upon the judgment the pleader designates the district by setting forth in the writ that the district sued is School District No. 1, in Rutland, as it existed at and before the division. Each method of designating with particularity the corporation sued is allowable.

Under Rev. Laws, § 846, the writ and declaration are blended in the same instrument. The declaration is made a part of the writ, and the whole is treated and construed as one instrument; so that the writ may be referred to to aid a defective averment in the declaration, and the declaration may be referred to, whenever necessary, to aid in the identification of the party sued. *Church v. Westminster*, 45 Vt. 380.

Whenever there is a doubt as to what person is the real party defendant in a judgment record, by reason of the same being applicable to more than one person, reference may be had to the process, pleadings, and proceedings in the action for the purpose of determining with certainty the real party. *Freem. Judg.* 50 a.

It is contended by the defendant that the

service of the original writ in 1876 was made upon Franklin Billings as clerk of the new District No. 1, and not as clerk of the old district; and that the judgment was against the new district, and is invalid against the old district. If this objection could be properly raised in this action, the answer to the contention is that the bill of exceptions does not show such to be the fact; and the court will not presume error where none is shown to exist. Both corporations had the same name and the same clerk. The declaration and writ of the process served upon Franklin Billings as clerk show that the corporation sued was the district as it existed before the division; and the officer's return shows that he delivered a true copy of the writ to Franklin Billings, clerk of the defendant district named in the writ; and, without any showing to the contrary, the presumption is that the writ was served upon Billings as the clerk of the district particularly designated in the writ and declaration.

The record received in evidence by the county court is a record of a judgment in favor of the intestate against the defendant in this suit, and was properly admitted; and it is conclusive upon the defendant. It cannot be impeached or attacked in this action brought to enforce it. It therefore follows that the matters which the defendant was allowed to prove under objection on the trial of this cause in the county court do not constitute a defense to this action.

Judgment affirmed.

W. C. ROBIE, Admr. of J. W. Horskins's Estate,
v.

ESTATE OF E. D. BRIGGS.

Chauncey TEMPLE, Admr. of E. D. Briggs's Estate,
v.

ESTATE OF J. W. HORSKINS.

Where one owes another an individual and a partnership account, and makes general payments without any application, without protestation against further liability, and the payments amount to more than the individual account, the law, upon principles of equity, will apply the balance on the partnership account, which will remove the bar of the Statute of Limitations, although the creditor, without definite knowledge of the standing of the two accounts, gave the debtor credit for all the payments on his individual account.

(Franklin—Decided June 6, 1887.)

APPEAL from the Probate Court. Heard on an auditor's report, April Term, 1886, Franklin County; Royce, Ch. J., presiding. Judgment on the report for the defendant in the case of *Robie v. Briggs's Estate*, and judgment for the plaintiff in the case of *Temple v. Horskins' Estate*. *Reversed.*

The case appears in the opinion.

Nease, Ballard & Burleson, and Cross & Start, for Horskins's estate:

After the death of Horskins, his administrator was the only person who could maintain an action on his account.

Peters v. Davis, 7 Mass. 257; *Joylin v. Taylor*, 24 N. H. 268; *Clark v. Howe*, 28 Me. 560.

These accounts are identical; they are due and owing to one and the same person. They are all accounts and constitute but one cause of action, and if the payments made by Briggs had not been sufficient to extinguish the private account of Horskins, the partnership account would have been saved from the operation of the statute by the payments made.

Sanderson v. Milton State Co. 18 Vt. 107; *Ayer v. Hawkins*, 19 Vt. 26; *Goodwin v. Buzell*, 35 Vt. 11.

Part payment of a debt barred by a statute, if made without protestation against further liability, is a recognition and acknowledgment of such a debt at the time of making the payment, from which a promise to pay the residue will be implied.

Cortiss v. Gros, 58 Vt. 702; *Ayer v. Hawkins*, 19 Vt. 26.

Mr. Stephen E. Royce, for Briggs's estate:

When a creditor has once exercised his right, and made application of a payment, he cannot change his mind and afterwards make a different application, more disadvantageous either to third persons or to the debtor.

Bank of Muskingum v. Carpenter, 7 Ohio, pt. 1, 21; *Tooke v. Bonds*, 29 Tex. 419; *Applegate v. Koons*, 74 Ind. 247; *McMaster v. Merick*, 41 Mich. 505; *Hill v. Southerland*, 1 Wash. (Va.) 128; *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 268; *Rosseau v. Cull*, 14 Vt. 88; *Ayer v. Hawkins*, 19 Vt. 26; *Wheeler v. House*, 27 Vt. 735; *Pierce v. Knight*, 81 Vt. 701; *Burr v. Burr*, 26 Pa. 284; *Pickett v. King*, 84 Barb. 198; *Roscoe v. Hale*, 7 Gray, 274; *Gilpin v. Plummer*, 2 Cranch, C. Ct. 54; *Thomas v. Brewer*, 7 N. W. Rep. 571; *Royston v. May*, 71 Ala. 398.

A creditor cannot, at his discretion, after a controversy has arisen, appropriate payments.

Applegate v. Koons, *supra*; *Pond v. Williams*, 1 Gray, 680; *Carroll v. Forsyth*, 69 Ill. 127; *Codman v. Armstrong*, 28 Me. 91.

Walker, J., delivered the opinion of the court:

The foregoing cases stand upon the same facts, as reported by the auditor, and the result reached in either case necessarily determines the other.

On the 7th day of October, 1882, J. W. Horskins held, as surviving partner of the firm of Horskins & Gates, a partnership account against E. D. Briggs, which accrued prior to the dissolution of that firm, January 1, 1866. This account had never been balanced, but on said 7th day of October it showed a balance against Briggs of \$598.05. No payment had been made thereon by Briggs since 1873, nor had it been otherwise acknowledged, and it was consequently then barred by the Statute of Limitations.

On the same 7th day of October, Horskins also held an individual account against Briggs, independent of the partnership account, which contained their matters of deal from January,

1866, to 1882, and a balance of an old account that accrued prior to the partnership account, brought forward as the first item thereof, which on that day showed a balance against Briggs of \$54.78. This individual account, which contained a large amount of dealings between the parties, had at all times during its existence showed a balance against Briggs, varying from \$50 to \$500, but had never been examined and balanced.

With these two accounts standing as thus stated, and without any examination of them, or any definite knowledge of their standing upon the books, or of the balance against him upon either, but supposing that he was owing Horskins a considerable amount, Briggs made three cash payments to Horskins upon his indebtedness generally, without any directions as to their application, of the dates and amounts following, to wit: October 7, 1882, \$100; January 24, 1884, \$46.86; March 14, 1884, \$58.14; aggregating \$200. All these payments were credited by Horskins, without any examination or balancing of the books, or definite knowledge of the standing of the two accounts, in his individual account with Briggs. Soon after the last payment, and in April, 1884, Horskins died. Gates died in 1878, and Briggs after the commencement of his action against Horskins's estate.

On balancing up the individual account after Horskins's death, it was ascertained that the \$100 payment made October 7, 1882, overpaid it \$45.22, and that when the last two payments were made there was nothing due from Briggs on the individual account, and that the three payments which Horskins had credited upon it overpaid the same \$145.22. Briggs thereupon presented a claim for this excess to the commissioners upon Horskins's estate, which passed to the county court by appeal; and for this excess the administrator of Briggs seeks to recover in his action against Horskins's estate. On the other hand, the administrator of Horskins, in his action against Briggs's estate, seeks to recover the unpaid balance of \$598.05, standing against Briggs in the partnership account, less the \$145.22, which he claims Briggs's estate cannot recover, because, as he contends, the three payments, of which the \$145.22 is a part, were made to apply on Briggs's indebtedness generally; and, after the application of a sufficient amount thereof to extinguish the individual debt, the law applies the excess, as of the date of the several payments, upon the partnership debt, and thus removes the statute bar.

The question, then, for consideration is whether the \$45.22, paid in excess of the individual debt October 7, 1882, and the two payments made in 1884, after the individual account was extinguished,—all being general payments without directions by the debtor as to their application, and credited by the creditor in the individual account without ascertaining how the two accounts stood,—warrant the implication of a new promise to pay the partnership debt.

It has long been well settled that a part payment of a debt barred by the statute, if made without protestation against further liability, is a conclusive recognition and acknowledgment, on the part of the debtor, of such debt

at the time of making it, from which the law implies an admission of the actual existence of the balance as a subsisting debt,—notwithstanding the statute,—and a promise to pay it, which prevents the operation of the statute.

It is also well settled that the debtor in making the payment, where there are several demands against him, may direct its application. He has the primary right to appropriate the payment to whatever debt he chooses, and his direction, when given in express terms, or when implied from the circumstances of the payment, must govern its application. But if no application is directed by the debtor, or implied from the circumstances of the payment, the creditor may make it. If neither the debtor nor creditor make the application, the law will make such application of the money as may be just. The debtor's intention as to the appropriation may be said to govern. This intention, when no designation of demand is made by the debtor at the time of payment, is gathered from the circumstances of the transaction. If a general payment is made, without direction, to a creditor holding only one demand, the intention of the debtor is manifest. When a voluntary payment is made by a debtor, on his indebtedness generally, to his creditor holding two or more known demands against him, without direction as to its application, and not under circumstances clearly showing to which debt he intended the money to be appropriated, the law regards him as having waived his right in favor of the creditor, and as intending that the payment should be applied as part payment of such debt or debts, if more than sufficient to pay one, as the creditor may justly and reasonably elect to appropriate it to; and on the creditor's failure to make the appropriation, as intending such an application as the law, upon the principles of equity, will make. So that the application of a general payment, whether directed by the debtor, creditor, or the law, may be said, in a legal sense, to be made in accordance with the debtor's intention; and such an application of a payment in either way will have the effect to remove the statute bar from the debt—or debts, if the payment is more than sufficient for one demand—upon which the payment is thus applied. This principle applies only to voluntary payments and payments authorized by the debtor. *Ayer v. Hawkins*, 19 Vt. 28; *Corliss v. Grow*, 58 Vt. 702; *Walker v. Butler*, 6 El. & Bl. 506.

Briggs knew of the existence of both debts. He made payments to Horskins upon both after the dissolution of the copartnership. He supposed he was owing Horskins a considerable amount, and on the day of Horskins's death spoke of paying \$100 more to him. With all this knowledge, he made the payments in question upon his indebtedness generally, and waived the right of appropriation. There is no fact found which shows that Briggs intended to pay only the individual debt, and not the partnership debt.

On the contrary, the auditor finds that there was nothing to show that he intended that the payments, or either of them, should be applied wholly upon either of the accounts to the exclusion of the other. He clearly did not intend them as loans or gifts. They were made and

intended as part payments of a greater subsisting indebtedness, and must be so appropriated. The debtor's intention is controlling. There were only two debts to which the payments could be appropriated. Horskins applied them first to the extinguishment of the individual debt, which was not barred by the statute. Of this Briggs could not complain, for it was most favorable to him. Horskins could legally appropriate to the individual debt only so much of the payments as was necessary for its extinguishment. When that debt was extinguished the balance must be appropriated to the payment of the partnership debt, which was barred by the statute, as of the date of the payments making up this balance. When so applied, whether by the creditor or the law, they have effect to take the debt out of the operation of the statute, because they were payments upon a general indebtedness, of which the partnership debt was a part; and, after the extinguishment of the individual debt, the only remaining demand upon which they could be applied.

Payments must be applied according to the intention of the parties, or the intention of the party paying, when that can be ascertained. It conclusively appears from the auditor's report that Briggs made the payments for the purpose of reducing his general indebtedness to Horskins, and that Horskins received the money with that understanding. And this purpose was not defeated by Horskins crediting in his individual account, without ascertaining the balance due thereon, the \$45.22, the excess of the October payment over the amount due on the individual account, and the two payments made after it was in fact extinguished. This erroneous entry did not appropriate the whole amount of the payments to the payment of the individual account. It appropriated only so much of the money as was necessary for the payment of the balance due thereon, and left the residue to be applied by the law, which applies it, as of the date of the payments, upon the partnership debt, which was the only remaining demand in the hands of the creditor. This is not a change of appropriation made by the creditor, but an application of money paid on general indebtedness and not appropriated by him.

With this application, the payments making up the \$145.22 were, by implication, payments upon the partnership debt as a larger subsisting debt, and an acknowledgment of the actual existence of the balance, from which the law implies a new promise which prevents the operation of the statute.

The right of Horskins's administrator to recover the balance found due on the partnership account is clear, if the payments removed the statute bar. As we hold that the payments removed the statute bar, the consequence is that the judgment of the County Court is reversed in both cases; and in the case of *W. C. Babin, Administrator of the Estate of J. W. Horskins v. The Estate of E. D. Briggs*, judgment is rendered upon the auditor's report for the plaintiff to recover of the defendant \$447.83, and interest thereon since March 14, 1894, damages and costs. In the case of *Chauncey Trench, Administrator of E. D. Briggs's Estate v. The Estate of J. W. Horskins*, judgment is rendered

upon the auditor's report for the defendant to recover costs. Both judgments are ordered to be certified to the Probate Court.

Village of ST. JOHNSBURY

2.

John C. THOMPSON.

1. The **charter of an incorporated village**, authorizing it to "**regulate**" its **viactualing houses**, **repeals** by implication the **general law** authorizing the selectmen of a town to license persons to keep such houses, and confers upon the village power to license.
2. The **by-laws of a municipal corporation** authorized by its charter have the same effect, **within its limits**, as a special law of the Legislature.
3. Under a charter which authorizes a village by its by-laws to "**regulate**" its viactualing shops, to restrain nuisances, to exercise other police powers, and to impose penalties, etc., a **by-law conferring power** upon the trustees of the village to license persons to keep such shops for a year or less time, under such regulations as the trustees might prescribe, and providing a **penalty of \$10 for keeping such shops without a license**, is a reasonable regulation, and not contrary to common right.
4. When there is **no conflict in the evidence**, and no dispute as to the facts, the only **question is one of law**, to be determined by the court; and in such case it is **lawful to direct a verdict**; and the verdict will be upheld if the law and the facts warrant it.
5. When one **controls the business of keeping a viactualing shop in the name and upon the credit of his wife**, but without her presence and personal attention, he is a **keeper** within the meaning of the by-law prohibiting a person from keeping such shop **without a license**; and he is **liable in an action to recover a penalty imposed by the by-law**.

(Caledonia—Decided May 28, 1887.)

ACTION of debt to recover a penalty. Plea, *nū debet*. Trial by jury, June Term, 1885, Caledonia County; Ross, J., presiding. Verdict ordered for the plaintiff for \$10. *Affirmed*.

The case appears in the opinion.

Messrs. Bates & May, for defendant:

The evidence did not warrant the court in ordering a verdict.

The trustees could regulate the use of viactualing shops; but they could not prohibit the exercise of an honest, lawful trade or calling, under the pretense of regulating the use of such shops.

It was a question of fact whether the defendant kept the shop.

It cannot be well claimed, as a matter of law, that a revocation in term of a license
VT.

never granted was intended as a revocation of one that had been granted.

20 Rep. 468.

It should have been submitted to the jury if there was any evidence tending to establish the defendant's claim.

Proff. Jury Tr. § 355; *Rogers v. Judd*, 6 Vt. 191.

The charter gave the trustees no power to demand a license. The word "regulate" has a well-known and settled meaning in a charter. 25 Ind. 288.

In New York it has been held that an Act to regulate public landings did not confer power to lay out and establish a new public landing.

Comrs. of North Hempstead v. Judges of Queens County, 17 Wend. 9; 11 R. I. 456; 28 Am. Rep. 508; Sedg. Stat. & Const. L. 280.

But the right to license must be conferred by charter.

Dunham v. Rochester, 5 Cow. 462; *Commonwealth v. Stodder*, 2 Cush. 562; *Cushing v. Boston*, 138 Mass. 380; *S. C.* 85 Am. Rep. 883; *Commonwealth v. Turner*, 1 Cush. 493; *Robinson v. Mayor*, 84 Am. Dec. 629; Dill. Mun. Corp. §§ 275, 291.

One rule relating to by-laws is that they must be consistent with the charter, reasonable and beneficial, harmonious with the statutory and common law,—not restraining trade.

Bish. Stat. Cr. § 23; *Clark v. Le Oren*, 9 B. & C. 52; *State v. Mott*, 61 Md. 297; *S. C.* 48 Am. Rep. 105; *Ward v. Little Rock*, 41 Ark. 526; *S. C.* 48 Am. Rep. 46; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141; *S. C.* 50 Am. Rep. 352; *Ward v. Greenville*, 8 Baxt. 247; *S. C.* 351 Am. Rep. 700, and note; *Clinton v. Phillips*, 68 Ill. 102; *S. C.* 42 Am. Rep. 52; *State v. Paterson*, 45 N. J. L. 810; *S. C.* 46 Am. Rep. 772; *Long v. Tazewell Dist.* 7 La. 184.

A distinction is to be made in reference to ordinances regulating or restraining trade.

State v. Clark, 28 N. H. 176; *Stokes v. New York*, 14 Wend. 87.

Messrs. Ide & Stafford, for plaintiff:

The power of the plaintiff to pass such by-laws as the one upon which this action is based is clearly given in Rev. Laws, §§ 2786, 2787, as well as by § 7 of the village charter.

Such a by-law is not unreasonable or unconstitutional.

Commonwealth v. Worcester, 3 Pick. 462; *Vandine's Case*, 6 Pick. 187; *Nightingale's Case*, 11 Pick. 168; *Bush v. Seabury*, 8 Johns. 418; *Commonwealth v. Rice*, 9 Met. 253; *Commonwealth v. Kimball*, 105 Mass. 465; *Commonwealth v. Burke*, 114 Mass. 261; *Commonwealth v. Dowling*, 114 Mass. 259. See *Commonwealth v. Drew*, 3 Cush. 279.

Walker, J., delivered the opinion of the court:

This is an action of debt to recover a penalty of \$10, imposed by a by-law of the village of St. Johnsbury, for keeping a viactualing shop in that village without a license from the trustees. The county court directed a verdict, upon the evidence, for the plaintiff, for \$10 and costs.

No question is made as to the organization of the village under the charter, or as to the adoption of the by-law upon which the action is founded; but it is contended by the defend-

ant that the by-law is invalid: (1) because it is in conflict with the general law of the State, and, as he insists, not authorized by the village charter; (2) because the by-law is in restraint of trade, and unreasonable, and contrary to common right. The defendant also insists that the county court was not warranted, upon the evidence, in directing a verdict for the plaintiff.

Taking up these objections in the order stated, the first question for consideration is the validity of the by-law.

1. The general law of the State since 1850 has authorized the selectmen of towns to license, for one year or less time, suitable persons to keep victualing houses or shops in their respective towns, and to sell therein provisions and fruit, and has clothed the selectmen with power to annul or vacate such licenses whenever, in their opinion, the public good requires it. The same statute law provides that any person keeping a victualing house or shop, and selling therein provisions or fruit without a license, shall forfeit to the town where such offense is committed \$10. Comp. Stat. chap. 87, §§ 1, 7; Gen. Stat. chap. 95, §§ 1, 8; Rev. Laws, §§ 3940, 3947.

With this law in force, the village of St. Johnsbury was incorporated by an Act of the Legislature approved November 23, 1852, and given power by its "by-laws to regulate * * * the construction, location, and use of hay-scales, markets, slaughter-houses, groceries, victualing shops, and the erection of dwelling-houses and other buildings, so as best to provide for the safety of the village; to restrain nuisances," and to exercise other police powers therein stated; and given power to impose any fine not exceeding \$25, for the breach of any such by-law, to be recovered for the use of the corporation in an action of debt, etc. Act of Incorporation, § 7.

Under this charter the village adopted By-law No. 8, authorizing its trustees to license, for one year or less time, any person to keep a grocery or victualing shop, under such regulations as they may prescribe, within the limits of the village, to sell therein all kinds of provisions and fruits, and provided therein, that "if any person, without a license therefor as provided in this article, shall hereafter keep any grocery or victualing shop within the limits of the village, and shall sell therein or furnish any victuals or fruit, he shall forfeit and pay, as a penalty to the corporation, the sum of \$10 and costs for each offense, to be recovered in an action of debt in the name of the corporation."

The general law and the by-law are alike in all their essential features. They require the same license and impose the same penalty. They cannot both stand together, for they give two municipal bodies conflicting powers over the same subject, in the same territory. One must give way to the other.

The by-laws of a municipal corporation, when authorized by the charter, have the same effect within its limits, and with respect to persons upon whom they lawfully operate, that an Act of the Legislature has upon the people at large. 1 Dill. Mun. Corp. § 808, and cases there cited. So, if the by-law is authorized by the charter, it has the effect of a special law of the Legislature, within the limits of the

village, and supersedes the general law upon the subject of victualing houses therein; for the charter giving the village power to pass the by-law inconsistent with and repugnant to the general law, by necessary implication operated to repeal the general law within the territorial limits of the village, on the principle that provisions of different statutes which are in conflict with each other cannot stand together; and in the absence of anything showing a different intent on the part of the Legislature, general legislation upon a particular subject must give way to later inconsistent special legislation on the same subject. 1 Dill. Mun. Corp. § 88; 4 Kent, Com. 466, note; *Re Snell*, 58 Vt. 207; *State v. Morristown*, 33 N. J. L. 57; *State v. Clarke*, 25 N. J. L. 54; *Davies v. Fairbairn*, 3 How. 636 [44 U. S. bk. 11, L. ed. 760]; *Re Goddard*, 16 Pick. 504; *State v. Clarke*, 54 Mo. 17; *Mark v. State*, 97 N. Y. 572.

It follows that the validity of the by-law depends upon the power of the village under its charter to pass it, and upon whether it is a reasonable regulation of the business of victualing houses, and not contrary to common right.

It is an undisputed proposition of law that a municipal corporation possesses and can exercise under its charter, not only powers granted in express words, but also such powers as are necessary and fairly implied in, or are incident to, the powers expressly granted, and such as are essential to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp. § 89.

The language of the charter relating to victualing houses is: "Said corporation may by by-laws regulate * * * the construction, location, and use of victualing shops."

The Legislature, by the language used, undertook to delegate to the village the general police power of the State over the construction, location, and use of victualing shops as well as markets and slaughter-houses, etc. There is no language used in the Act showing any intent on the part of the Legislature to restrict the power given, or to make it subject to the general law then in force in regard to the subjects named in the charter. By the charter, the subject matter of the construction, location, and use of victualing shops, within the limits of the village, is left to the legislation of the village government. It throws upon the village authorities the responsibility of deciding what legislation in respect thereto will best promote the good order of the community and the safety, health, and comfort of its inhabitants; and to that end it is competent for the village to enact all reasonable and needful by-laws. The intent of the Act was to give the village greater power and control over victualing shops than is given by the general law to selectmen of towns. The village part of St. Johnsbury had grown into a large village, and had become quite thickly settled, and there was necessity for its having larger police powers over victualing shops than is required in a sparsely-settled township. And that necessity doubtless largely induced the Legislature to pass the Act incorporating the village, establishing a more comprehensive system of government and control over victualing shops and the other subjects mentioned

in the charter than was given to towns by the general law. It gives the village power to legislate as to the construction and location of such shops, and also as to the manner of their use, and the right to use, and under what circumstances and rules that right shall be exercised.

The provisions of the charter and the general law are radically inconsistent. A license granted by the selectmen would give the person holding the same the right to keep a victualing shop of any construction, and in any location in the village, and to keep it open at all hours of the day and night, unless it became a public nuisance, and thus render inoperative and ineffectual any by-law which the village government might adopt in reference to the construction, location, and use of such shops. We cannot ascribe to the Legislature an intention to establish two such conflicting and hostile systems of government upon the same subject, or to leave in force provisions of law by which its later will, as expressed in the charter, may be thwarted and overthrown. Such a result would subject legislation to reproach for its uncertainty and unintelligibility.

It is urged in the argument that the word "regulate," as used in the charter, did not authorize the village to enact a by-law requiring keepers of victualing shops to be licensed.

It is not safe to found an argument on the use of a specific word; for the language of legislative enactments is not always precise and accurate. It is not the specific word used, but the intent of the Legislature as shown by the whole enactment, that determines its meaning and the powers conferred by it. It is apparent that the word "regulate," as employed in the Act, has a general signification, and applies to the right to use victualing shops as well as to the manner of use, and implies the power of restriction and restraint. This word, as used in city charters, has been held as conferring the power to license.

The case of *State v. Clarke*, 54 Mo. 17, relating to the social-evil powers of the city of St. Louis, is an instructive case on the effect of a special Act on a general law, and of the use and meaning of the word "regulate" in a charter. The defendant was indicted under the general Criminal Code of the State, which prohibited the keeping of bawdy houses. The defendant pleaded license from the city of St. Louis to keep such a house. The city charter gave the city power to pass ordinances, not inconsistent with any law of the State, "to regulate or suppress" such houses. Under the power to regulate, the city regulated such houses by passing an ordinance licensing them; and such an ordinance was held to be valid notwithstanding the general law, and to have the effect to prevent the enforcement of the general law of the State on that subject within the city of St. Louis.

It is plain that the purpose of the charter was, among other things, to give the village power to fix and determine the localities where victualing shops may be erected; to permit their being kept only as the public good may require; to direct and control the mode and manner of using them, and to prohibit their continuance whenever and wherever they become sources of danger to the good order,

safety, health, and comfort of the community.

It is argued that this construction may result in a total prohibition of the business. This does not necessarily follow. That a power may be abused is no test of the existence of the power. We are not to presume that the village will abuse the authority entrusted to it. It will be soon enough to deal with questions of that character when they arise. It is enough to say, for the present, that the by-law in question is fairly within the scope of the powers conferred by the charter. The regulation contemplated by it can be effected in no better way than by requiring keepers of such shops to be licensed, and by imposing a penalty upon them for keeping the same without a license.

II. It is next objected that the by-law is unreasonable and in restraint of trade. The purpose of the ordinance is not to impose a tax or raise a revenue for municipal use, but to regulate the business of keeping victualing shops. A police regulation relating to such shops could hardly be passed that would not have a partial operation. Every public regulation in a village or city necessarily, in some sense, restricts the absolute right that existed previously; but this is not considered an injury. The individuals thus restricted, as well as others, are supposed to be benefited. It is no objection to the validity of the by-law, because it is partial to some extent, provided it is only a proper restraint and regulation of the business for the good order, health, and comfort of the community, and not a general restraint.

A by-law that no meat shall be sold in the village would be bad, being a general restraint; but a by-law that the same shall not be sold except in a particular place is valid, not being a restraint of the right to sell, but a regulation of that right. *Buffalo v. Webster*, 10 Wend. 99; *Pierce v. Bartrum*, Cowp. 269.

In *Nightingale's Case*, 11 Pick. 168, a by-law of the city, providing that no inhabitant of the city or of any town in the vicinity thereof shall, without the permission of the clerk of the market, be suffered to occupy any stand for the purpose of vending commodities in certain streets, which by the law are a part of the market, was held to be a salutary and valid police regulation, and not operating as an improper restraint of trade, but a wholesome regulation of it.

In *Brooklyn v. Breslin*, 57 N. Y. 591, an ordinance of the city prohibiting cartmen from doing the business of a cartman in the city without a license was held to be, not a general restraint of the business, but a proper and wholesome regulation of it, and not against common right.

Ordinances of villages and cities, that none shall engage in the business of brokers or auctioneers unless licensed, have invariably been held to be reasonable and valid regulations of the business conducted by them, though the same necessarily restrains the individual rights of the people to some extent.

We have held that the Act gave the village power to pass the by-law. The wisdom and expediency of granting such power were for the Legislature to decide, and we think it cannot be said that the by-law is more than a proper regulation of that branch of business

for the good order of the village, and the health and comfort of its inhabitants, and a proper exercise of the police power delegated to the village by the Legislature, and that it is not contrary to common right, or an improper restraint of trade.

Victualing-shops, as well as markets and slaughter-houses, are fairly within the police powers of the State. These powers, as described by Judge Isaac F. Redfield, in *Thorpe v. Rutland & B. R. R. Co.* 27 Vt. 149, extend "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the State, and by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State,—of the perfect right to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned."

III. It is next contended that the evidence did not warrant the county court in directing a verdict for the plaintiff.

The writ is dated July 25, 1884, and the declaration alleges the breach of the by-law in June, 1884. The organization of the village was conceded by the defendant, and the adoption of the by-law was duly established by legitimate proof.

The evidence given on trial in the county court tended to show that on the 9th day of February, 1884, upon the application of the defendant, a license to keep a victualing shop was granted by the trustees of the village to C. A. Thompson, wife of the defendant, under which the defendant acted while in force; that on the 16th day of May following this license was vacated and revoked by a certificate signed by the same trustees and duly recorded; that on the same day of May notices of the revocation, signed by the same trustees, of the following form, were served upon the defendant and his wife, C. A. Thompson, to wit:

"To C. A. Thompson and John C. Thompson, of St. Johnsbury, Vt.

You are hereby notified that the license granted to John C. Thompson and Mrs. C. A. Thompson, his wife, by the trustees of the village of St. Johnsbury, on the 9th day of February, 1884, to keep a grocery and victualing shop, and to sell all kinds of provisions and fruits within the limits of the said village, is hereby revoked, annulled, and vacated, the public good, in our opinion, requiring that said license should be vacated.

Dated this 16th day of May, 1884."

(Signed by the trustees.)

There was no testimony tending to show that a license was granted to the defendant and his wife, C. A. Thompson, on the 9th day of February, 1884, or on any other day; nor was there any such claim made.

The evidence further tended to show that, after the revocation of the license of February 9, and the services of the notices thereof as aforesaid, the defendant kept a victualing shop in the plaintiff village between the date of July 5 and July 25, 1884, in the name of his wife, and was engaged in selling victuals and drink therein as the manager and superintendent thereof, upon the wife's capital, but with-

out her presence or personal attention or direction; all the business being conducted by him in her name; and that the defendant, during said period, held no license granted to him by the trustees.

This evidence was undisputed, and there was no conflict whatever in the same.

On this evidence the defendant claimed the right to go to the jury. The court asked on what question of facts they were in dispute. He replied, "On the question of whether he was a keeper of a victualing shop, and whether there was a license," and said he did not wish to waive any other questions, but pointed out none. The court asked him to point out any testimony in the case that was in conflict on these questions. He pointed out no testimony in which he claimed there was a conflict on these or any other questions. The court thereupon ordered a verdict for the plaintiff, for the penalty imposed by the by-law.

There being no conflict in the evidence, nor any disputes as to the facts, there was nothing to be submitted to the jury. The only questions to be determined upon the evidence were questions of law, which could be determined only by the court. With the case thus situated, it was proper and lawful for the court to direct the verdict; and the verdict thus directed will be upheld, if the law and the facts disclosed by the evidence warranted it; and we think it is clear that they did. *Lindsay v. Lindsay*, 11 Vt. 321; *Wilder v. Wheeldon*, 56 Vt. 344; *Noyes v. Rockwood*, 56 Vt. 647.

The defendant had no license during the time he is charged with keeping a victualing shop without a license. His wife's license of February 9 had been vacated on the 16th day of May, and notice had been served upon the defendant and his wife of the vacation of the license granted on that day. No other license had been issued to them, individually or jointly, on that day or any other day. The fact that the notification of revocation was of a license granted to the defendant and C. A. Thompson, his wife, February, 1884, does not help the defendant. He applied for and received the license, in the name of his wife, February 9, and he knew that that license was the only one held by him or his wife, and, on receiving the notice which was served upon him, he was legally notified of its vacation. He knew, then, in July, 1884, that the license of February 9, 1884, was not in force, and that neither he nor his wife was protected by it. In July, 1884, he was keeping a victualing-shop in the name of his wife, as her manager and superintendent, upon her capital, without her presence and personal attention, and had the control over the place and the business done there, and was selling victuals therein without a license. This constituted him the keeper of the place as a victualing shop, within the meaning and spirit of the by-law.

In misdemeanors all who participate in the offense knowingly and intentionally are principals, and may be convicted thereof, either separately or jointly. The same principle is applicable to actions for penalties for violations of municipal ordinances and by-laws, although recoverable, by force of the statute or ordinance, only by a civil action.

In *Regina v. Williams*, 1 Salk. 384, a mar-

ried woman was indicted jointly with her husband for keeping a bawdy house. In the opinion of the court it is said: "The keeping is not to be understood of having or renting in point of property; for in that sense she cannot keep it; but the keeping here is the governing and managing a house in such a disorderly manner as to be a nuisance.

In *Commonwealth v. Mann*, 4 Gray, 218, a clerk who kept the owner's books, took orders for coal, collected and paid bills, was convicted of maintaining a nuisance by means of the coal-yard, from which large quantities of coal dust were emitted. It was held that he was rightly convicted, if he, with a knowledge of what was done, aided, promoted, and encouraged the doing of the acts which constituted the offense.

In *Commonwealth v. Kimball*, 105 Mass. 465, under an indictment for keeping and maintaining a house as a liquor nuisance, it was held that proof that the defendant was present, having the entire control and superintendence of the house, however brief the time, will sustain the indictment, although he was only the clerk or servant of the householder. Of a like import are the following cases: *Commonwealth v. Drew*, 8 Cush. 279; *Commonwealth v. Gannett*, 1 Allen, 7; *Commonwealth v. Tryon*, 99 Mass. 442; *Commonwealth v. Burke*, 114 Mass. 261; *Commonwealth v. Dowling*, 114 Mass. 259.

Judgment affirmed.

Elmer D. KEYES *et al.*

v.
D. A. BUMP'S ADMR. *et al.*

1. To acquire a homestead in premises they must be used or kept for a family home; and it cannot be gained by a mere intention to occupy them at some indefinite future time. There must be a present use of the premises, or the keeping of them for that purpose, with a present right to use them.
2. As between the parties and their representatives, the consideration named in a mortgage does not determine the amount of a mortgage given for both present and future indebtedness; but the mortgage stands as security for the liabilities incurred under the contract set forth in the condition; nor is the record of the mortgage notice of the amount due, or a limitation of the amount secured.

(Rutland—Decided June 6, 1887.)

PETITION to foreclose two mortgages. Heard on a special master's report, September Term, 1886, Rutland County, Veazey, Chancellor. Decree *pro forma* for the orator, for the amount reported by the master, and interest, which was \$916.08. *Affirmed.*

The case is stated in the opinion.

Mr. L. A. Redington, for defendants—

Cited *Platt v. Griffith*, 27 N. J. Eq. 207; *Mix v. Cowles*, 20 Conn. 420-427; *Whiteman v. Field*, 53 Vt. 557; *West River Bank v. Gale*, 42 Vt. 27; *Rice v. Rudd*, 57 Vt. 11; *Va-*

sey v. Trustless, 59 Ill. 188; *Brettun v. Fox*, 100 Mass. 284; *Mercier v. Chace*, 11 Allen, 184.

Messrs. Lawrence & Meldon, for petitioners—

Cited *Bugbee v. Bemis*, 50 Vt. 216; *True v. Morrill's Est.* 28 Vt. 672; *Hansford v. Holdam*, 14 Bush, 210; *Lee v. Miller*, 11 Allen, 87; *Spaulding v. Crane*, 46 Vt. 292; *Whiteman v. Field*, 53 Vt. 554; 1 Jones, Mort. § 367; 31 Vt. 133; 16 Vt. 300.

Walker, J., delivered the opinion of the court:

This is a petition to foreclose two mortgages on certain premises described therein and situated in Castleton, executed by D. W. Bump, the intestate of the defendant administrator; one to E. D. Keyes and N. R. Brady, dated June 29, 1880; the other to E. D. Keyes, C. A. Perkins, and C. E. Keyes, dated September 23, 1885; both conditioned for the payment of money then due the mortgagees, and which should thereafter become due them, from the mortgagor, on account of goods sold and delivered by them to him, and for the payment for all goods thereafter sold and delivered by them to him, and for the payment of all notes and renewals thereof which the mortgagor was then, or thereafter should be, owing to them, and for all money then due, or thereafter to become due, them from him, for whatever cause or consideration, or by reason of any undertaking or liability of the mortgagor to the mortgagees. The consideration named in each of said mortgages is \$800; and it was understood that Bump was to have credit with the mortgagees to that amount, and that he was not to exceed that amount in notes and accounts taken together.

The mortgagor, Bump, died November 2, 1885, leaving a widow and minor child, who now claim a homestead in the premises thus mortgaged by him. Bump and his wife never lived on the premises in question, and she did not join with her husband in the execution of the mortgages. Bump bought the premises in the spring of 1880, which then consisted of about a half acre of land; and he owned no other real estate at the time of his death, or at the time of the execution of the mortgages. At the time he bought the premises, his family lived in a house at Castleton, near the mortgaged premises, which he rented, and where they continued to live until his death. In the spring of 1880, immediately after buying the premises, the intestate erected the two-story wood building now standing thereon. The lower story was then finished as a country store, and was thereafter occupied as such by him. In the winter of 1883-84, the second story of the building was finished, and its arrangements adapted to, and made suitable for, occupation by a family. In January, 1884, upon the completion of the second story, Richard Gleason moved into it as a tenant under a parol contract between him and the intestate, by which he was to pay \$50 a year rent, \$4 to be paid each month for eleven months, and \$6 for the twelfth month. And without other or further agreement he continued to occupy it with his family, and pay rent, until December 17, 1885. The building was not otherwise occupied during the lifetime

of the intestate, except the room first finished upstairs was occupied for a short time by Mrs. Bump's brother.

It fully appears from the master's report, that, at the date of the execution of the first mortgage, the building on the premises was used by the intestate only for the purposes of a country store; and that at the date of the execution of the second mortgage, the intestate was using the lower story for the purposes of a country store, and Gleason was in possession of the second story as a tenant, paying rent under a tenancy which had ripened into a tenancy from year to year. *Hanchett v. Whitney*, 2 Aiken, 240; *Same v. Same*, 1 Vt. 311; *Roe v. Lees*, 2 W. Bl. 1173; *Den v. Drake*, 4 N. J. L. 523.

The premises were not used by the intestate as a homestead in his lifetime. The master finds that, during a period embracing the dates of the execution of both of the mortgages in suit, the intestate had an intention at some indefinite future time, when circumstances should be favorable to his doing so, to occupy the second story of the building, with his family, as their home.

It is contended by the defendants that the intention of the intestate to occupy the second story of the building on the premises as a family home, at some indefinite future time, was the keeping of the premises as a homestead, within the meaning and spirit of the statute. We think this contention is not sound. The homestead right which passes to and vests in the widow and minor children of the head of the family dying intestate is defined in the statute as "a dwelling-house, outbuildings, and the land used in connection therewith, not exceeding \$500 in value, and used or kept by such housekeeper or head of family as a homestead." The statute requires more than the naked intention of the head of the family to make the premises his family home at some indefinite future time, to establish a homestead right. One of two conditions is essential to the existence of a homestead right under the statute: There must be either an actual personal use, by the head of the family, of a dwelling-house and lands appurtenant, as a family home; or an actual keeping, by him, of the same for a family home with the present right and purpose of so using it. A personal use is not claimed in this case, and the facts do not show a keeping of the premises with a present right and purpose of using them as a family home.

To give the construction contended for to the word "kept" would be adding an additional ground or condition to the statute for acquiring a homestead, and establish a dangerous precedent in this class of cases; as the intention of the head of the family, being locked up in his own breast, would not be known to or readily ascertainable by persons dealing with him. Such a doctrine would be productive of fraudulent claims to homesteads upon testimony that would be difficult to meet, and practically disprovable.

The homestead right is not lost by a temporary removal, with an intention to return and make the premises a home again, when accompanied with an actual keeping for that purpose; but when the premises have never been used or kept as a homestead by the head

of the family, he can acquire no right to a homestead therein by a mere intention to use them as such at some indefinite future time.

In *Spaulding v. Crane*, 46 Vt. 392, Judge Wheeler, in speaking for the court upon the question of the effect of the intention of the head of the family in respect to a homestead, says: "It would seem to have been the design of this statute to make the power of the husband to alienate or mortgage without the wife's joining, readily ascertainable by finding whether the premises were occupied by him as a residence, without leaving it to depend upon his intentions, which might be known only to himself, and about which his expressions might not bind or stop other persons with whom questions concerning his power might arise."

This argument applies with the same force to the statute in its present form as it did to the statute when it required the personal occupation of the premises in all cases to establish the homestead right. Nothing short of the present use of the premises, or the keeping of them for that purpose with a present right to so use them, will give to them the character of a homestead, so as to cut off the right of the owner to mortgage them without his wife's joining in the mortgage. Neither of these conditions existed in this case. The petitioners' mortgages are therefore considered valid against the homestead claim set up by the defendants.

The defendants insist that the petitioners are not entitled to have the mortgages foreclosed for a sum beyond \$800, the consideration named in the mortgages: (1) because it was understood that the intestate should have credit on the mortgages up to \$800, and was not to exceed that sum; (2) because the consideration named in the mortgages in law limits the security to that sum.

We think otherwise. There is no finding that there was any understanding between the intestate and the mortgagees that the mortgages should not stand as security for future advances or future indebtedness beyond the sum of \$800, in case the indebtedness should exceed that sum, and therefore the mortgages must stand as security according to the contract mentioned in them. The conditions of the mortgages are sufficiently definite under our system of registry. They show a certain and definite contract between the parties that the mortgages shall stand as security for both present and future indebtedness on account of goods then sold and delivered by the mortgagees to the intestate, and for all notes and renewals thereof then owing, or which the intestate might thereafter be owing, to them on account of their future dealings. There is no difficulty in ascertaining from the conditions the amount of the incumbrance intended to be secured. It was clearly the intent of the parties that the mortgages should stand as security for both present and future indebtedness of the classes described; and although the amount is not limited, they must stand, between the parties and their legal representatives, for the full amount of the indebtedness contracted by the intestate upon the security of the mortgages, which the master finds to be \$916.08. That mortgages may be given to se-

cure future advances and contingent debts, as well as debts which already exist and are certain and due, has long been well settled. Mortgages of this class, like mortgages of indemnity and mortgages to secure against official neglects, must necessarily be to secure sums indefinite and uncertain in amount at the time the mortgages are executed. To limit the extent of the incumbrance, and require it to appear in the mortgage, would largely defeat the beneficial effects of such mortgages. The law does not require it. The whole current of authority is opposed to it. 1 Jones, Mort. 373; *McDaniels v. Colvin*, 16 Vt. 800; *O'neal v. Atlantic Ins. Co.* 1 Pet. 386 [26 U. S. bk. 7, L. ed. 189]; *Shirras v. Caig*, 7 Cranch, 84 [11 U. S. bk. 3, L. ed. 260]; *Robinson v. Williams*, 22 N. Y. 380.

No question arises in this case as to the rights of subsequent mortgagees or attaching creditors; and their rights under such a mortgage, as against advances made by the mortgagee after notice of a subsequent mortgage or attachment, are not considered here.

It is a well-settled principle that the real consideration of deeds and mortgages may be shown, although different from that expressed in the instrument. The consideration named in the instrument is never conclusive. It is open to the utmost limit of inquiry. *Stevens v. Griffith*, 3 Vt. 448; *Wood v. Beach*, 7 Vt. 522.

The consideration named in a mortgage is not determinative of the amount of the mortgage; nor is it, when of record, notice of the amount due upon it, or a limitation of the amount secured thereby. A mortgage given to secure the sum named in the consideration clause may be half paid a week after it is executed, so that it will stand as security for only half the consideration named; or it may be one of long standing, with a large accumulation of interest upon it, making the amount due upon it double the consideration named in the mortgage, so that it would stand as security for double the consideration named.

In a mortgage for future advances the sum or amount named as the consideration is of no moment, as the mortgage stands as security for the amount of the liabilities and indebtedness incurred under the contract set forth in the condition, whatever the sum may be. It is not essential even that any amount be named in the consideration clause of the mortgage. This point was distinctly ruled in *Robinson v. Williams*, 22 N. Y. 380. The consideration named in the mortgage given in that case was \$1, and it was given to the Hollister Bank to secure future discounts and advances by the bank to the mortgagor; and the court held that a mortgage given to secure future advances, the limit of which is not defined therein, is good for the amount of the advances thus made. The same doctrine is sustained in *McKister v. Babcock*, 26 N. Y. 878; *Miller v. Lockwood*, 32 N. Y. 298; *Shirras v. Caig*, 7 Cranch, 84 [11 U. S. bk. 3, L. ed. 260], and in many other cases.

The petitioners are entitled to a decree of foreclosure against all the defendants, for the amount found due by the master.

The decree of the Court of Chancery is affirmed, and cause remanded.

VT.

Uraniah SMITH

v.

Michael FITZGERALD.

1. In an action of trespass on the freehold, the *ad damnum* in the writ is the "sum in demand," within the meaning of the statute (Rev. Laws, § 821), and determines the jurisdiction.
2. A husband may sue alone or jointly with his wife in trespass for injuries done to her realty during coverture, where the action will survive to either upon the death of the other.
3. Parol evidence of conversations between the parties previous to the execution of a deed is never admissible, in a court of law, to contradict, enlarge, or abridge the operation of the deed. Nor are the acts or declarations of the parties before or after its execution admissible to show their understanding of the deed.

(Franklin—Decided June 3, 1887.)

TRESPASS *quare clausum fregit*. Heard on a referee's report, September Term, 1886, Franklin County, Royce, Ch. J., presiding. Judgment on the report for the plaintiff. *Affirmed*.

The facts are stated in the opinion.

Messrs. Ballard & Burleson, for defendant:

The county court did not have jurisdiction. Rev. Laws, § 821.

The action should have been brought by the husband and wife jointly.

Hackett v. Hewitt, 57 Vt. 442; 1 Washb. Real Prop. 279; 2 Kent, Com. 131; Kel. Cont. 82.

In all cases where the right of action would survive to the wife, the husband and wife must join in any action brought therefor.

1 Pars. Cont. 286; 1 Chitty, Pl. 74; 10 Pick. 469; *Morse v. Earl*, 18 Wend. 272; *Milner v. Milner*, 2 T. R. 631; *Ramsey v. George*, 1 M. & S. 176.

Hubbell's testimony was admissible.

Rob. Dig. p. 272; *Davis v. Judge*, 44 Vt. 500.

The wife would not be estopped by this action.

Wright v. Hazen, 24 Vt. 143; *Knapp v. Marlboro*, 81 Vt. 674; 52 Vt. 287; 57 Vt. 42.

Messrs. Charles Soule, and Wilson & Hall, for plaintiff:

The court had jurisdiction.

Doubleday v. Martin, 27 Vt. 488; *Montgomery v. Edwards*, 45 Vt. 75; *Ladd v. Hill*, 4 Vt. 164.

It was unnecessary to join the wife.

1 Chitty, Pl. 74; *Bowen v. Amsden*, 47 Vt. 569; *Holton v. Whitney*, 38 Vt. 448; *Allen v. Kingsbury*, 16 Pick. 235; *Clapp v. Stoughton*, 10 Pick. 469.

This objection is waived by the reference.

The parol evidence was not admissible.

Pingry v. Watkins, 17 Vt. 379; *Morse v. Low*, 44 Vt. 561; *Abbott v. Choate*, 47 Vt. 53; *Vermont Cent. R. R. Co. v. Hills*, 38 Vt. 681.

Walker, J., delivered the opinion of the court:

This is an action *quare clausum fregit*, for cutting trees on land of which the plaintiff and his wife, Laura, were in possession in right of the wife, who held the same under a warranty deed from her father, and over which the plaintiff exercised such control and management as a husband may, in the law, exercise over the wife's real estate, and had no right or estate in the premises except such as a husband acquires by marriage in the real estate of his wife. The wife was not joined as a party plaintiff in the writ. It is inferable from the referee's report that the principal question before him was whether the *locus in quo* was within the limits of the plaintiff's wife's lot. The referee finds that the land is of small value except for wood and timber, and that the trees cut and taken away by the defendant stood upon the land of the plaintiff's wife, and were of the value of \$10. This was the extent of the plaintiff's claim for actual damages; but he claimed to recover exemplary damages in addition thereto, which the referee disallowed for the reason that the defendant cut the trees to assert his right, as he believed, to the *locus*.

The defendant in this court relies upon three exceptions which he filed to the referee's report in the court below, to wit: (1) That the county court had no original jurisdiction of the action; (2) that the judgment should be rendered for the defendant upon the report, because of the nonjoinder of the plaintiff's wife as a party plaintiff; (3) that the referee committed error in excluding the testimony of Homer E. Hubbell.

1. The action was brought originally to the county court, and the declaration charges the defendant with entering upon the plaintiff's land with force and arms, and cutting and carrying away certain trees standing and growing thereon, and with other wrongs, and concludes to the damage of the plaintiff, \$300.

The county court had original jurisdiction of the action, unless it is within the jurisdiction of a justice of the peace. A justice of the peace has jurisdiction of actions of trespass on the freehold when the sum in demand does not exceed \$20. Rev. Laws, § 821. This is the limit of the jurisdiction of a justice of the peace in this class of actions; and it is immaterial whether the title to the land is in dispute or not. To give the county court original jurisdiction, the sum in demand must exceed \$20. So the determining fact is the sum in demand in the action. What constitutes the sum in demand in an action of trespass on the freehold is not an open question in this State. This was settled by the opinion of the court in *Montgomery v. Edwards*, 45 Vt. 75, which was an action *quare clausum fregit*, brought originally to the county court. The declaration charged the defendant with cutting down and carrying away trees standing and growing on the plaintiff's land, of the value of \$15, and concluded to the damage of the plaintiff, \$50. The plaintiff claimed to recover treble damages, but did not declare upon the statute giving treble damages, and therefore could not recover such damages in the action. The plaintiff's testimony tended to show the value of the trees cut to be from \$6 to \$8; the jury found their value to be \$5.25. The defendant in that action

claimed that, upon the proof, the county court had not original jurisdiction, and moved to dismiss the action. The county court overruled the motion, and the defendant excepted. The supreme court, in passing upon the question, held that the action must be regarded as an ordinary action of trespass on the freehold, and that the *ad damnum* in the writ was the sum in demand, and that, as the *ad damnum* exceeded \$20, the county court had original jurisdiction of the action. Judge Peck, in the opinion of the court, says: "In actions of trespass on the freehold, and actions of assault and battery, and the like, the *ad damnum* in the writ is the sum in demand, determining the jurisdiction." The learned judge also says, in substance, that if the rule of good faith be applied, as it is in some other actions, there was no error in the decision of the county court, as the court may have found that the plaintiff in good faith supposed he could recover more than \$20, in view of the fact that he claimed treble damages. The case cited and the case at bar are very similar. The *ad damnum* in each case exceeds \$20. In neither was the value of the trees claimed to be over \$10. In one the plaintiff claimed to recover treble damages, and failed in that claim; in the other the plaintiff claimed to recover exemplary damages, and failed in that respect; and the good faith of the plaintiffs in their respective claims was not questioned in either case.

Upon the authority of the case cited, it must be held that the county court had original jurisdiction of the case at bar.

2. The next question to be considered is whether an action can be maintained in the name of the husband alone, against a person, for cutting trees upon the wife's land during the coverture.

As we have no statute law upon this subject, the question must necessarily be determined upon the principles and authority of the common law. The common-law rule as to the joinder of husband and wife in actions for damages to the real property of the latter during the coverture is said by some writers to be not quite clear. The rule, however, seems to be quite uniform in the elementary books and decisions of the courts.

In 1 Chitty's Pleading, 6th Am. ed. 85, the law is stated as follows: "In real actions for the recovery of the land of the wife, and in a writ of waste thereto, the husband and wife must join. But when the action is merely for the recovery of damages to the land or other real property of the wife during the coverture, * * * the husband may sue alone, or the wife may be joined, her interest in the land being stated in the declaration."

In 2 Waterman on Trespass, § 937, the rule is stated as follows: "At common law, where the action is merely for the recovery of damages done to the real estate of the wife during coverture, the husband may sue alone, or his wife may be joined."

In Dicey on Parties to Actions, 412, the rule is laid down as follows: "A husband may sue either alone or jointly with his wife, for all injuries done during coverture to real property of which the husband and wife are seised, or to which they are entitled in right of the wife."

The same doctrine is asserted in 2 Hillard on Torts, p. 502. It is there stated that an action for trespass for cutting trees on land held by husband and wife in right of the wife may be brought by the husband alone, or by the husband and wife jointly, at his election.

The rule thus laid down seems to have been followed in the decisions of the courts where the common law governs, and is supported by an unbroken line of authority. 2 Saund. Pl. 81; 1 Rolle, 348; 2 Vent. 195; Com. Dig. *Baron & Feme*, V, W, & X; 2 Bac. Abr. *Baron & Feme*, K; Cro. Car. 347; 1 W. Saund. 291; Selwyn, N. P. 810; *Bidgood v. Way*, 2 W. Black. 1236; *Weller v. Baker*, 3 Wils. 432; *Clapp v. Stoughton*, 10 Pick. 463; *Allen v. Kingsbury*, 16 Pick. 235; *Tallmadge v. Grannis*, 20 Conn. 296; *Fairchild v. Chastelleux*, 1 Pa. 176; S. C. 8 Watts, 412.

In *Tallmadge v. Grannis*, 20 Conn. 296, it was held that, for damages of a permanent character done to the real estate of the wife during coverture, the husband may sue alone, or the wife may be joined, her interest, in the latter case, being stated in the declaration.

Allen v. Kingsbury, 16 Pick. 235, was an action of trespass *quare clausum fregit*, for cutting trees on land held by the plaintiffs in right of the wife, in which the principal question was whether the *locus in quo* was included within the limits of the wife's lot. It was objected that the wife was improperly joined as plaintiff, and that the action should have been brought by the husband alone. The court, Wilde, J., held that the case fell within that class of cases where the husband may sue alone, or join with his wife, at his election, as held in *Clapp v. Stoughton*, 10 Pick. 463. This case is substantially like the case at bar.

The principle deduced from the cases cited, and upon which the decisions are based, is that, in all cases for injuries done to the wife's land during coverture, when the right of action will survive to the wife upon the death of the husband, and to the husband upon the death of the wife, the husband may sue alone, or join with his wife, at his election; and that the wife must be joined only in those cases where the right of action will survive to the wife alone, and not to the husband; such as actions to recover the title to the land, and actions brought to recover for the waste only.

It is well settled that an action of trespass for injuries committed to the wife's land during the coverture will survive to the husband on the death of the wife, and that, if the wife survive, any action for a tort committed to her real estate during the coverture will survive to her. 1 Chitty, Pl. 85. It must therefore be held in this case that the action was properly brought in the name of the husband alone.

3. The plaintiff's wife and defendant derived the title to their respective lots through separate claims of title coming down from Patrick Madden. The plaintiff's wife's lot was conveyed to Ami Wilson by Patrick Madden and wife, by deed, November 20, 1852, by the following description: "Beginning at the northeast corner of the farm known as the Noah Wilcox farm, now owned by Sylvester Flynn; thence northerly on the original lot line

to the southeast corner of land owned by Betsey Baker; thence westerly on the southerly line of said Baker land 80 rods; thence southerly, parallel with the easterly line, to the Flynn farm; thence easterly 80 rods to the place of beginning, being 40 rods."

The defendant's lot was conveyed to Isaac T. Parris and Patrick Rowley by Patrick Madden, by deed dated October 26, 1867, by a description which bounds the lot on the east side by the Ami Wilson lot.

Shortly after the deed to Wilson, he and Madden built a division fence between the lots, not intended to be on the exact line between the lots, but running in a zigzag course through the woods wherever it was most convenient to build a fence. The location of this fence has not been changed. The trees in question were cut west of this zigzag fence, but within the limits of the survey of the plaintiff's lot as described in the deed to Wilson, and subsequent deeds in the chain of title.

It is fairly inferable from the referee's report that the principal question in dispute before the referee was whether the trees cut were within the boundaries of the land deeded to Wilson, which is now held by the plaintiff's wife.

The defendant offered Homer E. Hubbell as a witness upon the trial to show that, when he wrote the deed from Patrick Madden and wife to Wilson, the parties thereto were all present, and that the matters were talked over between them, and they agreed that Wilson had purchased just 40 acres, and insisted that he should put into the deed the words "being 40 acres." This testimony was excluded by the referee, and the defendant insists it was error. The referee does not state for what purpose this testimony was offered, and it does not appear from the record clearly what the purpose was. Assuming, however, that the testimony was offered as bearing upon the amount of land which was intended to be conveyed from Madden to Wilson, and thus affecting the location of the division line,—as may perhaps be fairly inferred from the report,—we think the testimony was properly excluded.

Oral evidence of conversation between the parties previous to the execution of the deed is never admissible, in a court of law, to contradict, enlarge, or abridge the operation of the deed, or to restrict or enlarge its legal intentment. Nor are the acts or declarations of the parties before or after its execution admissible to show their understanding of the deed. The intention of the parties must be derived from the deed itself, and the deed must have effect to convey such land as is included in the description as shown upon its face. There is no ambiguity in the description of the premises in the deed to Wilson itself, and if there was, oral evidence is not admissible to explain it. It is not claimed that there is any latent ambiguity which calls for an explanation by parol. *Vermont Cent. R. R. Co. v. Hills*, 23 Vt. 681; *Pingry v. Watkins*, 17 Vt. 379; 2 Saund. Pl. 697; *Clifton v. Walmsley*, 5 T. R. 564; *Rea v. Varlo*, Cowp. 248.

We find no error in the judgment of the Court below, and the same is affirmed.

STATE of Vermont
v.

L. B. GOSS.

1. When an **express agent receives by express a package, marked C. O. D., containing intoxicating liquor, and, knowing its contents, delivers it to the consignee, collects the pay therefor, and transmits it to the consignor, he is liable to conviction under an indictment charging him with the illegal sale of such liquor; but when, in such case, he does not know the contents of such package, he is not liable, unless he had reason to believe or suspect what it contained.**
2. The rule is the same where the **agent delivered the liquor to a stagedriver, who paid for it with money furnished by the consignee, where it did not appear that the express company had undertaken to deliver it beyond the terminus of its own transit; or that the stagedriver was an express carrier; for a delivery to the stagedriver was a delivery to the consignee.**
3. An **express company is not bound to transport and deliver intoxicating liquor, if thereby it would incur a penalty.**
4. **Nor is such company, as a general thing, bound to know the contents of packages offered for carriage; nor are its agents presumed to know.**

(Caledonia—Decided June 21, 1887.)

COMPLAINT charging the respondent with the illegal sale of intoxicating liquor. Appeal from a justice court to the county court. Trial by jury, June Term, 1885, Caledonia County; Ross, J., presiding. Verdict, guilty. *Exceptions sustained.*

The case appears in the opinion.

Mr. L. P. Poland, for respondent:

It was not claimed that the liquor was to be used or disposed of in violation of law. If the defendant had known what the boxes contained, he violated no law; indeed, it was his legal duty to deliver them, and he would have subjected himself to liability if he had refused. The clear intent and purpose of the law was to prohibit public carriers from bringing and delivering intoxicating liquors to persons, to use and dispose of in violation of law, and to leave them bound to their common and legal duty to transport and deliver for all other people. The express agent is not liable unless he has knowledge that the article he delivers is intoxicating liquor. Ignorance of the law is never a defense against a criminal act, but ignorance of any fact that is an essential part of the criminal act is always an excuse.

Kreamer v. State, Am. Law Reg. (Aug. 1886) p. 517.

Mr. M. Montgomery, *State's Attorney*, and **Mr. Ide**, for the State:

The respondent, on the facts, was properly found guilty.

State v. O'Neil, 58 Vt. 140; *Riley v. Wheeler*, 334

42 Vt. 582; *Miller v. Cushman*, 38 Vt. 593; *Hodges v. Fox*, 36 Vt. 81; *Houdlette v. Tallman*, 14 Me. 400.

Knowledge is not a necessary element of statutory crime, unless the statute, in express terms or by necessary implication, makes it so.

Rowell, J., delivered the opinion of the court:

This is a complaint in one count for selling, furnishing, and giving away intoxicating liquor contrary to law.

The facts are these: In the summer of 1883, one Pearson, who lived at East Barnett, ordered some lager beer from Bellows Falls, to be sent to him by express, and it came in a box directed to him, and marked C. O. D. The respondent was station agent, and also agent of the express company, at East Barnett, and as such express agent delivered said box and its contents to Pearson, and received from him the designated price of \$1.75 for transmission to the consignor. The respondent had no knowledge of what the box contained; but the State claimed that, from the form and size of the box, and the price paid, he had reason to suspect that it contained lager beer, and that he could have found out by opening the box.

In March, 1884, a box came by express to East Barnett from Manchester, N. H., marked C. O. D., and directed to William Lowell, of South Danville, which is seven or eight miles from East Barnett. The respondent, as express agent, delivered this box to one Badger, the driver of a daily stage between the two places, to be carried to Lowell; and Badger then, or in a day or two after, paid the respondent the charges thereon, of about \$3.50, with money furnished him by Lowell for that purpose; but the respondent did not know whether it was Lowell's or Badger's money. Before Badger started for South Danville that day, the box was seized by an officer, and he arrested; and on opening the box it was found to contain a gallon of alcohol in a jug. There was no evidence that the respondent knew what the box contained, except that the testimony tended to show that there was such a perceptible odor of liquor emitted from it that he had reason to suspect that it contained liquor; and he admitted that he did so suspect.

The respondent claimed, and requested the court to charge, that as he was an express agent, and his only connection with the matter was in that capacity, his acts were not in violation of law, unless the persons to whom he delivered the boxes obtained the beer and the alcohol for the purpose of disposing of it contrary to law; and that if he knew what the boxes contained it would make no difference: that he could not in any event be made liable unless it was found that he did know what they contained; that delivering them to the persons named, and receiving and remitting the money to the consignors, did not constitute a sale by him for which he could be held liable; and that delivering the box to Badger was only a delivery to another carrier, and not a sale or a furnishing.

The court ruled that it was immaterial whether the respondent knew what the boxes contained or not, and that, upon the facts proved,—which were not disputed,—the re-

spondent was guilty of two illegal sales, and so instructed the jury, which returned a verdict accordingly.

It is undoubtedly true, as contended, that the respondent did not so become the seller of these packages as to make him civilly liable as such. But this does not settle the question; for one may well be criminally liable in respect to a transaction in which he engages as agent, although he is not civilly liable.

A distinction is attempted to be made between the respondent's relation to the alcohol and his relation to the beer; but none exists, we think. It does not appear that the express company had undertaken to deliver the alcohol beyond the terminus of its own transit at East Barnett; nor that, according to the rules and usages of the business, it was its duty to deliver the package to the stagedriver for further transit; nor that the driver was an express carrier, and so the company must be taken to have been the ultimate, and not an intermediate carrier; and when the stagedriver came with money furnished to him by the consignee for that purpose, and took and paid for the package, he was acting, and seems to have been regarded as acting, for and in behalf of the consignee; and a delivery to him, in the circumstances, was a delivery to the consignee.

Now, applying the doctrine of *State v. O'Neil*, 58 Vt. 140,—which seems to have received very general approval everywhere,—here were certainly two illegal sales at Barnett, for which the consignor might legally be indicted and convicted. But when the packages came into the hands of the respondent, no crimes had been committed by anyone in respect of illegal sales, for no sales had then been made; the transactions thus far constituted only executory contracts of sales in Bellows Falls and Manchester respectively; the completed sales—the things that constituted the offenses—remained to be perfected, and this was done by the respondent. Thus the consignor themselves have committed no crimes by way of illegal sales, except by the hand of the respondent, who, having done the essential acts that constitute the crimes, is responsible on general principles, unless the circumstances shield him.

In *Commonwealth v. Whalen*, 16 Gray, 25, a wife was convicted as a common seller on proof that, in the absence of her husband, she had delivered and taken pay for liquors that he had previously bargained and sold. The court said that a delivery is an essential part of a sale; and that if she acted as the agent of her husband in what she knew to be illegal sales, by making delivery in his absence, it was such a participation in the misdemeanor as to make her responsible.

But do the circumstances shield the respondent? He says they do, because he says it was his duty to deliver the packages as he did, even though he had known their contents, and that he should have been liable had he not delivered them; while, on the other hand, it is said that he was bound to know their contents at his peril, and that his want of knowledge makes no difference.

Both of these propositions are untenable. As to the first, although express companies are common carriers, and liable as such, yet the law neither requires nor permits them to do

illegal acts; and they are not bound to transport and deliver intoxicating liquor or other commodities, if thereby they would commit an offense or incur a penalty. They cannot be allowed, any more than other people, knowingly and with impunity to make themselves agents for others to break the laws of the State.

As to the other proposition, express carriers are not bound, as a general thing, to know the contents of packages offered to them for carriage. If they were, it would follow that they might refuse to carry without such knowledge; and as it would be unreasonable to require them to accept as conclusive the word of the shipper as to contents, they must have a right to inspect for themselves, as a condition of carrying, which would occasion great inconvenience in practice. But no such rights exist, as a general rule.

This precise question was passed upon by the Supreme Court of the United States in the *Nitro-Glycerine Case*, 15 Wall. 524 [82 U. S. bk. 21, L. ed. 206], where the rule is laid down thus: "It not, then, being his (the carrier's) duty to know the contents of any package offered to him for carriage, when there are no attendant circumstances awakening his suspicion as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, and he cannot accordingly be charged, as matter of law, with notice of the properties and character of packages thus received."

In *Crouch v. London & N. W. R. Co.* 14 C. B. 255, it is said that the proposition that a carrier has in all cases a right to be informed as to the contents of packages brought to him, and may refuse to carry them if the information is withheld, has not a shadow of authority to sustain it except a *dictum* of Best, *Ch. J.*, in *Riley v. Horne*, 5 Bing. 217, and that, in its generality, it cannot stand the test of reasoning. But this case recognizes the right of the carrier to refuse to receive packages offered without being made acquainted with their contents, when there is good ground for believing that they contain anything of a dangerous character; and it is said in the *Nitro-Glycerine Case* that it is only when such ground exists, arising from the appearance of the package, or other circumstances tending to excite suspicion, that the carrier is authorized, in the absence of special legislation on the subject, to require knowledge of the contents of the packages offered as a condition of receiving them for carriage. In England, railway carriers are authorized by statute to refuse to take any parcel that they suspect to contain goods of a dangerous nature, or to require the same to be opened to ascertain the fact.

In *Brass v. Maitland*, 6 E. & B. 471, which holds it to be the duty of the shipper, when he offers goods of a dangerous character to be carried, to give notice of their character, the Chief Justice said: "It would be strange to suppose that the master or the mate—having no reason to suspect that goods offered for general shipment might not be safely stowed away in the hold,—must ask every shipper the contents of every package." 1 Smith, Lead. Cas. 7th Am. ed. 389, 411.

If, then, in the absence of suspicious appearances or circumstances, an express carrier is

neither bound to know nor authorized to find out, as a condition of receiving it, what a package contains that is offered to him for carriage, it would be strange to hold him guilty of a criminal offense because of the character of the contents; for in such case he is bound to carry, and liable if he does not; and the law will not compel a man to act, and then punish him for acting. Hence, the turning point of this case is, whether the respondent had reason to believe or suspect—for it appears that

he did not know—that these packages contained what they did. If he did, he is charged with notice of their contents, and is guilty; if he did not, he is not charged with such notice, and is not guilty; and as the evidence tended to show he did, and the court ruled the point immaterial, the case must go back for a new trial.

Exceptions sustained, and cause remanded for a new trial.

NEW HAMPSHIRE.

SUPREME COURT.

Rebecca SMITH, Admx.,

v.

OSSIPÉE VALLEY TEN CENT SAVINGS
BANK.OSSIPÉE VALLEY TEN CENT SAVINGS
BANK

v.

Rebecca SMITH, Admx., et al.

S deposited money in a savings bank in the name of his daughter, intending it as a present gift to her, subject to the right in himself and his wife to take the income during their lives. The daughter was informed of the arrangement, and assented to it, but the deposit book was never delivered to her. Held, a good gift of the deposit, subject to the life interest specified.

(Carroll—Decided March 11, 1887.)

ON report.

The first action is assumpsit for a deposit in the defendant bank, made by the plaintiff's decedent, James Smith, in the name of his daughter, Huldah F. Smith, now Huldah F. Emerson, who appears as defendant in interest claiming the fund. The second suit is a bill of interpleader to determine to whom the bank shall pay the deposit. Facts found by the court as follows:

In 1871 James Smith deposited \$450 in the name of his said daughter Huldah, and took a deposit-book in her name. Other deposits were afterwards made to the same account, and he withdrew some dividends, leaving the amount of the account, at the time of his death in 1884, \$1,183.65. He never made any statement or declaration to the bank, oral or written, in regard to the deposit or his intention, except that he directed it to be placed in the name of Huldah as above.

On one occasion, before the marriage of Huldah, which occurred in 1874, he told her he had made the deposit, and intended it for her; that he should take the income while he lived, and wanted his wife, if she should survive him, to have the income while she lived. At the same time he showed her the deposit-book, and she took it, and saw the entries and deposits in her name, and assented; but it was not delivered to her. Since the death of James, his widow, the administratrix, has had the book, and has drawn the dividends upon an order given to the bank by Huldah for that purpose, directing them to retain the money deposited for her by her father, and to pay the interest, as it became due, to her mother. I find that James Smith intended the deposit as a gift to Huldah, subject to his taking the income while he lived, and to his wife's taking it for her life, if she survived him. He informed Huldah of the gift, and she accepted it.

In 1878 James Smith executed a document in the form of a will, which failed for want of a seal. In that instrument he gave to his daughter Huldah \$1,074.25, "which sum I have deposited in the Ossipee Valley Ten Cent

Savings Bank, in her name," that sum being in fact the amount of the deposit at the time the will was made. This document was offered as evidence that no gift of the deposit had been made to Huldah; and the questions as to its admissibility and legal effect were reserved for the opinion of the court. Such decree and judgment are to be entered in the cases as the court may order on the foregoing facts.

Messrs. J. Hobbs and E. A. Hibbard,
for Rebecca Smith.

Mr. George B. French, for Huldah F. Emerson:

The imperfectly-executed paper, purporting to be a will, was not competent evidence.

A gift accepted, as this was, is complete and irrevocable, and the donor cannot afterwards be given the very dangerous power of creating evidence contradicting the gift, although in this case the evidence did not. Prescribing any particular form of evidence by which he could nullify his act would not make the evidence any more reliable, or less perilous and unjust; it would simply tax the ingenuity, always equal to the required demand.

Peirce v. Burroughs, 58 N. H. 302; *Kimball v. Leland*, 110 Mass. 325; *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157. 1 New Eng. Rep. 221; *Howard v. Snelling*, 82 Ga. 195; *Gill v. Strozier*, 82 Ga. 688; *Julian v. Reynolds*, 8 Ala. 680; *Strong v. Brewer*, 17 Ala. 706; *Newman v. Wilbourne*, 1 Hill (S. C.), Ch. 10, 11; *Snowden v. Pope, Rice, Eq.* (S. C.) 174; *Cornett v. Fain*, 83 Ga. 219; *Woodruff v. Cook*, 25 Barb. 505; *Hicks v. Forrest*, 6 Ired. Eq. 528; *Cowan v. Tucker*, 8 Ired. L. 426; *High v. Stainback*, 1 Stew. (Ala.) 24; *McKane v. Bonner*, 1 Bailey (S. C.), 118; *Marston v. Marston*, 21 N. H. 513; *Smith v. Smith*, 7 C. & P. 401; *Sanborn v. Goodhue*, 28 N. H. 48, 66; *De Cuvmont v. Bogert*, 36 Hun, 889; *Kellogg v. Adams*, 51 Wis. 138; *Winchester v. Charter*, 97 Mass. 140; *Roberts v. Medbery*, 182 Mass. 100; *Grover v. Grover*, 24 Pick. 261.

The gift was complete, with nothing to be done; no power of revocation was retained. The enjoyment of the income of the gift, not by personal possession and use, but by receiving the same from the bank, was not adverse to the gift of the principal. It is a mistake to regard the book as the property given. It is but the evidence of a deposit; and a gift of the book would transfer only an equitable title in case the possessor of the book owned the deposit. When the bank accepted the deposit in the name of this claimant, it became liable to pay the amount to the claimant the moment she, as the third person interested, knew of it and assented.

Blasdel v. Locke, 52 N. H. 288; *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159, 163, 164; *Davis v. Ney*, 125 Mass. 590; *Stone v. Hackett*, 12 Gray, 227; *Martin v. Funk*, 75 N. Y. 184; *Perry, Tr.* §§ 148-145; *Howard v. Windham County Sav. Bank*, 40 Vt. 597; *Barber v. Frye*, 75 Me. 29; *Duncan v. Self*, 1 Murph. (N. C.) 466; *Minor v. Rogers*, 16 Am. Rep. 69; *Camp's App.* 4 Am. Rep. 89; *Gardner v. Merritt*, 83 Md. 78; 3 Am. Rep. 115.

These cases are not at variance with cases where a power of revocation was retained, or where the donor was not informed of the gift.

where there was no acceptance, or where the intention to make a gift is not found, as in the following cases:

Taylor v. Henry, 48 Md. 550; *Burton v. Bridgeport Sav. Bank*, 52 Conn. 398; *Minor v. Rogers*, 40 Conn. 512.

Bingham, J., delivered the opinion of the court:

If A places money for B in a bank, taking a deposit-book for it, in his name, and subsequently notifies him of the credit and that he intended it a gift, which B accepts, does this vest the title in him, and divest A of all title and possession of it, if he retains the deposit-book? In *Blasdel v. Locke*, 52 N. H. 238,—a bill in equity, by the administrator of the donor against the bank and the donee, to recover a deposit, on similar facts, though less favorable to the defendants,—it was held "that the deposit created a trust in the bank in favor of B, and that, upon information of what had been done being conveyed by A to B, and accepted by B, her title to the money became absolute, although there was no delivery of the deposit-book." The failure to deliver the deposit-book did not make the transaction an executory, instead of an executed, trust and perfected gift.

In the case at bar, the father of the defendant Huldah deposited in the bank, in her name, before her marriage, the money in controversy. He made no declaration to the bank, other than to direct the deposit in his daughter's name and receive the deposit-book. He intended, however, the deposit as a gift to her, subject to his taking the income while he lived, and his wife's taking it for her life, if she survived him. He afterwards showed the deposit-book to his daughter, she saw the entry, and he informed her of the gift, and she accepted it; he retaining the book during his life to enable him to draw the income. We understand the case to find that the father intended, at the time of making the deposit, to make a present gift to his daughter, subject to the taking of the income, unless the evidence of the imperfectly-executed will was in law conclusive. The will was not conclusive evidence, even if competent, on the question; and the case stands on the finding of the court on all the evidence, including the will. The administratrix of James Smith, the father, claims that the transaction was in the nature of a testamentary disposition of the property, not in accordance with the Statute of Wills. *Bartlett v. Remington*, 59 N. H. 865. There is, however, a marked distinction between this case and that of *Bartlett v. Remington*. In that case the deposit was made in the name of the person making it, for Sarah Sturoct, on the trust that the depositor was to hold the title and the power to dispose of the property so long as she lived, and then what was left was to go to Sarah. This was held to be an executory trust, not an executed one. In this case the money was deposited in the name of a third party, the depositor intending to make a present gift of it, subject to the taking of the income. To establish a valid gift, a delivery of the subject-matter to the donee or some person for him, so as to divest the title and possession of the donor, must be shown; and the inquiry

is whether a valid gift *in presenti* can be made of money, subject to the right of the donor to take the income. Such a gift, we think, may be made by a proper transfer to a trustee; and the question is whether the facts of this case present such a transfer. If A deposits money in B's name, without his knowledge, intending it a gift, it is not perfected, as the assent of both parties is necessary. *Peirce v. Burroughs*, 58 N. H. 302. But when B is notified of the gift and accepts it, his legal title to the money is perfected; and if not paid on demand, he may maintain his action at law to recover it. A could have no action for the money, either at law or in equity, as all title and right of possession have passed from him. Again, if A deposits money in B's name, to his credit, intending it a present gift, but to remain in the bank during the lives of A and his wife and that of the survivor, subject to the income being taken by them, the bank takes the money on the trust to hold it for the term, pay the income to A and wife, or the survivor, during the term, and, at the close, pay the principal sum to B; and when B is notified of the gift, and accepts it, with its burdens and conditions, a title to the principal is perfected in him, subject to the equitable right of A and wife to take the income. A's title and possession, and all right to a title, or the possession of the principal, is as entirely divested at the moment of the acceptance as if it were to be paid by the bank to B on demand. It is an executed, perfected gift as to A. He has delivered the money to the bank; his dominion and power to revoke are gone. His situation is not dissimilar to what it would have been had he given the money accompanied by an unqualified delivery to B, vesting the title and possession in him on B's undertaking to account to A for the income he might receive from it during the term; the important difference being that the payment of the income to Smith and wife is secured and made through a trustee,—practically, at least, the safer way.

Just what it is necessary to do to pass the title to money through the intervention of a savings bank, the authorities do not agree in the different States, and often in the same State; and it would be a difficult task to reconcile them. The doctrine of *Blasdel v. Locke*, *supra*, is not supported in all of its positions by all of the authorities, but we see no good reason for departing from it, and think it supports the conclusions to which we have arrived. The following authorities discuss the questions involved in this case: *Scott v. Berkshire Co. Sav. Bank*, 140 Mass. 157, 165, 1 New Eng. Rep. 231; *Davis v. Ney*, 125 Mass. 590; *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159; *Turner v. Estabrook*, 129 Mass. 425; *Ida v. Pierson*, 134 Mass. 260; *Eastman v. Woronoco Sav. Bank*, 186 Mass. 208; *Sherman v. New Bedford Five Cents Sav. Bank*, 188 Mass. 581; *Nutt v. Morris*, 142 Mass. 1, 2 New Eng. Rep. 243; *Curtis v. Portland Sav. Bank*, 77 Me. 151; *S. C.* 52 Am. Rep. 750; *Marston v. Marston*, 64 N. H. 146, 2 New Eng. Rep. 865; *Robinson v. Ring*, 73 Me. 140; *S. C.* 39 Am. Rep. 308; *Martin v. Funk*, 75 N. Y. 184; *Young v. Young*, 80 N. Y. 422; *Willis v. Smyth*, 91 N. Y. 297; *Mabbie v. Bailey*, 95 N. Y. 206; *Burton v. Bridgeport Sav. Bank*, 52 Conn. 398; *S. C.* 53 Am. Rep.

602; *Minor v. Rogers*, 40 Conn. 512; *Camp's App.* 36 Conn. 88; *Gardner v. Merritt*, 32 Md. 78; *S. C. 3 Am. Rep.* 115; *Ray v. Simmons*, 11 R. I. 266; *S. C. 23 Am. Rep.* 447; *Taylor v. Henry*, 48 Md. 550; *S. C. 30 Am. Rep.* 486, 489; *Howard v. Windham County Sav. Bank*, 40 Vt. 597; *Pope v. Burlington Sav. Bank*, 56 Vt. 284; *Marcy v. Amaguen*, 61 N. H. 131.

Decree that the plaintiff in the bill of interpleader pay the income of the deposit to Mrs. Smith during her life, and, at her death, the principal to Huldah F. Emerson. In the suit at law, judgment for the defendant. The costs will be adjusted at the trial term.

Allen, J., did not sit; the others concurred.

TOWN OF RINDGE

v.

Daniel H. SARGENT.

The reasonableness of a use of land which obstructs the flow of surface water over it is determined by its operation upon the interests of all parties affected by it.

(Cheshire—Decided March 11, 1887.)

CASE reserved. Decree for plaintiff.

Bill in equity to restrain the defendant from obstructing the free and natural flow of surface water from the plaintiff's land over and across the defendant's land. Facts found by a referee.

The case is stated in the opinion.

Messrs. Lane & Dole, and Batchelder & Faulkner, for plaintiff:

Counsel cited *Bassett v. Salisbury Mfg. Co.* 28 N. H. 438; 43 N. H. 529; *Swett v. Cutts*, 50 N. H. 439; *Webber v. Gage*, 39 N. H. 182; 2 Story, Eq. Jur. §§ 925-928; High, Inj. § 512.

Mr. Leonard Wellington, for defendant:

It is the duty of the town to take care of its surface water by providing some way to dispose of it without injury to the citizens of the town. The water being purely surface water, the defendant had the right to stop its flow upon his land.

Running water, for the diversion of which an action will lie, must be a really definite, natural stream, confined in a well-defined channel, and not mere drainage flowing over or soaking through the soil.

3 Kent, Com. 489.

Water flowing over the soil is governed by the same rules as water soaking through the pores of the earth; and the landowner, where the same is found, has the right to dispose of it, to obstruct or divert it, as may be necessary in the reasonable use of his own land, without regard to the injury done to his neighbors, caused by such diversion or obstruction.

Swett v. Cutts, 50 N. H. 439.

A landowner has the right to make changes and improvements on his land by building on it or raising the surface; and he may raise an obstruction to prevent surface water from continuing to flow over his land.

Flagg v. Worcester, 13 Gray, 608; 10 Gray, 28.

No action can be maintained for changing

the course or obstructing the flow of mere surface water.

Dickinson v. Worcester, 7 Allen, 22.

The owner of land may lawfully occupy and improve it in such manner as either preventing surface water which accumulates elsewhere from coming upon it, or altering the course of surface water which has accumulated thereon, although it is made to flow upon the land of another to his injury.

Gannon v. Hargadon, 10 Allen, 106; *Bates v. Smith*, 100 Mass. 181; *Ashley v. Wolcott*, 11 Cush. 195; *Luther v. Winnisimmet Co.* 9 Cush. 171; *Franklin v. Fisk*, 13 Allen, 211.

In the case of casual and intermittent surface waters, not running in any defined channel, but spreading over the surface of the land, there is nothing to prevent the landowner dealing with them as he pleases.

Add. Torts, 78 and cases cited.

In all of the cases above cited, no question is raised as to any rights of an adjacent landowner; but, Was the use made of the person's own land a reasonable and proper use? and that position is taken by the court in case of *Bassett v. Salisbury Mfg. Co.* 43 N. H. 577, where it says that "every interference by one landowner with the natural drainage actually injurious to the land of another would be unreasonable if not made by the former in the reasonable use of his own property."

The referee finds the defendant was in the reasonable use of his own land in this case, and if so, he could, while in such reasonable use, dispose of the surface water as he pleased. The right to control the flow of surface water or regulate it cannot be enforced by one adjacent owner against another.

It seems to be a right of self-defense, which the owner of land possesses, consistent with the right to improve and cultivate his land to the full enjoyment thereof, that he should have the power of disposing of such surface water as he may see fit.

Rawstron v. Taylor, 11 Exch. 380.

The water is caused by heavy rains or the melting of snow; so that for only a small portion of the year is there any water at all; yet if the defendant has no means of protecting himself, he would be deprived of the full enjoyment and use of his property in the income and improvements he otherwise would have, and he would also be prevented from making valuable and lasting improvements, and thereby end all enterprise and thrift. Whether the town can or cannot drain its water over the defendant's land easier than elsewhere can make no difference with the decision, as the defendant is not obliged to find an outlet for the plaintiff's surface water because the plaintiff is a town. The defendant has the same right to cause the water to flow back or keep it from his premises, although it may come from the highway.

Bangor v. Lansil, 51 Me. 521; *Goodale v. Tuttle*, 29 N. Y. 459; 50 Barb. 316; *Chatfield v. Wilson*, 28 Vt. 49; 31 N. J. L. 351; *Hoyt v. City of Hudson*, 27 Wis. 656.

Carpenter, J., delivered the opinion of the court:

If the use made by the defendant of his land in obstructing the flow of the surface water

over it is to be considered by itself, independent of the relation of his land to surrounding lands, and without regard to the injury or inconvenience which the obstruction may cause to others, the referee finds that the defendant's use of his land is reasonable; but if such reasonable use is to be determined, not solely in view of the defendant's interest, but in view of the convenience of surrounding landowners, he finds that the defendant's use of his land, by which the surface water is made to set back upon, overflow, and prevent the drainage of the plaintiff's land, is unreasonable. If the use was reasonable, there is to be a decree for the defendant; if unreasonable, for the plaintiff.

The owner of the soil may put it and the water falling, resting, or flowing upon it or percolating through it, to any use he pleases that is not injurious to another. In such case the question of the reasonableness of the use does not arise. Reasonableness or unreasonableness, in a legal sense, cannot be predicated of a use by which the rights, interest, and convenience of no one but the party exercising it are affected. A use is reasonable which does not unreasonably prejudice the rights of others. In determining the question of reasonableness the effect of the use upon the interests of both parties, the benefits derived from it by one, the injury caused to it by the other, and all the circumstances affecting either of them, are to be considered. *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569; *Hayes v. Waldron*, 44 N. H. 580, 584, 586; *Sweet v. Cutts*, 50 N. H. 439, 446; *Thompson v. Androscoggin R. I. Co.* 58 N. H. 108, 111; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642.

Decree for the plaintiff.

Bingham, J., did not sit; the others concurred.

John G. STICKNEY *et al.*

v.

TOWN OF ORFORD.

1. A school district is bound by the location of a schoolhouse made, upon appeal, by the county commissioners.
2. A tax assessed, upon the vote of a school district, for the erection of a schoolhouse on a lot other than the one lawfully designated by the county commissioners on appeal, is not legal, and will be abated on petition of taxpayers of the district.

(Grafton—Decided March 11, 1887.)

ON report. *Tax abated.*
Appeal from the refusal of the selectmen of Orford to abate a tax assessed to each of the plaintiffs, in School District No. 6, for the purpose of building a schoolhouse. Facts found by the court. The appeal is resisted by other taxpayers in the district.

The case is stated in the opinion.

Messrs. Chapman & Lang, and Shirley & Stone, for plaintiffs:

The proceedings of the commissioners locating the site of the school building were in 324

due form of law, upon full notice, and an appearance, in person or by counsel, of all parties interested, who were fully heard upon all questions of law and fact.

The judgment was not only that of a court of competent jurisdiction, but was, in effect and in legal essence, a judgment *in rem*. Such a judgment is a judgment and an end of the whole matter.

Lane v. Morrill, 51 N. H. 428; *Barney v. Leeds*, 54 N. H. 184.

No mob or school meeting can annul such a judgment, or take an appeal from it to themselves, which will have this effect.

Furnum's Petition, 51 N. H. 376-386; *Holbrook v. Paulkner*, 55 N. H. 815.

When a court is constituted to adjudicate matters, it is unnecessary to recite that it is not a court of conciliation, or that its decision is binding. One of the inherent powers of a court is to bind the parties by its decision. The power can only be taken away by express words, or by an irresistible implication. The Act of June 14, 1871 (1 Sess. Laws, p. 514), and the Act of July 8, 1872 (2 Sess. Laws, pp. 21, 22), simply provide that the jurisdiction of the commissioners under the Foundation Act shall extend to the common-school system, and for the compulsory purchase of school-house sites.

The votes and acts of which we complain were *ultra vires*, and incapable of ratification.

School District No. 7 v. Currier, 45 N. H. 573.

The votes at the meetings of January 14, 1882, and January 27, 1883, are not competent evidence of ratification, even if these acts could be lawfully ratified. "No committee shall have power to bind the district beyond the amount of money voted by the district; and the district shall not be bound by any act,—as a ratification of the doings of such committee beyond their authority,—unless by express vote of the district at a meeting called for that purpose."

Gen. Laws, chap. 88, § 8.

Messrs. Bingham, Mitchells, & Bachellor, and J. H. Watson, for defendant.

Allen, J., delivered the opinion of the court:

The plaintiffs seek the abatement of taxes claimed to be assessed upon illegal votes of School District No. 6, in Orford. At an adjourned meeting of the district, April 7, 1880, it was "voted to build a new schoolhouse, and locate the same; to raise \$350; sell the old schoolhouse; and that Capt. Brown be an agent to take the deed of the land, and have it put upon record." The vote does not show where the schoolhouse was to be located, any further than that there was an article in the warrant for the meeting, "to see if the district will vote to build a new schoolhouse, and purchase land upon which to locate the same, at the corners where the highway passing the Ames House intersects with the highway from the river road to Indian Pond." The minority of the voters, to the number of fourteen, understanding the location was changed by the vote, and being aggrieved thereat, in accordance with the statute, applied to the county commissioners to determine the location, which that board did, deciding August 11, 1880, that

the best interests of the district required the schoolhouse to be located on the old site.

September 14, 1880, in accordance with the commissioners' decision, the district voted to rescind its action of April 7, and voted to raise \$50 to pay the commissioners' fees and repair the schoolhouse. Whether a tax for the \$50 was ever assessed, or whether any part of it was laid out in repairing the schoolhouse, does not appear. June 4, 1881, it was voted by the district to purchase a lot for a schoolhouse, in another place, and to build a schoolhouse there, and to raise \$300 for the purpose. It was also voted to tear down the old schoolhouse, and use the materials in building the new one, and a committee was chosen to carry into effect these votes. September 22, 1881, it was formally voted by the district to discontinue the location made by the county commissioners, and to locate the schoolhouse upon the lot designated in the vote of June 4, and to ratify and confirm the votes of the meeting held upon that day.

A schoolhouse having been built upon the new location, and burned before it was used for school purposes, at a meeting of the district, January 14, 1882, it was voted to apply the insurance money due the district in payment of the expense of building the schoolhouse that had been destroyed, and to raise \$400 for building a schoolhouse upon the same site; and, the house having been erected, January 27, 1883, it was voted to raise \$15 for a stove and pipe for the schoolhouse, and \$20 for fencing the lot. It was under the votes of June 4, 1881, January 14, 1882, and January 27, 1883, that the taxes complained of, amounting to \$735, were assessed. The vote of the district to build a schoolhouse upon a different lot from that designated by the commissioners as a location was something less than a year after that location; and the vote of the district formally locating the schoolhouse upon the different lot was a little more than a year after the commissioners' location. The question is made, whether the location by the commissioners, made in accordance with the statute, after legal notice and hearing, is binding and conclusive upon the district for a period extending beyond the time when the district attempted to locate its schoolhouse elsewhere.

By Gen. Laws, chap. 48, § 6, it is provided that "the decision of the selectmen, fence-viewers, school committee, and other committees and town officers, shall be binding and conclusive upon all parties for the term of five years, unless an appeal shall be prosecuted therefrom in cases allowed by law." Subsequent to the enactment of this statute, which first appeared in the General Statutes of 1867, chap. 338, § 6, it was enacted in 1871 (Laws 1871, chap. 4, § 1; Gen. Laws, chap. 88, §§ 6, 7) that, "if any ten or more voters of a school district are aggrieved by the location of any schoolhouse by the district or its committee, or by the superintending school committee, upon proceedings before them for that purpose, they may apply by petition to the county commissioners, who shall hear and determine the location thereof." No provision was made in this statute for any appeal from the commissioners, nor was it provided in terms that their

decision should be binding and conclusive upon the district for any period of time.

Ordinarily, from the nature of judgments, the decision of an appellate tribunal must have as great force, at least, as the judgment of the inferior tribunal upon the same matter would have had if no appeal had been taken. In the absence of any statute provision to the contrary, no reason appears why the judgment of the county commissioners locating the schoolhouse in School District No. 6, in Orford, was not as binding and conclusive upon the district, and for as long a period of time, as the location by the district would have been if no appeal had been prosecuted. The law of 1871 was designed as a remedy for the minority against the hardship of an unjust location of the schoolhouse by a majority of the district. The remedy by appeal would be futile, unless the commissioners' decision were binding upon the district for at least some reasonable period of time. If the school district, on an appeal from its location to a tribunal created for the purpose of correcting an erroneous or unjust location, could be permitted to disregard the judgment of that tribunal, and immediately vote a new and different location, the law intended as a remedy for error and injustice, and the pacification of neighborhood quarrels, would defeat its own ends, and all proceedings under it would be idle farces ending in increased bitterness of disputes, the disrupting of common interests, and an increase of vexatious litigation. A construction of the statute leading to such unfortunate and absurd results is evidence of a contrary legislative intention. That intention could not have been to provide a remedy, and, at the same time, make the procedure for obtaining it worse than useless. *Holbrook v. Faulkner*, 55 N. H. 311, 315, 316.

In the ascertainment of the intention of the Legislature,—which is the true construction of the statute,—the law making final and conclusive, for five years, the location of a schoolhouse by "the school committee and other committees," when no appeal is taken, and other existing laws upon the subject, must be considered with it. An appeal from the district's location to the school committee of the town is allowed on the application of three or more aggrieved voters of the district (Gen. Laws, chap. 88, § 4); and the decision of that officer is made conclusive for five years, unless appealed from. The Legislature, in providing for an appeal to the county commissioners from the school district, on the application of a large number of persons, could not have intended a result less conclusive, or binding for a less period of time. That the Legislature intended and understood that the school district would be bound by the location of the commissioners is manifest from the statute enacted the same year (Laws 1871, chap. 41, § 1; Gen. Laws, chap. 88, § 11) providing, in case of refusal by the district to purchase or procure the land designated by the commissioners for a schoolhouse lot, that the selectmen of the town might appraise the land. And, by a previously-existing statute (Gen. Laws, chap. 88, § 14), if the district refused to build a schoolhouse upon the lot so designated, the selectmen might procure it to be built, and assess a tax upon

the district for the expense. If the school district was permitted to abrogate or discontinue a location made by the commissioners,—which would be a refusal to procure the land designated and to build a schoolhouse upon it,—it could nullify the statutes designed to compel the purchase of the land located for a lot by the commissioners, and the building upon it of a schoolhouse. *Holbrook v. Faulkner*, 55 N. H. 316.

After the location of the schoolhouse by the county commissioners in August, 1880, made after legal notice and hearing, the school district could not lawfully discontinue that location and make a different one, at the time it was attempted to be done. And the assessment of a tax for purchasing the lot located elsewhere, and building schoolhouses upon it, cannot bind the plaintiffs. Money raised for the erection of a schoolhouse upon a lot other than the one legally designated upon a proper appeal from the action of the district is deemed to be raised for an illegal purpose. *Marble v. McKenney*, 60 Me. 382; *Gustin v. School District No. 5*, 10 Gray, 85; *Cooley, Tax*, 253, 254.

Taxes abated.

Smith and Bingham, JJ., did not sit; the others concurred.

Calvin B. PERRY *et al.*

v.

TOWN OF FITZWILLIAM.

1. The equalizing tax required by Laws 1885, chap. 43, § 2, could be levied at the annual assessment of 1886.
2. A petition by taxpayers, alleging that the school-district property was appraised, under the provisions of Laws 1885, chap. 43, at "more than double its value in cash, whereby the town has been made to assume a burden which by law should not be borne, to the great injustice of the taxpayers," does not state a case entitling them to relief.
3. Considering the confusion into which the affairs of the town would be thrown by a reappraisal and reassessment, unreasonable delay in filing a petition for relief from an excessive appraisal may be strong, if not conclusive, evidence that the assessors' mistakes are waived.

(Cheshire—Decided March 11, 1887.)

ON report. *Case discharged.*

Petition by Calvin B. Perry and one hundred and fifteen others, citizens and taxpayers of the town of Fitzwilliam, alleging that it was the duty of the selectmen in office March 1, 1886, to appraise the schoolhouses and other property of the several school districts; that they neglected to perform that duty; that the selectmen elected March 9, 1886, appraised said property at "more than double its value in cash, whereby the town has been made to assume a burden which by law should not be borne, to the great injustice of the taxpayers," and praying the court to order a new appraisal of said property by the county commissioners,

or some other legally constituted board, at its actual value; or that the court investigate and determine the value of said property in such manner as may be just and equitable to the taxpayers and citizens of the town; and that such decree be made as will remit to the taxpayers their just proportion, etc. The defendant demurred.

Messrs. Batchelder & Faulkner, for defendant.

Mr. D. H. Woodward, for petitioners.

Smith, J., delivered the opinion of the court:

The equalizing tax required by Laws 1885, chap. 43, § 2, could be levied at the annual assessment of 1886. This provision implies that the appraisal might be made by the board making the assessment. It is not necessary to inquire whether it could have been made by their predecessors.

The petition does not state a case entitling the petitioners to relief. It alleges that, in consequence of the excessive appraisal of the property of the several school districts, the "town has been made to assume a burden which by law should not be borne, to the great injustice of the taxpayers," etc. The town, as a corporation, has not been damaged by the appraisal and assessment. It has neither paid nor received anything; or, if the assessment and remission can be considered as the receipt and payment of money, the amount remitted to the taxpayers being the same as the amount assessed, it has not suffered by the excessive appraisal. Nor is it true that all the taxpayers have suffered injustice. As the amount assessed and remitted to the taxpayers was in excess of the correct amount, and as the excess of the remission was not in the same proportion in all parts of the town district, the effect is that some of the taxpayers are required to pay more, and some less, than their respective shares.

It is not alleged that the petitioners were injured by the excessive appraisal. But if that is what they intended to complain of, still, sufficient facts are not alleged to enable the court to determine what justice requires. So much of the proceedings in the appraisal and assessment should be set out as will show wherein injustice has been done. There is no averment of the date, either of the appraisal or of the assessment.

The petition was filed June 22, 1886. The appraisal may have been made as early as March 10. Whether it was made so long before the filing of the petition, and whether the fact was so generally known to the taxpayers of the town that their delay in filing their petition should be considered unreasonable and a waiver of any objection to the appraisal, are questions of fact to be settled at the trial. The confusion into which the affairs of the town would be thrown by a reappraisal and reassessment,—especially when, as probable in this case, the taxes are mostly collected,—is a reason why application for the correction of the assessors' mistakes should be made at the earliest opportunity; and neglect to make such application seasonably would be strong, if not conclusive evidence that the objection to the assessors' mistakes is waived.

The petitioners may consider whether they will move to amend, and in what respects. Unless leave is obtained at the trial term to amend, the petition must be dismissed.

As the demurrer is sustained on other grounds, it is unnecessary to consider whether the petitioners' remedy is by abatement, or whether an appeal lies from the judgment of the selectmen in making the appraisal and assessment.

Case discharged.

Carpenter, J., did not sit; the others concurred.

FROST

v.

EASTERN RAILROAD.

1. A right of personal action accruing to an infant is not barred by the Statute of Limitations until two years after the disability is removed.
2. A landowner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant does not raise a duty where none otherwise exists.

(Strafford—Decided March 11, 1887.)

ON defendant's exceptions. *Sustained.*

Case for personal injuries from the alleged negligence of the defendant in not properly guarding and securing a turntable.

The plaintiff, who sues by his father and next friend, was seven years old when the accident occurred, June 30, 1877, and the action was commenced June 7, 1884. Plea, the general issue and Statute of Limitations. A motion for a nonsuit was denied, and the defendant excepted. Verdict for the plaintiff.

The facts are sufficiently stated in the opinion.

Messrs. Frink & Batchelder, for defendant:

This action is brought by the father of the minor. It is barred by the Statute of Limitations, unless it is saved by Gen. Laws, chap. 221, § 7.

The reasonable construction of the statutes seems to be that the right of action is reserved to the infant himself after he arrives at majority, and does not extend the term within which his next friend may bring suit.

The next friend is under no disability to bring suit. He may do it the next day after the injury is received. Why should the time within which he may bring suit in behalf of the infant be extended? He is as capable of determining the rights of the infant and chances of success at any time within the six years limiting personal actions as during a longer period.

The wrongful acts of the boy who set the turntable in motion would seem to be the direct and culpable cause of the injury.

The turntable was perfectly harmless, so far as this boy was concerned, in the condition in which defendant left it. The question is not what duty the railroad corporation owed others, but this party. As against this boy

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and boys of similar age, who may be presumed not to know the danger of playing with such a machine, it was harmless, because they could not move it. As against adults and older boys, it ought to have been harmless, because they knew the danger of playing with it. So if anyone was injured by it, the primary cause would seem to be the wrongful act of these older boys who set it in motion.

St. Louis, V. & F. H. R. R. Co. v. Bell, 81 Ill. 76, 25 Am. Rep. 269; *Morrissey v. Eastern R. R. Co.* 126 Mass. 377; *Hargreaves v. Deacon*, 25 Mich. 1; *Baltimore & O. R. R. Co. v. Schweindling*, 101 Pa. 258, 47 Am. Rep. 706.

See particularly, as bearing on the question of negligence and defendant's duty to plaintiff, *Nolan v. N. Y. & N. H. Co.* 25 Am. & Eng. R. R. Cas. pt. 2, 343.

Messrs. Dodge & Caverly, for plaintiff:

As a general proposition especially applicable to this and similar cases, the statute does not begin to run against the right of action by any party till such time as he has a claim that he may presently cause to be heard in court. Then, and then only, the statute attaches.

Amott v. Holden, L. J. 22 Q. B. 19; *Blair v. Ormond*, L. J. 20 Q. B. 452; *Whitehead v. Lord*, L. J. 21 Exch. 239; *Howland v. Cuykendall*, 40 Barb. 320.

The infant does not obtain to that right in its entirety till his majority. The fact that suit may be brought *prochein ami* is but a partial protection, and so the law has protected by considering him without the statute till his majority is reached; thus the statute has, till then, no application to him at all.

Pierce v. Dustin, 24 N. H. 427; *Watson v. Watson*, 10 Conn. 77; *Stuart v. Kissam*, 2 Barb. 493.

As to defendant's motion for nonsuit on the ground that negligence or wrongdoing on the part of other and older boys did contribute to the accident, it would have properly been refused under the circumstances.

"If the concurrent or successive negligence of two persons combined together results in injury to a third person, he may recover damages of either or both."

Burrows v. March Gas & Coke Co. cited in 2 Thomp. Neg. p. 1070; *Eaton v. Boston & L. R. Co.* 11 Allen, 500; *Wheeler v. Worcester*, 10 Allen, 591; *Barrett v. Third Ave. R. R. Co.* 45 N. Y. 628; *McMahon v. Davidson*, 12 Minn. 357; *Ricker v. Freeman*, 50 N. H. 420; *Lynch v. Nurdin*, 1 Q. B. 29; *Birge v. Gardiner*, 19 Conn. 507; *Whirley v. Whiteman*, 1 Head, 610; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207; 18 Am. Rep. 393.

That negligence or wrongdoing of other boys is no defense to this action, see—

Whart. Neg. § 144; Cooley, Torts, 79; *Lake v. Milliken*, 62 Me. 240; *Bartlett v. Boston G. L. Co.* 117 Mass. 586; *Small v. Chicago, R. I. & P. R. Co.* 55 Iowa, 582; *Johnson v. Chicago, M. & St. P. R. Co.* 31 Minn. 57; *Oil City Gas Co. v. Robinson*, 99 Pa. 1; *Pastene v. Adams*, 49 Cal. 87; *Lane v. Atlantic Works*, 107 Mass. 104; *Weick v. Lander*, 75 Ill. 98; *Binsford v. Johnston*, 82 Ind. 426; *Steller v. Chicago & N. W. R. Co.* 46 Wis. 497.

The whole question of negligence, in this State, being a matter for the jury, it was properly left to them in all its bearings, and no ex-

ception being taken to the charge of the court, it would seem that the matter is concluded.

Gilman v. Noyes, 57 N. H. 627; *Stark v. Lancaster*, 57 N. H. 98; *Fent v. Toledo*, P. & W. R. Co. 59 Ill. 849; *Fairbanks v. Kerr*, 70 Pa. 86; *Holden v. Rutland & B. R. R. Co.* 30 Vt. 297; *Sutton v. Bacon*, 31 Vt. 540; *Littleton v. Richardson*, 32 N. H. 59; *State v. Manchester & L. R. R. Co.* 52 N. H. 559.

"When damage could have been avoided by reasonable care of the defendants, the negligence of the plaintiff is no defense."

Hicks v. Pacific R. R. Co. 64 Mo. 480; *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 22; 6 Cent. L. J. 229; *Isbell v. New York & N. H. R. Co.* 27 Conn. 398; 2 Redf. Am. R. Cas. 474; *Trow v. Vermont Cent. R. R. Co.* 24 Vt. 494; *Kershaker v. Cleveland, C. & C. R. R. Co.* 8 Ohio St. 172; *New Haven Steamboat & Transp. Co. v. Vanderbilt*, 16 Conn. 421; *Birge v. Gardiner*, 19 Conn. 507; *Bird v. Holbrook*, 4 Bing. 628; *Dixon v. Bell*, 5 M. & S. 198.

Clark, J., delivered the opinion of the court:

The action is not barred by the Statute of Limitations. "Any infant, married woman, or insane person may bring any personal actions within two years after such disability is removed." Gen. Laws, chap. 821, § 7.

As a general rule, in cases where a disability exists when the right of action accrues, the statute does not run during the continuance of the disability; and it has not commenced to run against the plaintiff. *Pierce v. Dustin*, 24 N. H. 417; *Little v. Downing*, 37 N. H. 356. It is said that the plaintiff's next friend was under no disability,—that he could have brought the action at any time within six years after the right of action accrued, and therefore the statute should apply in this case. It is an answer to this suggestion that it is the infant's action; and the failure of the next friend to bring suit within six years is no bar to the plaintiff's right of action. *Wood, Lim.* 476.

The motion for a nonsuit raises the question whether there was evidence upon which the jury could properly find a verdict for the plaintiff. *Paine v. Grand Trunk R.* 58 N. H. 611. The ground of the action is that the defendant was guilty of negligence in maintaining a turntable insecurely guarded, which, being wrongfully set in motion by older boys, caused an injury to the plaintiff, who was at that time seven years old, and was attracted to the turntable by the noise of the older and larger boys turning and playing upon it. The turntable was situated on the defendant's land, about 60 feet from the public street, and in a cut with high, steep embankments on each side; and the land on each side was private property and fenced. It was fastened by a toggle, which prevented its being set in motion unless the toggle was drawn by a lever to which was attached a switch padlock, which, being locked, prevented the lever from being used unless the staple was drawn. At the time of the accident the turntable was fastened by the toggle, but it was a controverted point whether the padlock was then locked. When secured by the toggle and not locked with the padlock, the turntable could not be

set in motion by boys of the age and strength of the plaintiff.

Upon these facts we think the action cannot be maintained. The alleged negligence complained of relates to the construction and condition of the turntable, and it is not claimed that the defendant was guilty of any active misconduct towards the plaintiff. The right of a landowner in the use of his own land is not limited or qualified like the enjoyment of a right or privilege in which others have an interest; as the use of a street for highway purposes under the general law, or for other purposes under special license (*Moynihan v. Whidden*, 148 Mass. 287, 3 New Eng. Rep. 363), where care must be taken not to infringe upon the lawful rights of others. At the time of his injury the plaintiff was using the defendant's premises as a playground, without right. The turntable was required in operating the defendant's railroad. It was located on its own land, so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers. *Aldrich v. Wright*, 53 N. H. 404. Under these circumstances the defendant owed no duty to the plaintiff; and there can be no negligence or breach of duty, where there is no act or service which the party is bound to perform or fulfill. A landowner is not required to take active measures to ensure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises, to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises; and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger. *Clark v. Manchester*, 62 N. H. —; *State v. Manchester & L. R. R.* 52 N. H. 528; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368; *Morrison v. Eastern R. R. Co.* 126 Mass. 377; *Sewery v. Nickerson*, 120 Mass. 306; *Morgan v. Hallonell*, 57 Me. 375; *Pierce v. Whitcomb*, 43 Vt. 127; *McAlpin v. Powell*, 70 N. Y. 126; *St. Louis, I. & T. H. R. R. Co. v. Bell*, 81 Ill. 76; *Gavin v. Chicago*, 97 Ill. 66; *Wood v. School District*, 44 Iowa, 27; *Gramlich v. Wurst*, 86 Pa. 74; *Casley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 396; *Gillespie v. McGowan*, 100 Pa. 144; *Mangan v. Atterton*, L. R. 1 Exch. 289.

The maxim that a man must use his property so as not to incommode his neighbor only applies to neighbors who do not interfere with it or enter upon it. *Knight v. Abert*, 6 Pa. 472. To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it.

We are not prepared to adopt the doctrine of *Stout City & P. R. Co. v. Stout*, 17 Wall. 657 [84 U. S. bk. 21, L. ed. 745], and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession ag-

gricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling; nor is the owner of a fruit tree bound to cut it down or enclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. "The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public and not to another, under the same circumstances. In this respect, children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different care; but precautionary measures having for their object the protection of the public must, as a rule, have reference to all classes alike." *Nolan v. New York, N. H. & H. R. R. Co.* 53 Conn. 461, 1 New Eng. Rep. 826.

There being no evidence to charge the defendant with negligence, the motion for a non-suit should have been granted.

Exceptions sustained.

Bingham, J., did not sit; the others concurred.

George S. PEAVEY
v.
TOWN of GREENFIELD.

The excess only of the par value of national bank stock over the amount of the owner's interest-bearing indebtedness is liable to taxation.

(Hillsborough—Decided March 11, 1887.)

PETITION for abatement of tax. *Tax abated.*
The case is stated in the opinion.

Messrs. Burnham & Brown, for plaintiff:

The plaintiff asks an abatement of his tax, claiming that, for the purposes of taxation, there is no distinction between national bank stock and "money on hand or at interest."

Weston v. Manchester, 62 N. H.—; U. S. Rev. Stat. § 5219; Gen. Laws, chap. 53, § 6.

Mr. Ezra M. Smith, for defendant:

Gen. Laws, chap. 53, § 6, provides that stock in corporations in the State, except manufacturing and railroad corporations, is liable to taxation; but no provision is made for deduction on account of debts or liabilities of the party taxed. The same section also provides that stock in public funds is liable to be taxed, but exempts all such stock that is exempted by the laws of the United States; and it further provides that money on hand or at interest, more than the owner pays interest for, including money deposited in any bank other than a savings bank within this State, or loaned on any mortgage, pledge, obligation, note, or other security, whether on interest or interest be paid or received in advance, is liable to be taxed.

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We claim that the Legislature did not intend to have this deduction apply except as particularly specified in this last part of said § 6.

If deductions can be made from bank stock, there is no reason why they cannot, with equal propriety, be made from public funds, livestock, or even real estate. We claim that the Federal law does not attempt to make provisions for any deductions from bank stock, but leaves that with the several States, providing only that the States shall not impose a greater rate than they do upon other property of the same class.

Carpenter, J., delivered the opinion of the court:

The plaintiff returned for taxation his shares of national bank stock less the amount of his interest-bearing indebtedness. The selectmen refused to deduct the indebtedness, and assessed taxes upon the full amount of the bank stock. "Money on hand or at interest more than the owner pays interest for" being a statutory limit of the taxation of such moneyed capital, and shares of national banks not being taxable "at a greater rate than is assessed upon other moneyed capital," the plaintiff's return was correct. Gen. Laws, chap. 53, § 6; U. S. Rev. Stat. § 5219; *Pelton v. National Bank*, 101 U. S. 143 [Bk. 25, L. ed. 901]; *Evansville Bank v. Britton*, 105 U. S. 322 [Bk. 26, L. ed. 1053]; *Weston v. Manchester*, 62 N. H.—. *Tax abated.*

Smith, J., did not sit; the others concurred.

HERITAGE
v.
DODGE.

A school teacher may enforce discipline by the imposition of reasonable corporal punishment. He may determine when and to what extent punishment is necessary; and he is not liable for error in judgment, when he has acted in good faith and without malice.

(Sullivan—Decided March 11, 1887.)

ON plaintiff's exceptions. *Overruled.*
Trespass for assault and battery. Plea, the general issue, with a brief statement that the defendant was teacher of a public school in which the plaintiff was a scholar, and that the assault and battery complained of was the infliction of reasonable punishment of the plaintiff for disrespectful conduct and violation of the regulations of school.

The evidence tended to show that some of the scholars had a practice of coughing and making noises resembling coughing, for the purpose of attracting attention, which disturbed the order and quiet of the school. The defendant requested that the noises be stopped; but the disturbance continued to some extent. At the time of the assault the defendant was repeating the request to the school, when the plaintiff made a noise resembling a cough, which the defendant understood was intended by the plaintiff as an act of contempt and defiance of the teacher's authority; and there-

upon the defendant inflicted the punishment complained of.

The plaintiff offered evidence tending to show that a portion of the scholars, including the plaintiff, were affected with a cough known as chin cough, or whooping cough; and the plaintiff testified that the coughing for which he was punished was involuntary, and not intended as an act of disobedience or defiance. The plaintiff requested the following instruction: "If the jury find that the plaintiff could not help coughing, by reason of a chin cough, then the defendant was not justified in punishing the plaintiff, although the defendant believed that the plaintiff coughed for the purpose of defying his authority and disobeying the rules of school." The court declined to give this instruction, and the plaintiff excepted.

Upon this point the court charged the jury that if the defendant, acting honestly and with reasonable caution and prudence, believed that the act of the plaintiff was intended as an act of disrespect and contempt of the teacher's authority, and if he had reasonable cause for believing that the noise made by the plaintiff was intentional and for the purpose of showing his defiance of the reasonable requirements of the defendant in the government of the school, then the defendant was justified in inflicting moderate and reasonable punishment upon the plaintiff.

The plaintiff excepted to the foregoing instructions. Verdict for the defendant.

Mr. S. L. Bowers, for plaintiff.

Messrs. A. S. Wait and G. Dodge, for defendant.

Smith, J., delivered the opinion of the court:

The instructions requested made the defendant liable, without regard to the fact whether he exercised reasonable judgment and discretion in determining whether the plaintiff was guilty of intentional misconduct as a scholar. The law clothes the teacher, as it does the parent in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment. 1 Bl. Com. 453; 2 Kent, Com. 205; Reeve, Dom. Rel. 288, 289, 375. He is not required to be infallible in his judgment. He is the judge to determine when and to what extent correction is necessary; and, like all others clothed with discretion, he cannot be made personally responsible for error in judgment when he has acted in good faith and without malice. *Cooley*, Const. Lim. 341; *Cooley*, Torts, 171, 172, 288; *Lander v. Seaver*, 32 Vt. 114; *State v. Pendergrass*, 2 Dev. & B. (N. C.) 365; *Fitzgerald v. Northote*, 4 F. & F. 656; *Reeve*, Dom. Rel. 288.

The instructions were correct, and there was no error in the refusal to give those requested.

Exceptions overruled.

Clark, J., did not sit; the others concurred.

COUILLARD

v.

SEAUER.

In an action of trespass, the matter in controversy was a boundary line; the

parties agreed to try the case on their deeds, and plaintiff therefore summoned no witnesses. Defendant introduced evidence of an agreed boundary. Plaintiff, being surprised, moved for a continuance, which was denied, and trial postponed until the next day, when his witnesses testified. His counsel had but a short time for examining his witnesses before calling them, and "was convinced that one of them did not testify as fully as he should have done." On petition for a new trial.

—*Held*:

(a) These facts do not show that "justice has not been done through accident, mistake, or misfortune and that a further hearing would be equitable." Gen. Laws, chap. 234, § 1.

(b) If justice required that counsel should have more time for the examination of witnesses after their arrival, a motion for more time should have been made. The failure to make the usual motion is no cause for reversing the judgment.

(Cheshire—Decided March 11, 1887.)

ON plaintiff's exceptions. *Overruled.*

Petition for a new trial. The defendant demurred; the court sustained the demurrer; and the plaintiff excepted.

The facts are stated in the opinion.

Messrs. Hiram Blake and Don H. Woodward, for plaintiff:

"A new trial may be granted in any case where a review may not be had of right, when justice has not been done, and a further hearing would be equitable.

Gen. Laws, chap. 234, § 1.

It is also a principle well established in law and equity that surprise, which is allied to accident, is a good ground for granting a new trial.

Sanford Mfg. Co. v. Wiggin, 14 N. H. 441, and cases cited.

Surprise is that situation in which a party is unexpectedly placed, without any fault of his own, which will be injurious to his interest.

§ Graham & W. New Tr. 875.

The agreement made between the counsel to have the case tried upon the record title, and that no oral evidence should be produced by either side, not being in writing, the court was not bound to notice it, and did not. It, however, seriously affected the plaintiff's case, and gave an undue advantage to the defendant.

Any unconscionable advantage obtained by one party over the other, through fraud or artifice, to the injury of the other, will be good ground for a new trial.

3 Graham & W. New Tr. 1009, citing *Prior v. McIlvaine*, 8 Brev. 419; *Lemage v. Mealing*, 11 Jur. 108; *Anderson v. George*, 1 Bur. 352, and others.

The court gave the plaintiff a short but insufficient time to send for his witnesses, and then allowed the plaintiff, against his objection, to put in only rebutting evidence, excluding all evidence not rebutting. To this the plaintiff could not well except, as the cou-

tract to try the case without oral evidence was not in writing; and so the trial proceeded in the nature of an *ex parte* trial for the defendant.

The plaintiff, by reason of the repudiation of the agreement by the defendant, had insufficient time to examine his witnesses before the trial, and ascertain fully what they could testify to; and since the trial he has discovered that one witness had further evidence material to the issue, regarding the boundaries of the land, and that other witnesses will testify as to the occupation of the land before and since it was owned by the defendant; and we submit that these facts alone establish good ground for new trial under the requirements laid down in *State v. Carr*, 21 N. H. 166.

Mr. H. W. Brigham, for defendant:

Courts will not grant a new trial, unless it clearly appears that some wrong or injustice has been done, merely to satisfy the desire of parties while smarting under defeat.

Woodworth v. Wilson, 50 N. H. 225; *Emery v. Chesley*, 18 N. H. 198; *Handy v. Davis*, 38 N. H. 411; *Folsom v. Folsom*, 55 N. H. 80.

The court who tried the case was cognizant of all the facts, and he continued the case to allow the plaintiff to send for his witnesses, and they came and testified to all that was permissible for them to do. If the plaintiff had had them there at the beginning of the trial he could have only used them as a rebuttal. The action of the court below will not be reviewed here.

Folsom v. Folsom, *supra*.

Messrs. Batchelder & Faulkner, also for defendant:

If it can be claimed that there are any matters stated in the petition which were not within the discretion of the court, and can therefore be urged here, we submit that they utterly fail to establish a case for granting a new trial, under the well-known rules established by the decisions in—

State v. Carr, 21 N. H. 116; *Dennett v. Dennett*, 44 N. H. 531; *Heath v. Marshall*, 46 N. H. 40; *Carroll v. McCullough*, 63 N. H. 95.

Smith, J., delivered the opinion of the court:

The original action of trespass, brought by the plaintiff, was tried by the court, and judgment was rendered for the defendant. The following are the facts stated in the petition: The matter in controversy was a boundary line. Before the trial the parties agreed to try the case on their deeds, and for that reason the plaintiff summoned no witnesses. At the trial the defendant introduced evidence of an agreed boundary. The plaintiff, being surprised and not prepared to meet the defendant's evidence, moved for a continuance. His motion was denied, and the trial was postponed until the afternoon of the next day, when his witnesses testified. His counsel had but a short time for examining his witnesses before calling them to the stand, and is convinced that one of them did not testify as fully as he should have done. By the application of the 50th Rule of court, the plaintiff was allowed to introduce rebutting evidence only.

These facts do not show that "justice has not been done through accident, mistake, or misfortune, and that a further hearing would

be equitable." Gen. Laws, chap. 284, § 1. If justice required that counsel should have more time for the examination of witnesses after their arrival and before the resumption of the trial, a motion for more time should have been made, according to the usual practice in such cases. It frequently happens that, at the time fixed by an order for beginning or resuming a trial, more time is needed for preparation than was supposed to be necessary when the order was made. The failure of the plaintiff to make the usual motion is no cause for reversing the judgment. It is not alleged that the plaintiff's case would have been strengthened if more time had been obtained for a previous examination of his witnesses. It is only said that his counsel "is convinced" that one of them "did not testify as fully as he should have done." To make this a ground for a new trial would greatly impair the just value of a verdict. It does not appear how the plaintiff was affected by the 50th Rule. The defense being agreed boundary, all the testimony of the plaintiff's witnesses was rebutting.

Exceptions overruled.

Allen and Carpenter, JJ., did not sit; the others concurred.

Isaac K. GAGE

George M. DUDLEY.

1. **Items in mutual accounts, within six years** next before action brought, constitute of themselves no admission of an unsettled account extending beyond six years, nor any evidence of a promise to pay a balance, so as to take the case out of the Statute of Limitations.
2. A mere understanding entertained by each party that any funds in the hands of either should be applied "on the balance of indebtedness, whichever way it might be, at the end of each year," in the absence of any actual application, or statement of account, or express promise between them, has not the effect of an application, or of a promise to pay such balances.

(Merrimack—Decided March 11, 1887.)

ON report. *Judgment for plaintiff.*

Assumpsit. Writ dated May 12, 1882. Plea, Statute of Limitations. Facts found by a referee. The plaintiff's specification was for items of account from 1869 to the date of the writ. The defendant's set-off was for items of account from 1871 to 1879.

No accounting or settlement was ever had by the parties after a settlement in 1871, and there was no special application of any item, by either side, in payment of any item or items on the other side. Both parties testified that it was their understanding that any funds in their hands at the end of each year were to be applied on the balance of indebtedness, whichever way it might be, of one or the other. This was the thought or expectation of each party, but nothing was ever said by either to the other about it, and neither made a new promise to the other. The referee held that the Statute of Limitations applies to all items on both

sides which accrued more than six years before the date of the writ, and made his finding accordingly.

Messrs. Bingham & Mitchell, for plaintiff:

To the defendant's set-off the plaintiff had a right to plead the Statute of Limitations, it being in the nature of a cross-action.

Rollins v. Horn, 44 N. H. 591.

To constitute a new promise which will effect the removal of the bar of the Statute of Limitations, there must be "an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay."

Holt v. Gage, 60 N. H. 541; *Bell v. Morrison*, 1 Pet. 362 (28 U. S. bk. 7, L. ed. 179); *Russell v. Copp*, 5 N. H. 154; *Blair v. Drew*, 6 N. H. 235, 247; *Douglas v. Elkins*, 28 N. H. 26; *Batchelder v. Batchelder*, 48 N. H. 23; *Brown v. Latham*, 58 N. H. 30; *Dunbar v. Dunbar*, 2 New Eng. Rep. 455.

Each item of an account stands by itself in reference to the operation of the statute.

Blair v. Drew, 6 N. H. 235.

Mr. Daniel Barnard, for defendant:

The plaintiff is estopped. He brought his suit in the first instance and specified his claim, running back over seven years and ten months before the date of his writ. The defendant thereupon filed his set-off, running back between ten and eleven years, to which the plaintiff filed a second specification of items, which went back to 1869, with a third one, including items omitted in the second, while the last settlement between the parties was made in 1871.

By reason of the plaintiff's specifications, the defendant made full preparation to try, and did try, the whole case, at great expense of time and money. It is inequitable and unjust, under such circumstances, for him to be allowed to apply the Statute of Limitations, if it is a matter of discretion.

The rule still prevails in this country and elsewhere, "that mutual accounts, of however long standing, between persons who do not come under the description of 'merchants,' are not barred by the statute if there be any items within six years."

Ang. Lim. 4th ed. § 145, p. 131, and authorities.

Blair v. Drew, (decided in 1838), 6 N. H. 235, holds a contrary doctrine, and in this respect is contrary to the current authorities of every, or nearly every, other State. Judge Parker at that time, although it was not necessary in deciding the case, considered the question upon reason and authority as it then seemed to him; but his conclusions, in the more than half-century which has intervened, instead of being followed by other courts, have been overruled in substantially every other State; and we submit that our court should yield this point to the substantially unanimous judicial opinion of the country.

The law will not, when the intention and understanding of both parties is found as an affirmative fact, presume a different state of facts than the one found; but rather what both parties fairly understand, as between themselves, the law will execute. Not to carry out such an understanding, we claim in this case, is a fraud upon the defendant, which the law will not sanction.

The intention of the parties controls.

Houghton v. Pattie, 58 N. H. 326; *Morse v.*

Morse, 58 N. H. 391; *Crawford v. Parsons*, 63 N. H. 438, 1 New Eng. Rep. 323.

The case of *Blair v. Drew*, *supra*, recognizes accounts between "merchants" as an exception from the statute. The defendant was a merchant, and his account was largely for merchandise from his store, furnished according to the usual course of business. The account of the plaintiff was really in payment.

Bingham, J., delivered the opinion of the court:

In assumpsit, if the defendant pleads a set-off, the plaintiff may reply the Statute of Limitations. Wood, Lim. § 281; *Rollins v. Horn*, 44 N. H. 591; *Alsop v. Nichols*, 9 Conn. 358. It is not certain that the plaintiff would be required to reply the statute, as it is held in some jurisdictions that when the debt, on its face, appears to be barred, it cannot be used as a set-off without evidence to take it out of the statute. Wood, Lim. 601, note. However this may be, under the present liberal practice, the replication, though not in time, was properly allowed.

It appears that the parties settled in February, 1781; that the great number of items, unlike in subject-matter, charged in both the specification and set-off, arose at different times, in the dealings of the parties, between the settlement and the commencement of the suit, and that no settlement was made during this period. The report finds that no new promise was made by either party to pay any item more than six years old at the date of the writ, and that no special application was made of any item, by either side, in payment of any item on the other side. The referee ruled that the statute barred the accounts of both parties, that were over six years old at the date of the writ; and the defendant's exception raises the question as to his account.

On the facts above stated no error is seen in the ruling; but the referee makes a further finding on which more difficult questions arise, both as to its meaning and the law. He finds that the understanding of the parties was that any funds in their hands at the end of each year were to be applied on the balance of indebtedness, whichever way it might be of one to the other; that is, it was the apparent thought or expectation of each party, but nothing was ever said by either to the other about it, and neither made a promise to the other. It was the common ordinary understanding between any two parties having dealings together for a series of years, that the account of one shall go to balance the other. The finding is ambiguous, especially the main part of it, to such a degree that it cannot be practically applied to the case. But when considered in connection with its qualifying adjuncts, the referee's meaning would seem to be that the common understanding between parties who have mutual dealings for a series of years is that the accounts of one will be set off against the accounts of the other, and that these parties were not an exception to the general rule, though they never said anything about it, or made a promise. This leaves the case to be governed by the same legal principles that control the great mass of transactions between men that depend on the original un-

dertakings, unchanged by new promises or renewals in any form. The inquiry is, then, whether the ordinary understanding that exists between parties at the commencement of mutual dealings, when nothing is said, that the accounts of one will be set off against the other, or go to balance those of the other, will take the account out of the operation of the Statute of Limitations.

A leading case on this point is *Callling v. Skoulding*, 6 T. R. 189, in which it was decided that if there is a mutual account of any sort between the parties, for any item of which credit has been given within six years, that is evidence of an acknowledgment of such an open account, and of a promise to pay the balance that will take it out of the statute. Lord Kenyon said: "It is not doubted but that a promise or acknowledgment within six years will take the case out of the statute, and the only question is whether there is not evidence of an acknowledgment in the present case. Here are mutual items of account, and I take it to have been already settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account, given by one party to the other, is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute." *Callling v. Skoulding* is in effect the case now before the court, in which no acknowledgment exists since the opening of their account, other than that it has been a mutual running account. Neither has there been an application made of any item in either account on the account of the other, or any item in it, and neither ever said to the other that the account of one should go to balance the other. This leaves nothing to support the referee's finding as to the apparent thought or expectation of the parties, but the fact that the accounts were mutual, as in *Callling v. Skoulding*.

The Statute of 21 James, chap. 16, § 3, was in substance enacted in this State in 1825 (Laws 1880, title 16, chap. 3, § 1): "All actions of account and upon the case, other than such as concern the trade of merchandise between merchant and merchant, their factors and servants; all actions of debt grounded upon any lending or contract not under seal; all actions of debt for arrearages of rent; and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be hereafter sued or brought,—shall be commenced and sued within the time hereinafter limited, and not afterwards; to wit, the actions of account, and actions of debt, and actions upon the case, other than for slander, and said actions of trespass, detinue, and replevin, for cattle and goods, and said actions of trespass *quare clausum fregit*, within six years next after the cause of such actions or suits, and not after." In England the exception as to merchants' accounts was held to include mutual running accounts. *Cranch v. Kirkman*, Peake, N. P. 121. In *Callling v. Skoulding*, this class of accounts was taken out of the statute, on the additional ground before stated. The doctrine of those cases as to acknowledgments and new promises was gener-

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ally adopted in common-law jurisdiction, for a time at least. In 1827 and 1828, the cases of *Tanner v. Smart*, 6 B. & C. 608, and *Bell v. Morrison*, 1 Pet. 351 [26 U. S. bk. 7, L. ed. 175], were decided, in which it was held that if no express promise was proved, but a promise is to be raised by implication from the acknowledgment of the party, it ought to contain an unqualified and direct admission of a present subsisting debt which the party is liable and willing to pay. *Hart v. Pendergast*, 14 M. & W. 741, 744. In 1830, in *Russell v. Copp*, 5 N. H. 154, the doctrine of *Tanner v. Smart* and *Bell v. Morrison* was affirmed and held to be the law in this State. In 1839, in *Blair v. Drew*, 6 N. H. 235, 247, the court says: "Consistently with the principles of repeated decisions in this court, that, in order to raise a new promise by implication from an acknowledgment, it must contain a direct and unqualified admission of a subsisting debt which the party is liable and willing to pay, we cannot hold that one item in an account has of itself any force or effect to take other items, which would otherwise be barred, out of the statute." The opinion is by Parker, Ch. J., and is a review of the English decisions on the statute of James; and upon principle he held that items in mutual accounts, within six years next before action brought, constitute of themselves no admission of an unsettled account extending beyond six years, nor any evidence of a promise to pay a balance, so as to take a case out of the Statute of Limitations. The case also decides that the exception in the statute of James as to demands concerning the trade of merchandise between merchant and merchant, their factors and servants, does not extend to accounts between parties not merchants, and respecting transactions which do not possess a mercantile character.

It is said, however, that this case has not been followed, and the court is asked to re-examine it. It may be true, literally, that the case has not been approved in the other jurisdictions, to the extent that their courts have reversed their previous decisions and approved of this; but it is true that the doctrine of *Callling v. Skoulding*, as before stated, has disappeared in England and in most of the States by statute; and it is now held that no new promise or acknowledgment will take a case out of the statute, unless it is in writing signed by the party chargeable thereby. 3 Pars. Cont. 67; *Cottam v. Partridge*, 4 M. & G. 274, 277, 291; *Chace v. Trafford*, 116 Mass. 529; *Richardson v. Cook*, 37 Vt. 599. This State has adhered to the doctrine of *Blair v. Drew*, approving it in *Livernore v. Rand*, 26 N. H. 85, placing the decision of the case on the reasoning of *Blair v. Drew*, and holding that the payment of money generally upon an account should be applied in payment of the earliest charges in it not barred by the statute; that such payment is not sufficient evidence that the account is unsettled, or to take its items out of the Statute of Limitations, and that the only inference that can be drawn from the mere fact of payment is that the party who made it admitted that sum to be due, but nothing more. The doctrine on which *Blair v. Drew* stands—that an acknowledgment, in order to take a case out of the statute, must

contain an unqualified admission of a previous subsisting debt which the party is liable and willing to pay—has become fundamental. *Ventris v. Shaw*, 14 N. H. 422, 425; *Douglas v. Elkins*, 28 N. H. 26, 33; *Manning v. Wheeler*, 18 N. H. 486; *Holt v. Gage*, 60 N. H. 536, 541. In this case Smith, J., after giving the early English rule and citing the authorities, states the present rule, cites the authorities, and adds that "the expression of a willingness to pay is an important part of the evidence, and cannot be dispensed with." *Blair v. Drew* has been cited by the court when occasion required, since it was decided, as authority and without criticism.

The Legislature has recognized the doctrine of *Blair v. Drew*, and conformed its action to it. Laws 1840, chap. 504, § 1, repealed the clause in the Act of 1825, excepting from its operation actions of account, wherein the trade of merchandise between merchant and merchant, their factors and servants, were concerned, which, with the construction given this clause in *Blair v. Drew*, limiting it literally to accounts as to merchandise between merchant and merchant and their servants, left no class of accounts that were not barred in six years after the cause of action accrued, item by item; and the Revised Statutes, chap. 181, §§ 3, 4, place the Statute of Limitations in form after taking from the statute of 1825 the clause repealed in 1840. The statutory law is now essentially [the same as to actions of accounts. Gen. Laws, chap. 221, § 3. This statute, and the decision in *Blair v. Drew*, and the subsequent cases in harmony with it, constitute the law of the State on the question. If the only other interpretation that the findings of the referee appear susceptible of is adopted, —that the parties understood at the commencement of the dealings in February, 1871, that, at the end of each year, the accounts were to be stated, a balance struck and applied on a balance of past indebtedness,—the dealings of each year would constitute a transaction by itself, and the balance would be a new item on which a right of action accrued at the end of each year, that would be barred in six years. When the balance was struck, it was no longer the open running account, but a closed account stated, on which the statute would run if not applied as expected. Neither would the balance be a new item in a new account, as such was not the agreement. It formed no item in the open running account. *Union Bank v. Knapp*, 3 Pick. 96, 109; *Belchertown v. Bridgman*, 118 Mass. 486, 487. But in this case no balance has ever been struck; no part of the annual statement of accounts has ever been performed, or the understanding in any way recognized or renewed, by any acknowledgment or new promise as to past transactions. *Brown v. Latham*, 58 N. H. 80. The agreement as to stating and applying the account annually cannot be discarded in part and retained in part; it must stand or fall together.

Judgment for the plaintiff.

Carpenter, J., did not sit; the others concurred.

BROWN *et al.*

SCHOOL DISTRICT No. 6 in Orford.

A vote of a school district to raise money for the erection of a schoolhouse upon a lot other than the one designated by the county commissioners upon a proper appeal from the action of the district is unauthorized and void.

(Grafton—Decided March 11, 1887.)

ON report. *Judgment for defendant.*

The case is stated in the opinion.

Messrs. Bingham, Mitchells, & Bachellor, for plaintiffs.

Messrs. Chapman & Lang, and Aldrich & Remick, for defendant.

Clark, J., delivered the opinion of the court:

This action is brought to recover for labor and materials in building a schoolhouse in School District No. 6, in Orford. August 11, 1880, a location for the schoolhouse in the district was lawfully determined by the county commissioners, on the petition of legal voters aggrieved by the location made by the district. At a meeting of the district, June 4, 1881, it was voted to purchase a lot, and build a new schoolhouse on a different location, and \$300 was voted for the purpose; and the plaintiffs were chosen a committee to carry the votes into effect. At a subsequent meeting, held September 22, 1881, it was voted to discontinue the location as made by the county commissioners August 11, 1880, and to ratify and confirm the votes passed and acts done at the meeting held June 4, 1881. The labor and materials for which the plaintiffs seek to recover were furnished in building a schoolhouse on the location selected by the district.

In *Stickney v. Orford*, ante, p. 524, it is decided that the district could not lawfully discontinue the location designated by the commissioners, and make one elsewhere, at the time they attempted it; that the location by the commissioners was binding for five years, and the district had no power to change it; and that a tax voted to build a schoolhouse upon a different lot was unauthorized and illegal. If the votes to raise money and build a schoolhouse elsewhere than on the location established by the commissioners were unauthorized and illegal, the plaintiffs' action cannot be maintained. The district had no power to build a schoolhouse on that location, or to authorize the plaintiffs to build one. If the district owned the land, it could not lawfully raise or appropriate money for the erection of a schoolhouse upon it. The district had no authority to assess the taxpayers for that purpose.

The votes of the district, being absolutely void from lack of corporate power, were incapable of confirmation, and no subsequent acts of ratification or acceptance could give validity to the plaintiffs' claim. If the district had no power to authorize the building of the schoolhouse, it had no power to bind itself by a subsequent acceptance.

Judgment for the defendant.

Allen, J., did not sit; the others concurred.

MAINE.

SUPREME JUDICIAL COURT.

Stephen B. HINCKLEY

v.

Daniel HINCKLEY *et al.*

1. Under the Maine statutes a plaintiff can not be a witness when the defendants have been made parties as heirs of a deceased party.
2. It would be a fraud in equity to convert into an absolute sale that which was intended for a different purpose.
3. A son conveyed to his mother a large estate inherited from his father, and received from her an agreement in writing to reconvey when he paid her an indebtedness of a specified amount. She thereafter kept a strict and detailed account of the property and its income; and while she lived she regularly paid her son the net income. She spoke of it as his property in her letters to him. At her death she devised it to another to hold in trust for the son. There was no account of any indebtedness from her son to her, and no evidence of any save the paper she gave him when she received from him the conveyance. *Held*, that the conveyance constituted a trust which terminated at the death of the mother.

(Penobscot—Decided March 23, 1887.)

BILL in equity to regain an estate conveyed by the orator. *Sustained.*

The opinion states the case and material facts.

Messrs. John Varney, F. H. Appleton, and Hugh R. Chaplin, for plaintiff:

The plaintiff says that, if not a trust, the transaction constitutes an equitable mortgage which has never been foreclosed, and which he should be let in to redeem by paying whatever, if anything, can be found to be due thereon. The plaintiff's title to relief is the same in either alternative, and hence his bill is framed with a double aspect (as in *Gerriah v. Towne*, 8 Gray, 83; 11 Vt. 290), and alleges the right of the plaintiff to the conveyance which he seeks, on two grounds.

The relationship of the parties, their situation, the circumstances surrounding the transaction, and the monstrous iniquity and inequity of the thing, of themselves, afford the strongest kind of presumption against the defendants' claim of forfeiture. But the testimony of Mr. McCrillis, the attorney in the whole transaction, who drew the deed and papers, effectually disposes of this matter, and is clearly admissible. *Stearns v. Hall*, 9 Cush. 31; *Blood v. Hardy*, 15 Me. 61.

The statutes provide that "there can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing signed by the party or his attorney." This statute has recently been construed by the court in *McClellan v. McClellan*, 65 Me. 500. It was there held that the words, "created or declared by some writ-

ing," are equivalent to "manifested and proved," so that express trusts may be "created" in the first instance, or subsequently "declared" by any proper writing signed as required. "In fact," says Judge Virgin, "they frequently originate in the verbal negotiations of parties; and whenever they do so arise, and are proved by some writing signed by the party or his attorney, whether it be contemporaneous with, or prior or subsequent, to the principal transaction, the authorities all concur in declaring the statute complied with in this respect."

When the trust is of and concerning personality, the rule invariably obtains that such trust need not be proved by writings, but can be established by parol.

1 Perry, Tr. § 86.

When there is any written evidence showing that the person apparently entitled is not really so, the rule universally obtains that parol evidence is admissible to show the trust under which he actually holds the estate.

Browne, Fr. §§ 97, 111.

If there is any competent written evidence that the person holding the legal title is only a trustee, that will open the door for the admission of parol evidence to explain the position of the parties; as, where there are entries in the books of the grantee, of payments made by him to, or on account of, the grantor, which payments were consistent only with the fact that the grantee took in trust, he was declared to be trustee. The trust thus proved relates back to the time of its creation.

1 Perry, Tr. § 81; Lewin, Tr. 201; *Rogan v. Walker*, 1 Wis. 527.

It is not necessary that Mrs. Hinckley should have intended these agreements to be evidence of a trust.

1 Perry, Tr. 68.

In *Faxon v. Folovey*, 110 Mass. 392, A conveyed land in Q to B, by a deed absolute in form, but intended to secure B against loss or a liability he had assumed for A. On August 11, 1863, A gave B his promissory note for \$225, the amount B had had to pay under this liability, and B signed and delivered to A the following writing: "Received of A a deed for three lots of land in Q, which is to be deeded back to him, his heirs, and assigns, upon payment of a note for \$225, dated August 11, 1862." Held, that this was a sufficient declaration of trust; that its object and nature are stated with sufficient certainty; and as a declaration of trust, it is not necessary to be made at the time of the delivery of the deed."

The defendants may invoke the codicil of Mrs. Hinckley as proof of a different understanding of the transaction, and of her intention not to raise a trust in favor of the plaintiff. But the cited cases show that her intention is of no consequence, if the papers she has signed declare the fiduciary relations between herself and her son.

McClellan v. McClellan, 65 Me. 500; 1 Perry, Tr. § 82.

Daniel Hinckley's testimony is inadmissible, for when a trust results by force of a writing, the trustee cannot defeat it by parol evidence (Lewin, Tr. 204). He having testified, however (his deposition, as matter of fact, being taken long before the plaintiff's), the latter's

evidence becomes clearly competent, as held in *Haskell v. Hervey*, 74 Me. 196.

As between an equitable mortgage and a sale with an agreement to reconvey, the courts always incline strongly towards the former, and place the burden of proof upon the party who would have such a transaction construed as a conditional sale.

Flagg v. Mann, 8 Sum. 84.

"When the deed and agreement are, on their face, of even date, the transaction is a mortgage in equity."

Jones, Mort. § 248.

In *Kerr v. Gilmore*, 6 Watts, 405, the court says: "If a case can occur where such conveyances do not constitute a mortgage, it must be one in which some time has elapsed, some circumstances have occurred to satisfy the court and jury that the contracts were really separate, and that the first was always intended as a real sale, and the second bargain a real and distinct agreement to purchase again the property which had once been actually sold."

The fact that interest is to be paid is a strong fact to show that the transaction is a mortgage.

Murphy v. Calley, 1 Allen, 107.

The consideration, if there was any, in comparison with the value of the property conveyed, was nothing. Says the court in *Campbell v. Dearborn*, 109 Mass. 140: "Inadequacy of price, though not of itself alone sufficient ground to set in motion the equity powers of the court, may nevertheless properly be effective to quicken their exercise, where other sufficient grounds exist, and, in connection with other evidence, may afford strong grounds of inference that the transaction purporting to be a sale was not fairly and in reality so."

See also *Jones, Mort.* § 275; *Peugh v. Davis*, 96 U. S. 332 (Bk. 24, L. ed. 775).

It is not necessary that the debt should be evidenced by any express covenant, or by any separate security.

Jones, Mort. § 265, and cases; *Kent, Com.* 12th ed. *144, note d.

"When a debt is recognized, such an agreement shows the transaction to be a mortgage."

Henry v. Davis, 7 Johns. Ch. 40.

In *Stinchfield v. Milliken*, 71 Me. 567, *Peters, Ch. J.*, says: "The existence of a debt is well nigh infallible evidence of the intention" that the transaction was for security, and hence a mortgage.

Says *Graves, J.*, in *Cornell v. Hall*, 22 Mich. 377: "When it is doubtful whether the transaction is a mortgage or a conditional sale, it will generally be treated as a mortgage."

See also *Trucks v. Lindsey*, 18 Iowa, 504.

The rule as to the mortgagor's release is concisely stated in *Peugh v. Davis*, *supra*, thus: "Without citing the authorities, it may be stated, as conclusions from them, that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest; or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable."

Messrs. Wilson & Woodard, for defendants:

Up to the time of the production of the papers by Mr. McCrillis, defendants' counsel had regarded the transaction between the mother and son as similar to the transactions in the case of *Hunnewell v. Lane*, 11 Met. 163, where a daughter had been persuaded by her father to place in his hands some thousands of dollars' worth of property to protect it against her inability to take care of it; and, upon the death of her father, and his estate being represented insolvent, a bill was brought by the daughter for a conveyance, and it was decreed.

The letters of Mrs. Hinckley to Stephen are largely relied upon to maintain the bill. We submit that there is nothing in them inconsistent with our view of trust for the security of property for the son, and an equitable mortgage for the security of the debt due from the son to the mother.

It is not denied that, in case of an instrument absolute upon its face, with no instrument of defeasance back, parol testimony might be admissible to prove that it was really intended as security for a debt; but when, as in the case at bar, there is an instrument of defeasance, free from any imputation of fraud, accident, or mistake, unambiguous in its terms, parol evidence cannot be admitted to vary, add to, or contradict the written instrument.

This doctrine is fully discussed in *Campbell v. Dearborn*, 109 Mass. 140; *Elder v. Elder*, 10 Me. 80; *Gluss v. Hurlburt*, 102 Mass. 24; *Chadwick v. Perkins*, 3 Me. 399.

The case of *Woolam v. Hearn*, 2 White & T. L. Cas. Eq. pt. 1, 220, lays down the doctrine, which seems to be founded on good reason, that "though a defendant, resisting a specific performance, may go into parol evidence to show that by fraud the written agreement does not express the real terms, a plaintiff cannot do so for the purpose of obtaining a specific performance with a variation."

The testimony of Stephen B. Hinckley is not admissible under the first of the statutes of this State, relating to evidence in cases in which an executor or administrator is a party.

Rev. Stat. chap. 82, § 98, subsec. 11; *Hall v. Otis*, 77 Me. 122; *Dwarr. Stat.* 199.

The control of the question of the costs of these proceedings lies wholly with the court.

We cite 2 Perry, Tr. §§ 892, 899, 928; *Perry, Tr.* § 245; *Stilson v. Leeman*, 75 Me. 412.

Haskell, J., delivered the opinion of the court:

Bill to regain an estate, partly real and partly personal, of the approximate value of \$100,000, conveyed by the orator to his mother in her lifetime, to be held by her, either as a personal trust for his benefit, or in equitable mortgage to secure advances made to the orator, or for his benefit, and interest upon the same.

The answer admits that, on January 8, 1868, the orator conveyed the real estate to his mother, and received from her a writing, promising to reconvey the same upon payment of all sums of money then due to her from the orator, within one year, and that, on June 3 of the same year, he conveyed to her the personal es-

tate; but avers that he then received a writing from her in place of, and as a substitute for, the writing of January 8, whereby she promised to reconvey both the real and personal estate to the orator upon condition only that he should pay her \$12,817.56 with interest, one half in two months, and the other half in six months, when the writing should become void; and that the orator has not paid any part of the sum mentioned, but has forfeited all right to reclaim his estate; and that his mother, in her lifetime, acquired the absolute title to the same, and, by a codicil to her will, that has been proved and allowed in the probate court, devised the same to the respondent Daniel, in trust nevertheless for the orator during his life, and at his death to descend to his children, if any, if not, then to be divided among her heirs; and that the respondent Daniel, at the death of the mother, took the estate, and has since held the same pursuant to the trust created by the mother's will, as he has a legal right to do.

It appears that the orator had been improvident, and had incurred debts, and was inclined to be wasteful of property that he had recently inherited from his father, and had expensive, if not dissolute, habits; and that his mother, desirous to preserve the property for him, and to prevent its waste, induced him to convey the same to her upon the terms mentioned in the writings between them. That she took possession of the property and managed and controlled it until her death, July 10, 1883, meantime paying to the orator the net income as it accrued, of which she kept a strict and detailed account. That she left no account showing the indebtedness of \$12,817.56, or any writing explaining the same or its origin, or any credit or writing showing that any part of the same had been paid.

The cause comes upon report with a stipulation that objection to the competency of witnesses, or to the admissibility of evidence, may be made at the trial.

Objection is well taken to the competency of the orator as a witness, inasmuch as the respondents are "made parties, as heirs of a deceased party," and his testimony must be laid out of the case. *Rev. Stat. chap. 82, § 98; Simmons v. Moulton*, 27 Me. 496; *Burleigh v. White*, 64 Me. 23; *Wentworth v. Wentworth*, 71 Me. 72; *Higgins v. Butler*, 78 Me. 50, 3 New Eng. Rep. 278.

The respective legal rights of the mother and of the orator flow from the written instruments between them; but extraneous evidence is admissible to prove every material fact known to the parties when the writings were executed. *Conway v. Alexander*, 7 Cranch, 218 [11 U. S. bk. 3, L. ed. 821]; *Morris v. Nixon*, 1 How. 148 [42 U. S. bk. 11, L. ed. 69]; *Russell v. Southard*, 12 How. 139 [53 U. S. bk. 13, L. ed. 927].

The deed and memorandum of June 3 do indicate an absolute sale; but the question recurs, whether the "terms were not adopted to veil a transaction" widely differing from the appearance that it assumed. It would be fraud in equity to convert into an absolute sale that which was intended for a different purpose (*Whitlick v. Kane*, 1 Paige, 202; *Taylor v. Luther*, 3 Sum. 238; *Flagg v. Mann*, Id. 486; *Eldredge v. Jenkins*, 3 Story, 181; *Wyman v. ME.*

Babeock, 2 Curtis, 386; *S. C.* 19 How. 289, 60 U. S. bk. 15, L. ed. 691; *Campbell v. Dearborn*, 109 Mass. 180); and to determine this, the court must look through the cloak that conceals the real truth, and consider, from the light thrown upon the transaction by all the circumstances surrounding it, what the real purpose and intent of the parties must have been. *Peugh v. Davis*, 96 U. S. 332 [Bk. 24, L. ed. 775].

In this case, a mother saw her son improvident, wasteful of his substance, and, it may be, of dissolute habits; she knew that he had incurred debts, and was likely to incur other liabilities, and indulge in expenditures that not only threatened his personal welfare, but as well the consuming of a large estate recently inherited from his father, her husband. She first took from him a conveyance of all his real estate, and gave in return a writing that she would reconvey the same upon payment, within one year, of all the sums he owed her, and interest. Six months later she received all his personal property, and gave in return a writing to reconvey both the real and personal estate upon payment to her, within six months, of nearly \$18,000, with interest. The security exceeded the supposed debt nearly or quite eightfold. She must have known that he had no means to pay so large a debt, save from the property she had received. How the debt arose the evidence does not show. She left nothing to show it. What, then, can be the true interpretation of the contract between the mother and son, unless it be that she acquired his property to preserve it, and, incidentally, to secure her from loss for advances made for his benefit?

The bill is framed in a double aspect, either that the mother was an equitable mortgagee, or held the estate as a trust voluntarily created by the orator for his own benefit; and it may be of little practical consequence in which capacity she held the estate. That the transaction of June 3 might well be held to create an equitable mortgage, if the debt named in it was real, there can be little doubt; but the evidence touching the mother's treatment of the property for the sixteen years that she held it prior to her death, and her written declaration to the orator concerning it, may as well be held to prove that she did not claim to hold the property simply in mortgage, but rather that she held the property by what she considered "a sacred trust for her son."

An express trust concerning lands can only be created or declared by some writing signed by the party or his attorney (*Rev. Stat. 1857, 1883, chap. 73, § 11*); and the writing need not be made at the time of the principal transaction; it may be made subsequently; and it is sufficient, though it be informal, if the terms of the trust can be understood from it. *McClellan v. McClellan*, 65 Me. 500, and cases cited; *Faxon v. Folvey*, 110 Mass. 392.

So soon as the mother acquired the property, she began a detailed account of its income; and, so long as she lived, caused a strict account of income and expenditure to be kept touching it, and promptly paid to the orator the net income as it accrued, without deducting a farthing in payment of any supposed debt of her own, or of interest upon it, or for her own services in the management of the

property. Her letters to the orator show how tenderly her affections followed him in sickness and in health, and how solicitous she was that the income from his property should be as large as possible. In one letter she says: "You seem to feel, and have no confidence in me; when I have written you repeatedly that I considered your property in my hands as sacred as my own heart's blood. I have done the very best for you that I could. I have wished many, many times, that you had never put your property into my hands, for it has caused me so much care and trouble; but it has been much better, for you have received your income regular, without any trouble or expense. * * * I shall do right by you. You say you have nothing to show in case I am taken away. You have my letters; besides, there is plenty of evidence among my papers that your property is all right." Again she writes: "You may rest assured, I shall always send you all of your interest, except enough to pay your taxes. * * * I think yours is invested as well as it can be these times." Again she writes: "Your income is a little more this year. I send you \$200 this month, and shall continue to send you the same amount every month as long as your property yields it."

These letters plainly enough declare that she held the orator's property in trust for his benefit, and her own conduct conformed to the declarations of her pen. She writes the orator, "I shall always send you all of your interest except enough to pay your taxes." And at her death she left a will providing that all of the orator's estate should be held in trust, the income to be paid to him during life, and the principal to be distributed among his heirs at his death.

The memoranda of January 8 and of June 8 are evidence of the relation of debtor and creditor; and that of June 8 is the only evidence in the case of the amount of the mother's supposed debt. It is not signed by the orator; nor is it made the basis of his claim by any averment in his bill. The respondents set it up in their answer as containing a condition, for the breach of which the orator has forfeited all right to regain the property conveyed to his mother; and the orator replies that the debt named in it is wholly fictitious, and stoutly contends that the circumstances under which it was given, and the conduct of the mother for sixteen years, while she held, managed, and paid over to him the income of his property, without ever suggesting that it was burdened with a debt of nearly \$13,000, or making any charge or entry of the same in her book of account with him, overcome all evidence of the debt from the writing itself.

The accounts of the mother show that she has been repaid all sums that she had charged to the orator, and that at her death she held a cash balance of income from his estate of \$2,242.50.

The court is constrained to believe that the \$12,817.56 mentioned in the writing of June 8 is not due from the orator, but that it is a fictitious sum, written for the appearance of a debt, when no debt existed. She charged the orator for payments of money made for him during the year prior to June 8, 1868, and on

the 31st of July, 1868, charged him with \$2,172 paid upon her note given June 2, the day before the date of the writing of June 8, in payment of sundry executions against him; but made no charge of the \$12,817.56 mentioned in that writing. It is improbable that she could have kept so detailed and strict an account with the orator, and not have charged him with all that he owed her. Moreover, if she had advanced so large a sum, is it possible that for sixteen years she would not have mentioned it to some of the relatives, or friends, or counsellors, or have referred to it in some of the numerous letters to the orator? On the contrary, her letters clearly show that she considered all the property that she had received from the orator as his, and so treated it as long as she lived. Her conduct and her letters repudiate any claim for the \$12,817.56 now sought to be charged upon the orator's estate, and must be held to overcome the writing of June 8, in that particular.

The trust assumed by the mother was personal, and terminated with her own life (*Hennell v. Lane*, 11 Met. 168); she could not delegate it, or by devise continue it. It follows, therefore, that the respondent Daniel, the executor of the trustee, should account for the personal estate that his testatrix held belonging to the orator, and should pay over the same to him. The respondents, heirs of the testatrix, should release their interest to the orator, in the real estate that he conveyed to her by deed of January 8, 1868, and neither party should recover costs. In case of disagreement about performing the final decree, either party may apply for relief by written application in this cause.

Decree accordingly.

Peters, Ch. J., Walton, Danforth, Emery, and Foster, JJ., concurred.

Lucilius A. EMERY, Exr.,

v.

UNION SOCIETY of Savannah *et al.*

1. A devise is broken by the sale of the real estate by the testator in his lifetime.
2. In such a case the proceeds of the sale go to the residuary legatee, in the absence of any specific provision in relation thereto.

(Hancock—Decided March 30, 1867.)

ON report. Bill sustained.

Bill in equity, by the executor of the will of William F. Howland, against the Union Society of Savannah, Ga., and Anna Marion Wirgman, John Myers Durborrow, Richard Newton Durborrow, and Savannah Struthers, all of Philadelphia. The suit is brought to obtain a construction of the will.

The facts are stated in the opinion.

Messrs. Hale & Hamlin, for plaintiff.

Messrs. Hohnes & Payson, for Union Society of Savannah:

Where real estate is devised by a will, and after the execution of such will, the testator conveys such real estate, the will is revoked

pro tanto; or perhaps the more correct expression is that the devise is thereby adeemed.

1 Redf. Wills, p. *389, § 13; 1 Jarm. Wills, p. 309, 5th Am. ed.; 1 Wms. Exrs. p. 241, note c, 1; Powell, Dev. 3d Am. ed. pp. 376, 377; 1 Toller, Exrs. 3d Am. ed. p. 19, 20, 22; *Carter v. Thomas*, 4 Me. 341-344; *Hawes v. Humphrey*, 9 Pick. 350-360; *Ward v. Ward*, 15 Pick. 511, 524; *Wiggin v. Snett*, 6 Met. 194-202.

The general rule is well sustained (*Webster v. Webster*, 105 Mass. 538-542; *Herrington v. Budd*, 5 Denio, 321; *Walton v. Walton*, 7 Johns. Ch. 258; *Arthur v. Arthur*, 10 Barb. 9; *Skerrett v. Burd*, 1 Whart. 246; *Brush v. Brush*, 11 Ohio, 287; *Bouten v. Johnson*, 6 Ind. 110; *S. C.* 61 Am. Dec. 110; *Epps v. Dean*, 28 Ga. 533; *Wells v. Wells*, 35 Miss. 638; *Tanner v. Van Bibber*, 2 Duv. (Ky.) 550; *Adams v. Winne*, 7 Paige, 97; *Philson v. Moore*, 23 Hun, 152; *Beck v. McGillis*, 9 Barb. 35-52 et seq.); even where the conveyance is to the person to whom the devise was made (*Rose v. Rose*, 7 Barb. 174; *Arthur v. Arthur*, 10 Barb. 9).

And such devise is not only adeemed by an absolute conveyance of the title, but this effect is not avoided by taking a mortgage back.

Adams v. Winne, *supra*; *Brown v. Brown*, 16 Barb. 569; *Arthur v. Arthur*, *supra*; *Rose v. Rose*, *supra*; *Beck v. McGillis*, 9 Barb. 35; *McNaughton v. McNaughton*, 84 N. Y. 201.

In fact, "where the estate is varied in any essential particular by the testator, although not done with any expectation of revoking the devise, it will nevertheless have that effect."

1 Redf. Wills, p. 336, and cases in note; *Beck v. McGillis*, 9 Barb. 35-53; *Herrington v. Budd*, 5 Denio, 321.

It sometimes happens, in cases of a contract for conveyance by the testator, that the legal estate only remains subject to the operation of the devise, and the amount due on the purchase money becomes a part of the general personal estate, and hence goes to the residuary fund, unless taken by prior devise.

1 Redf. Wills, p. 336, § 7; *Farrar v. Winterton*, 5 Beav. 1; *Moor v. Raisbeck*, 12 Sim. 128; *Ex parte Hawkins*, 18 Sim. 569; *Clingan v. Mitcheltree*, 31 Pa. 25; 1 Jarm. Wills, p. 326; *Donohoo v. Lea*, 1 Swan (Tenn.), 119; *S. C.* 55 Am. Dec. 725.

In *Bosley v. Wyatt*, 14 How. 391-397 (55 U. S. bk. 14, L. ed. 468-471), the court says: "We do not mean to say that every residuary clause in a codicil will pass land specifically devised in a will, where, by some act of the testator, the devise is impliedly revoked after the codicil was executed. There are adjudged cases where it has been held otherwise;" but all such cases turn upon some peculiar provision of the will; as, for instance, where the notes given for the purchase money are included in the devise (*Atwood v. Weems*, 99 U. S. 183-185, Bk. 25, L. ed. 471); where the will showed that the residuary bequest was of a residue of only a part of the estate (*Ommanney v. Butcher*, 1 Turn. & R. 260; and see 2 Wms. Exrs. 1563, and cases cited in notes; *Webster v. Webster*, 105 Mass. 538).

All distinctions between real and personal estate, in respect to revoked or lapsed legacies or devises, have been abolished by statute.

Drow v. Wakefield, 54 Me. 291, 296, and cases cited; *Thayer v. Wellington*, 9 Allen, 238.

ME.

There are fixed rules of law which no intention of the testator can overcome,—certain words and phrases, and the effect of certain acts of the testator,—“which have been established by a long course of judicial decisions, and have become landmarks of property, and cannot therefore be disturbed.”

Bosley v. Wyatt, *supra*; *Smith v. Bell*, 6 Pet. 68-70 (31 U. S. bk. 8, L. ed. 322); *Clark v. Packard*, 9 Gray, 417-420; *Brattle Square Church v. Grant*, 3 Gray, 142-158; *Ramsdell v. Ramsdell*, 21 Me. 288-292; *Fisk v. Keene*, 35 Me. 349-354; *Malcolm v. Malcolm*, 3 Cush. 472, 477 et seq.; *Warren v. Webb*, 68 Me. 135; *Nash v. Simpson*, 78 Me. 142, 149, 1 New Eng. Rep. 699.

It must operate, even though known to produce a result contrary to the actual intention of the testator. "The principle which governs in cases of an actual alteration in the estate of the deviser is clearly distinguishable from that which governs in cases of an intended alteration only; for in the former cases the revocation is a consequence of law, uninfluenced by and independent of any intent in the deviser to revoke or not; but in the latter cases the revocation is an inference from the fact, as furnishing a ground to conclude that such was the intent of the party."

Powell, Dev. 3d Am. ed. p. 376. See Toller, Exrs. 21; *Brown v. Brown*, 16 Barb. 569-572, and cases cited.

There are "apparent" exceptions to the general rule that the intention of the testator is to govern in the construction of a will, because they are not necessarily so. In fact it is a well-established rule of law that any change in the estate is proof of a change in the testator's intention.

4 Kent, Com. 13th ed. p. *528; *Brown v. Brown*, *supra*; Powell, Dev. ed. 1822, p. 376; *Carter v. Thomas*, 4 Me. 341-344.

The construction and effect of this will depend, of course, upon the laws of Maine, where the testator had his domicile.

Gilman v. Gilman, 52 Me. 165-172, and cases cited.

A well-established rule is that courts will so construe a will as to dispose of all the property of the deceased, unless his intention appears to the contrary, or some established rule of construction forbids it.

2 Redf. Wills, p. 116; 3 Jarm. Wills, 5th Am. ed. p. 707, Rule 16; *Blaisdell v. Hight*, 69 Me. 306-308; *Dole v. Johnson*, 3 Allen, 364; *Nash v. Simpson*, 78 Me. 142, 147, 1 New Eng. Rep. 699.

The general rule as to devises and legacies which have failed for any reason is that they go to the residuary fund, if such there be.

1 Jarm. Wills, p. 326; 1 Redf. Wills, p. 336; 2 Id. p. 174; *Drow v. Wakefield*, 54 Me. 291-296; *Thayer v. Wellington*, 9 Allen, 295; *Hayden v. Stoughton*, 5 Pick. 537; *Farrar v. Winterton*, 5 Beav. 1; *Adams v. Winne*, 7 Paige, 97; *Arthur v. Arthur*, 10 Barb. 9; *Beck v. McGillis*, 9 Barb. 35; *Rose v. Rose*, 7 Barb. 174; *King v. Strong*, 9 Paige, 94; *James v. James*, 4 Paige, 114; *Philson v. Moore*, 23 Hun, 152; *Kennell v. Abbott*, 4 Ves. Jr. 302; *Moor v. Raisbeck*, 12 Sim. 128; *Ex parte Hawkins*, 18 Sim. 569; *Clingan v. Mitcheltree*, 31 Pa. 25; *Donohoo v. Lea*, 1 Swan (Tenn.), 119; *S. C.* 55 Am. Dec. 727; *Birch v. Baker*, Mosely, 374; *Gale v. Gale*, 21 Beav. 349;

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Frazier v. Frazier, 2 Leigh, 642-649; *Clark v. Packard*, 9 Gray, 417-420.

No other provision of the will can anticipate the residuary fund, as in *Brattle Square Church v. Grant*, 3 Gray, 142-159.

We do not at present see any argument to be drawn from the fact that the Philadelphia respondents are collateral kindred, or next of kin, of the testator, so long as there is no intestacy; for we do not know of any case in which such kinship has been allowed to have any effect upon a question of this kind. It must be fresh in the recollection of the court that, in the case of deficit of assets, even the children of the testator have no precedence upon the question of abatement.

Emery v. Batchelder, 78 Me. 283, 2 New Eng. Rep. 68.

The mere understanding of a testator cannot revoke his will.

Hoitt v. Hoitt, 68 N. H. 475, 1 New Eng. Rep. 547.

If we may venture to suggest that counsel have in mind a rule of law not applicable to this case, it might be well supposed that they had confounded the case at bar—in which the devise and trust itself was perfectly consistent with the rules of law covering the construction of wills, and valid, when made, in every respect,—with certain cases where the gift to the first taker was absolutely void in the first instance; as, for example, as being within the rule against perpetuities; in which case, because of the first being void *ab initio*, it would follow that gifts over would also be necessarily void. More than one instance of this is to be found in the books; but, for the reasons already stated, it has no application to the case at bar, which lies wholly without the necessary limit which gives the rule its force. As examples of the doctrine referred to, the court is respectfully referred to the cases of—

Arnold v. Chapman, 1 Ves. 108; *Tucker v. Tucker*, 5 N. Y. 408; *Fosdick v. Fosdick*, 6 Allen, 41.

Perhaps the question may be raised under the whole will as to whether the trust created thereby was limited to the provision for the wife's support during her lifetime or widowhood, or whether it included also the taking and eventually turning over to the "residuary legatees as provided in this will." In the first instance, the words seem to be those of a trust for the whole. We deem it immaterial which view is taken, although it would seem from the provisions for selling, conveying, and exchanging, coupled with the words of the devise, that the trust was not limited, as contended, but embraced the whole property. The fact of the death of one of the beneficiaries under the trust, where there is a provision as to where his interest shall go, cannot, in any aspect of the case, prevent his taking the title. This disposes of the whole assumption of counsel for the Philadelphia respondents, upon the question that the residuary devise is void.

1 Jarm. Wills. 627; *Doe v. Edlen*, 31 E. C. L. 143; 4 Ad. & E. 582.

We consider that, upon the authorities, the doctrine is fully settled that where a gift is made to one, and upon his decease it is given over to another person, and the first taker dies before the decease of the testator, the gift is

not thereby made void as to all, but the second taker succeeds to the same right and title at the death of the testator as he would at the death of the first taker, had he survived the testator. This doctrine is neither new nor doubtful. The authorities have been uniform upon this point, always supposing that the first gift is not in itself void by reason of being in violation of some established rule or statute governing the construction of wills, or limiting the power of the testator in the disposition of his property.

Miller v. Warren, 2 Vern. 207; *Gulliver v. Wickett*, 1 Wils. 105; *Tucker v. Tucker*, 5 N. Y. 408; *Warner v. Beach*, 4 Gray, 162.

Meurs. Symonds & Libbey, for the other respondents:

As was said in *Morey v. Sohler*, 2 New Eng. Rep. 269: "In this State many of the conditions upon which the doctrine of implied revocation was formerly based in England no longer exist. * * * Under this alteration of the common law, any form of words showing the intent of the testator to devise all the estate which he should own at the time of his decease passes all his property, real and personal, whether owned at the time of making the will or acquired afterward. If a testator, after executing his will, makes a conveyance of lands specifically devised, and, subsequently becoming revested with the title, is the owner of the same land at his decease, it passes by the will as if there had been no alienation."

In 1 Redf. Wills, 338, it is said: "According to the present English statute, and those of most of the American States, it is only necessary that the will be so expressed, in order to operate upon such estate as the testator may have at his decease; and it is not material, even as to real estate, that he should be seised of the same estate at the time of executing the will, since the instrument will operate upon any estate coming fairly within its terms, in which the testator is seised of a disposable interest at the time of his death."

Now we submit that, under our present statutes, and under the established rules for the construction of wills, in which the great object sought to be attained is to arrive at the intention expressed by the testator, it would not be a forced construction of this will to hold that whatever interest in real estate in Savannah the testator had at the date of his death, by virtue of the mortgage, as well as the debt which said mortgage was given to secure, passed under the devise to the nephews and nieces, for whom the trustee was directed to reserve such real estate unless a strong necessity to sell it should arise; and that this construction is much more reasonable, and more in accordance with the testator's intention than one which would substantially exclude the heirs from the benefit of their inheritance, and, after very trifling bequests, give the whole estate, under the last clause in the will, to the Union Society of Savannah.

See *Dunlap v. Dunlap*, 74 Me. 402.

A testator devised to his daughter H. one-third part of a certain farm, "but if my executor shall think best to sell said farm, then I give to her one-third part of the proceeds of the sale of said farm;" to his daughter S. one-third part of the same farm, "or if said farm

is sold, then one-third part of the proceeds of the sale of said farm;" and after a devise to his daughter A, in the same words as to S, added, "And I hereby authorize my executor to sell and pass deeds to convey said farm in such manner as he may think best for all concerned, and divide the proceeds as above directed; but if he should think best not to sell the same, then they may take the farm." After the making of his will, the testator in his lifetime sold the farm. Held, that S was entitled to one third of the proceeds of such sale.

Clark v. Puckard, 9 Gray, 417.

If it be held in this State (*Drew v. Wakefield*, 54 Me. 296) that the distinction has been abolished between a lapsed devise of real estate and a lapsed legacy of personal estate, and that both now pass by the residuary clause, the same is not true of the law of Georgia.

See 1 Jarm. Wills, 685, note 8, in which it is said: "In the absence of all statutory provisions the rule of the common law has been adopted in many States,—that void and lapsed legacies go to the residuary legatee, but void and lapsed devises to the heir," citing *Hughes v. Allen*, 31 Ga. 489; *Word v. Mitchell*, 32 Ga. 623; *Thweatt v. Redd*, 50 Ga. 181.

Undoubtedly, if it had been the intention of the testator that the bequest and devise to Anna Marlon Wirgman *et al.*, or that the bequest and devise to the Union Society, take effect upon the death of the testator's wife at any time, the effect of her death in the lifetime of the testator would simply be to accelerate the enjoyment of such legacies and devises by removing the prior life estate out of the way; but in each of these cases we submit that the whole context and purport of the will, and the conduct of the testator, so far as it appears as a fact in the present case, tend to show that he did not intend either of these legacies or devises to take effect at all, except upon the death of his widow or her remarriage. The event of her death and of her remarriage are referred to the same period of time, namely, that succeeding his own decease.

See *Tucker v. Tucker*, 5 N. Y. 420; *Randfield v. Randfield*, 2 De Gex & J. 59.

The argument of the learned counsel for the Union Society wholly misconceives the position which we take in this case. We claim no revocation of the will. We do not deny that the will is to take effect precisely according to the intent expressed in it; nor do we claim that there is any rule of law which prevents the gift over to the Union Society from taking effect in any event in which the testator so designed. If the meaning of this will is that the gift over to the Union Society is to be effective in the event of the decease of the testator's wife in his own life, as well as in the event of her decease after his own death, we do not urge that there is any technical rule of law which prevents that result. We do not deny anything stated by the court in the case cited on the other side, *Morton v. Barrett*, 22 Me. 257. The gift over to the Union Society is just as valid in the event (which happened) of the death of the wife before, as it would have been in the event of the death of the wife after, the testator's own decease, provided that is the testator's intent expressed in the will. What we do deny is that the will so intends.

MR.

We appeal with confidence to all general rules of construction as in our favor in this case, but general rules hold only when special facts do not control them; and we respectfully submit that the more carefully the precise language of this will is studied, in the light of the situation itself and of the testator's manifest feeling and desire, the stronger the conviction becomes that the will intended what the man himself intended, and is as far from attempting the wrong which the Union Society would impute to it as the testator would be if he could now declare his intention to the court.

Corbyn v. French, 4 Ves. 435; *Stewart v. Jones*, 3 De Gex & J. 532; *Tilson v. Jones*, 1 Russ. & M. 558; *Conoley v. Knapp*, 42 N. J. L. 302, 303; *Randfield v. Randfield*, 2 De Gex & J. 57; *Nash v. Simpson*, 78 Me. 147, 1 New Eng. Rep. 699.

Virgin, J., delivered the opinion of the court:

The testator, a resident in this State, executed his will February 3, 1883, died April 23, 1885, and his will was probated the succeeding June.

At the date of his will he had a wife and five nephews and nieces,—children of his only sister,—residents in Philadelphia. He also owned one moiety of certain real estate in Savannah, Georgia, which was all he owned there, and his nephews named owned the other moiety.

After giving certain specific legacies to various persons, the testator bequeathed and devised to the plaintiff, as his trustee, all the residue of his estate, real and personal, upon certain trusts, and authorized him to lease, exchange, sell, and convey any or all of his estate for the purpose of executing the provisions of his will.

The trusts specified were: To hold, manage, care for, and invest all the residue of his estate, real and personal, according to his best discretion and judgment; pay the annual income thereof to his wife so long as she shall remain his widow; should that not suffice, then the trustee should add thereto, irrespective of any other source of income possessed by her, such a sum out of the principal as would suffice; but that he should not sell the real estate in Savannah "until a strong necessity should arise therefor;" and "to divide so much of his estate as may be remaining upon the death or remarriage of his wife among his residuary legatees, as provided in this will."

He then bequeathed and devised, upon the death or remarriage of his wife, unto four of his Philadelphia nephews and nieces,—Anna M. Wirgman, John M. Durborrow, Richard N. Durborrow, and W. F. H. Durborrow,—"to hold in equal shares, all his real estate in Savannah."

He then bequeathed and devised, "upon the death or remarriage of his wife, all the residue of his estate, real and personal, to the Union Society of Savannah," a society duly incorporated for charitable purposes.

After the execution of the will, but before the decease of the testator, his wife died. Thereafter, on July 31, 1884, the testator sold and conveyed his real estate in Savannah for the sum of \$15,000,—\$5,000 cash and two

notes of \$5,000 each, payable in one and two years respectively, with interest, secured by a mortgage on the premises. The notes were entrusted by the testator to the husband of one of the devisees for collection, who, after the decease of the testator, collected the first note, and interest on both to July 31, 1885, and remitted the same to the plaintiff as executor; and the second note still remains unpaid in the custody of him to whom it was entrusted.

Not only the surviving nephews and nieces, but the Union Society, claim the proceeds of the Savannah property. In their answer the former claimed them, and "the interest of the testator therein by virtue of the mortgage, as belonging to them under the will." At the argument the claim is that the trust declared was based on the contingency that his wife would survive the testator, in which event the residuum was to go to the trustee; but that in the event which actually happened,—of his wife's death preceding his own,—the will is silent; and that such property remains undisposed of by the will, and is to go according to the rules of inheritance, under the law of the State of Georgia.

The testator's domicil having been in this State, the construction of his will and its effect depend upon the law here. *Gilman v. Gilman*, 52 Me. 165.

It is settled law that, whether searching for the meaning of the whole or of any particular clause of a will, the intention of the testator, as collected from all of its provisions and its general scope, is the criterion for its interpretation; and when that intention is ascertained, full latitude can be given to it, provided it conforms to those settled rules of law which establish and secure the rights of property. *Anderson v. Parsons*, 4 Me. 486, 488; *Morton v. Barrett*, 22 Me. 257; 4 Kent, Com. *535.

Doubtless the provisions of the will in controversy, establishing the trust, are based on the testator's expectation that his wife would survive him, and that her death and remarriage referred to a time subsequent to his own decease. It is equally certain that, when he executed his will, he intended that the four children of his only sister, mentioned by name therein as devisees, should, after his decease, have his moiety of the Savannah real estate, or so much thereof as should not be needed for the maintenance of his widow in "that style and station to which she had been accustomed as his wife." And if the title to that property had been in the testator at his decease, probably no question would have arisen in regard to the devisees' title.

But his own sale and conveyance of it after the death of his wife, when it was no longer possibly needed for her support under the will, took it away from the provisions of the will, so far as it related to the trust and the devise to his nephews and nieces, and thus revoked *pro tanto* those devises. *Carter v. Thomas*, 4 Me. 341; *Hawes v. Humphrey*, 9 Pick. 350, 361; *Webster v. Webster*, 105 Mass. 542. In *Brydges v. Duchess Chandos*, 2 Ves. Jr. 417, the chancellor declared this to be a principle of the common law, not to be shaken in point of authority. It is the rule laid down in all of the elementary works on wills and devises, as well

as in a multitude of adjudicated cases. And the fact that the testator took back a mortgage, which passed no title, but simply created a lien upon the property for security of a part of the purchase money, does not prevent the partial revocation. *Adams v. Winne*, 7 Paige, 97; *Beck v. McGillis*, 9 Barb. 35; *McNaughton v. McNaughton*, 34 N. Y. 201.

"Conveying a part of the estate upon which the will would otherwise operate," said Weston, J., "indicates a change of purpose in the testator as to that part; and suffering the will to remain uncanceled evinces that his intention is unchanged with respect to other property bequeathed or devised therein." *Carter v. Thomas*, *supra*; Kent, Com. 12th ed. *529. An implied revocation is recognized in Rev. Stat. chap. 74, § 3.

The proceeds of the sale of the Savannah property cannot go, under the will, to the nephews and nieces as devisees, for the will contains no such provision, as did the wills in *Clark v. Packard*, 9 Gray. 417; *Atwood v. Weems*, 99 U. S. 183 [Bk. 25, L. ed. 471]; *McNaughton v. McNaughton*, *supra*.

If, after the decease of his wife, the testator still intended that the real estate which he had devised to his nephews and nieces should go to them, why did he sell and convey it to a stranger? Why not convey it to them, and thus execute his own will in that respect? And if he intended that they should have the proceeds of the sale, why did he take the cash, and entrust the notes to the husband of one of them for collection, instead of passing them over as their property?

If the proceeds do not go by the will to the devisees of the land, to whom do they go? The nephews and nieces contend that they are not disposed of in any manner by the will, but are intestate property, and hence go by descent to the next of kin; while the Union Society claims that they fall to it through the residuary clause. And this result we think is in accordance with the rules of law. Rules of law are necessarily common, and sometimes operate harshly, but still they are landmarks which must be observed.

It is not to be disputed that a general legatee, as distinguished from a particular legatee, is entitled to everything which "turns out not to be disposed of" (2 Wms. Exrs. 6th Am. ed. 1567, and notes; 2 Jarm. Wills, *763; *Booley v. Wyatt*, 14 How. 391 [55 U. S. bk. 14, L. ed. 468]; *Drew v. Wakefield*, 54 Me. 291; *Thayer v. Wellington*, 9 Allen, 253, 295), because the testator is supposed to take the particular legacy from the residuary legatee only for the sake of the particular legatee; so that, upon the failure of the particular intent, the court gives effect to the general intent" (2 Wms. Exrs. 1569; 2 Jarm. Wills, *762).

To be sure, the testator may, by the terms of the bequest, narrow the title of the residuary legatee so as to exclude lapsed legacies. *Dunlap v. Dunlap*, 74 Me. 402; 3 Wms. Exrs. 6th Am. ed. 1571; 2 Jarm. Wills, *763; *Bulard v. Goffe*, 20 Pick. 252; *Tindall's Exrs. v. Tindall*, 24 N. J. Eq. 512, and cases cited. In this will, however, we find no such language as would seem to bring the residuary clause—whereby "upon the death of his wife, all the

residue of the testator's estate, real and personal," was to go to the Union Society—within this rule.

The result is the proceeds of the sale of the Savannah real estate fall into the general residuary clause in behalf of the Union Society.

Bill sustained. Costs of both parties to be paid by the executor, including reasonable counsel fees.

Peters, Ch. J., Walton, Libbey, and Haskell, JJ., concurred.

William F. ALLEN *et al.*

v.

MAINE CENTRAL R. R. CO.

1. It is **not necessary that a notice, from the consignor to the carrier, not to deliver goods in transit to the consignee, should state the basis of the claim to the right of stoppage in transitu.**
2. **The shipper should act in good faith, and, if requested, should furnish the carrier, in due time, with reasonable evidence of the validity of his claim.**

(Cumberland—Decided March 24, 1887.)

ON report. Judgment for plaintiffs.

An action to recover the value of four bales of woolen rags shipped by William F. Allen & Co., at Philadelphia, to William Beatty, of Gray, Maine.

Soon after Allen & Co. parted with the goods they learned that Beatty was insolvent, and notified the station agent of defendant company, who had charge of receipts and delivery of freight, at Gray, Maine, to stop the transit of the goods. They gave this notice by the following telegram, received at 8.15 of the afternoon of its date.

"Philadelphia, March 24th, 1884.

"Stop and return four bales rags consigned to William Beatty, No. Gray, Maine, marked Diamond P. with B. outside.

W. F. Allen & Co."

They also, at the same date, March 24, 1884, instructed the agent of the steamship company, the Winsor line, to have the stock returned, and wrote a letter, in addition to their telegram, to the said station agent of the Maine Central Railroad, at Gray, Maine, of which the following is a copy:

"WILLIAM F. ALLEN & CO.

Woolen Rags, Wool, and Hair,

No. 132 NORTH ST., PHILADELPHIA.

March 24, 1884."

To F^t Agt. Maine Central R. R., Gray, Maine:

Dear Sir,—We telegraphed you to stop and return four bales rags consigned to William Beatty, No. Gray, Maine, marked Diamond P. with B. outside. We now write to confirm same. Enclosed you will find a postal card; please make us an early reply and oblige

Yours truly,

W. F. Allen & Co."

A postal card was enclosed, with their printed address upon it, for an answer.

In answer to said letter and to said telegram, A. H. Perley, the station agent at Gray, on March 26, 1884, sent the following message upon the postal card which had been forwarded to him by plaintiffs, to wit:

Gray, March 26, 1884.

Your rags are in freight-house at Gray. Mr. Beatty claims that he can take the rags if he pays the freight. I will do as the company says.

A. H. Perley.

This postal card was received by plaintiffs, as appears by the post-stamp upon it, March 27, 1884; and upon the same day plaintiffs sent another letter to Perley, as follows:

Dear Sir,—Your postal at hand. We are very much obliged to you for the information in reference to rags consigned to Beatty. We have instructed the agent of the Steamship Co. here to have the stock returned, which we trust will be successful; and if we do get them back it is all due to your kindness in notifying us. We enclose you a postal, which, if not too much trouble, would like you to write and state whether the rags have been shipped back or not. Awaiting your reply, we remain

Respectfully yours,

W. F. A.

Before receiving the last letter, Perley, under date of March 27, wrote Allen & Co. as follows:

"You will have to prove that those rags are yours before I can send them; Mr. Beatty claims them.

A. H. Perley, Agent."

On March 28, in answer to postal of Perley, of March 27, just quoted, plaintiffs wrote to Perley as follows:

Dear Sir,—Your postal at hand; we have forwarded through the Winsor Line agent our affidavit proving our claim to the goods, which will probably arrive at your end of the line in due time. Our attorney advises this course, although our telegram to you would relieve you of any responsibility; but of course you are the judge of that. As soon as our affidavit arrives, please return stock. Thanking you for your promptness in answering our communication, we remain respectfully yours,

W. F. A. & Co.

On April 1, the general freight agent at Portland received the following letter enclosing an affidavit, a copy of which follows:

Office of the Boston & Philadelphia
Steamships,

E. B. Sampson, Agent, 70 Long Wharf,
Boston, March 31, 1884.

Mr. W. S. Eaton,

General Agt. Maine Cen. R. R., Portland:
Dear Sir,—Referring again to the 4 bales rags consigned to Wm. Beatty, North Gray, Maine, our agts. in Phil. send me copy of bill and deposition of shippers, which I herewith enclose to you. They further say, From what we know of the firm, we believe the goods belong to them (the shippers), and that their request to have them returned should be complied with unless there are some legal proceedings to prevent it. Please advise me result.

Yours truly,

E. B. Sampson, Agt.

The bill and deposition are as follows:

Philadelphia, March 15, 1884.

Mr. Wm. Beatty,

Bought of Wm. F. Allen & Co.,
Wholesale Dealers of Woolen Rags, Wool, and
Hair, No. 132 North Front Street.

498 4 Bales Soft Woolens,
467 1,857 9½ \$176.41

441 Marked Diamond P with B, outside.

Shipped to North Gray, Maine, via Winsor
Line."

"State of Pennsylvania.

County of Philadelphia, ss.

Before me, the subscriber, a notary public,
personally appeared William F. Allen, who,
being duly sworn according to law, doth depose
and say that he is a member of the firm of
Wm. F. Allen & Co., and that said firm of Wm.
F. Allen & Co. shipped four bales of soft
woolen rags, as is set out on the invoice hereto
attached, marked A. J. R. M. ct. P., to Wm.
Beatty, of No. Gray, Maine, by the Winsor
Line, via Maine Central Railroad.

William F. Allen.

Sworn to and subscribed before me the 28th
day of March, A. D. 1884.

Joshua R. Morgan,

Notary Public.

In the afternoon of March 31, the said sta-
tion agent at Gray, under threat of immediate
suit by Beatty, delivered the goods to him,
without waiting longer to receive the affidavit
aforesaid.

Mr. Clarence Hale, for plaintiffs:

Notice given to the carrier to stop the goods
is sufficient.

The statement of the law given in Benj.
Sales, 4th Am. ed. § 859, is "No particular
form or mode of stoppage has been held nec-
essary in any case. * * * All that is required
is some act or declaration of the vendor, coun-
termanding delivery. The usual mode is a
simple notice to the carrier, stating the ven-
dor's claim, forbidding delivery to the vendee,
or requiring that the goods shall be held sub-
ject to the vendor's orders." The foundation
of the above law seems to have been a remark
of Lord Hardwicke, that corporal possession
of goods stopped was no longer required. It
was made the subject of decision in a *nis*
prius case before Lord Kenyon,—*Holst v.*
Pownall, 1 Esp. 240.

The facts were that the goods were in quar-
antine, and defendants, as assignees of vendee,
a bankrupt, took possession. The agent of
the unpaid vendor gave notice to the captain
to stop them, but delivery was made to de-
fendants, and plaintiff brought trover. Held,
the notice to stop the cargo, served by the
agent of the vendor before quarantine was
ended, was a sufficient stoppage *in transitu*;
judgment for plaintiff. A note adds: "This
case was affirmed on appeal."

Northey v. Field, 2 Esp. 613, was a case
where goods were claimed by an agent of the
unpaid vendor while in the custody of a cus-
toms officer. Held, actual possession by the
consignor was not necessary; a claim was suf-
ficient.

Litt v. Cowley, 7 Taunt. 169, in the court of
common pleas, was a case where notice was

given to stop goods, but, by mistake of agent
of carrier, they were delivered. Gibbs, *Ch. J.*,
said: "It was formerly held that the only
way of stoppage *in transitu* was by actual cor-
poral touch of the goods. It has since been
held that, after notice to a carrier not to de-
liver, he is liable for the goods in trover
against himself, if he does deliver them."

A leading case on this branch of the law is
found in the case of *Newhall v. Vargas*, 13 Me.
98. On the point of notice the court says, at
p. 109: "Notice to the carrier, or to anyone
having charge of the goods, before the transi-
ends, is sufficient for this purpose. *Mills v.*
Ball, 2 Bos. & P. 457; *Litt v. Cowley*, 7 Taunt.
169." The opinion comments favorably also
on *Northey v. Field*, *supra*.

In 1862 the New Hampshire Supreme Court
had the subject under consideration in a case
very like the one at bar,—*Reynolds v. Boston &*
M. R. R. 43 N. H. 588.

Mottam v. Heyer, 5 Den. 633, was a case
where, with goods in bond, notice of stoppage
was given to vendee. In course of the opin-
ion the judge says: "Under the decisions
made within the last half century, it is suf-
ficient if the vendor or his agent, at any time
before the *transitus* is ended, gives notice, to
the carrier or middleman in whose possession
or under whose control the goods are, of his
rights, and prohibits the delivery of the goods
to the vendee or his assigns."

Rucker v. Donovan, 13 Kan. 251, 19 Am.
Rep. 84, was a case where goods were
seized in transit on an execution against
vendee, and, after demand made by the vendor
from the officer making the levy, replevin was
brought. Brewer, *J.*, delivering the opinion
of the court, said: "The facts show a passage
of the title from plaintiffs to Conner & Co.;
and a reinvestment, in the plaintiffs, of title and
right to possession, is claimed only by virtue
of an exercise of the right of stoppage *in transi-
tu*. * * * Actual seizure of the goods before
they came into the hands of the vendee is not
essential. A demand of the carrier or notice
to him to stop the goods, or a claim and en-
deavor to get the possession, is sufficient. No
particular form of notice and demand is re-
quired."

In a recent case reported in 14 Ch. D. 446,
sub nom. Ex parte Falk, the notice was by
cable from Liverpool to Calcutta, and the
court held the notice sufficient.

The notice was given to the proper party.

Whitehead v. Anderson, 9 M. & W. 518; *Litt*
v. Cowley, 7 Taunt. 169.

The carrier in whose possession the goods
were at the time notice was given is liable,
though the contract to carry was made by
plaintiffs with the Winsor line.

See 2 Kent, Com. 605, 12th ed. note b, and
cases cited.

The railroad company improperly delivered
goods to Beatty, and is liable therefor in this
action.

It has long been settled law that the carrier
is liable if he delivers goods to the wrong one
of two conflicting claimants. On this point
Benj. Sales, 4th Am. ed. § 861, says: "For it is
well settled that a bailee delivers at his peril,
that he is bound to decide between conflicting
claimants to goods in his possession that, he

is liable in trover if he delivers them to the wrong person, and that his only mode of protecting himself is to take an indemnity, and, if that be refused, to bring an action of interpleader." Cases cited to support this proposition are *Wilson v. Anderson*, 1 B. & A. 450, and *Batut v. Hartley*, L. R. 7 Q. B. 594. See also *Redf. Carriers*, § 239, and cases cited in note.

Messrs. Drummond & Drummond, for defendant:

In the first case of this character at law, the consignee's claim was not allowed; but in a case in equity, the claim was allowed "as a matter of equity, based upon the equitable lien of the vendor for the price of the goods."

2 Rorer, R. R. 1835.

At first the doctrine was that this claim could be exercised only when the consignee became insolvent after the purchase of the goods; but it was soon extended to cases in which he was insolvent at the time of the purchase, but the fact not known to the consignor till afterwards.

Id. 1837.

We invite examination of some text-book law, founded upon *dicta* of courts.

It is said that the consignor must "serve a notice upon the carrier, describing and identifying the goods, the nature of his claim, the evidence thereof, and of his own identity as consignor, and notifying the carrier not to deliver the same to the consignee."

Id. 1837, 1838.

The author adds: "After the service of such notice on the carrier, he cannot deliver the goods to the consignee without rendering himself liable to the consignor, in case it turns out that consignor is entitled to the possession of the goods, and incurs a loss by reason of their being delivered to the consignee."

Id. 1838.

But suppose they are not delivered to the consignee, and "it turns out" that the consignor is not entitled to the possession? If so delivered, the consignor may maintain trover to enforce his right, "if well founded."

Id. 1838.

If not "well founded," cannot consignee maintain trover, if they are not delivered to him?

The same author says further: "After notice, it becomes the duty of the carrier to hold the goods, and not deliver them to the consignee. The law will then afford the parties—consignor and consignee, or the assigns of the latter—such opportunity of asserting or enforcing their rights to the property as will effectually guard the interests of the carrier from the responsibility of delivering to either when not entitled to receive the same. We do not conceive it to be the duty of the carrier to decide between them, and actually deliver the goods to the alleged consignor, or that it is required by law; forasmuch as the carrier can seldom, if ever, know, and is not made the judge to decide, whether or not the circumstances exist which reinvest the property in the consignor; or, indeed, whether the person claiming to be the consignor be in fact such or not; and especially on long lines of railways is personal knowledge the more impracticable. After notice, he occupies the position of a stakeholder between the parties." And again: "In short,

the duty of the carrier, raised by the notice, is a negative one. It requires him to not deliver the goods to the consignee, thereby placing him in the light of a stakeholder of the property for those who may, by legal process, prove themselves entitled to it. It does not make the carrier a judge to decide who is entitled to the property, nor is he bound to take on himself the responsibility of determining that question; but it becomes his duty to hold it, and let the parties assert their rights by judicial process, as in cases of other disputes about property in the hands of a third person; and, if need be, the parties may be compelled, on general principles, at his application, to interplead with each other as to the ownership or right of possession."

With all deference to the learned author, and the other authors whom he quotes, except the statement relating to a bill of interpleader, the whole extract is "a delusion and a snare," legally and practically. It is not law, and never has been law. No decided case can be found which holds that a carrier can legally defend an action, brought by a consignee, for refusal to make instant delivery of goods, on the ground that he had been notified that the consignor claims to stop them *in transitu*, unless he goes further and shows the right of the consignor to stop them.

Benjamin, in his work on Sales, says: "The usual mode is a simple notice to the carrier, stating the vendor's claim, forbidding delivery to the vendee, or requiring that the goods shall be held subject to the vendor's orders." § 1276. In a note he says: "If the party in possession is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage *in transitu*, the notice is sufficient." § 1276, note.

Emery, J., delivered the opinion of the court:

The only mooted question in this case is whether the plaintiffs effectually exercised against the carrier their clear rights of stopping the goods *in transitu*.

The plaintiffs seasonably telegraphed and wrote the proper officer of the defendant company (the carrier) to stop and return the goods. The defendant company contend the notice was insufficient because there was no statement of the nature or basis of the claim to have the goods stopped. While such a statement is probably usual, it does not seem necessary in this case. The carrier is presumed to know the law, and, by such a notice as was given here is effectually apprised of a claim adverse to the consignee, as well as of a claim upon himself. In *Benjamin on Sales*, 1276, while it is said that the usual mode is a simple notice to the carrier, stating the vendor's claim, etc., it is also stated that "all that is required is some act or declaration of the vendor countermanding the delivery." *Brewer, J.*, in *Rucker v. Donovan*, 13 Kan. 251 (19 Am. Rep. 84), said, "A notice to the carrier to stop the goods is sufficient. No particular form of notice is required." In *Clemenson v. Grand T. R. Co.* 42 U. C. Q. B. 263, while it was held that the notice was faulty in not identifying the goods, it was said that a specification of the basis of the claim was not necessary.

The defendant further contends that the plaintiffs' omission to afterward prove to the carrier their right to stop the goods, when requested by the carrier to do so, has vacated their claim, and released the carrier from liability. But the carrier is not the tribunal to determine the rights of the consignor and consignee. Neither of these parties can be required to plead or make proof before the carrier. No man need prove his case to his adversary. It is sufficient if he prove it to the court. The carrier cannot conclusively adjudicate upon his own obligations to either party. He is in the same position as is any man against whom conflicting claims are made. If, as is alleged here, the circumstances are such that he cannot compel them to interplead, he must inquire for himself, and resist or yield at his peril.

It is reasonable, however, that the person assuming the right to stop goods in transit should act in good faith toward the carrier. He should, if requested, furnish him, in due time, with reasonable evidence of the validity of his claim, though it may not amount to proof. Should the consignor refuse such reasonable information as he may possess, such refusal might be construed as a waiver of his peculiar right, and might justify the carrier, after a reasonable time, in no longer detaining the goods from the consignee. But there was no such refusal here. The plaintiffs sent forward the invoice and their affidavit within a reasonable time.

The plaintiffs have now proved their right to stop the goods, and the defendant company, having denied that right without good reason, must respond in damages.

Judgment for plaintiffs for \$176.41, with interest from the date of the writ.

Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, JJ., concurred.

Ellen F. BRIGGS

v.

LEWISTON & AUBURN HORSE R. R. CO.

1. The construction and operation of a street railroad in a street is not a new and different use of the land taken for the street.
2. The motor is not the criterion by which a street railroad is to be judged; it is the use.
3. Where a street railroad company, chartered by the Legislature, changes the grade of the street, by the authority of the city council, it is not liable in trespass to the landowner.

(Androscoggin—Decided April 14, 1887.)

ON report. *Judgment for defendant.*

Action for damages for trespass upon land. The opinion states the point.

Messrs. Savage & Oakes, for plaintiff:

The law in this State seems to be well settled that where land is sold bounded "by a highway, or upon or along a highway, the thread or centre line of the way is presumed to be the limit or boundary of such land."

442,

3 Washb. Real Prop. 635; *Johnson v. Anderson*, 18 Me. 76; *Bangor House v. Brown*, 33 Me. 309; Id. 502; *Warren v. Blake*, 54 Me. 283; *Webber v. Overlock*, 66 Me. 177; *Oxton v. Groves*, 68 Me. 371.

Unquestionably this is a presumption that may be overruled by a clearly-expressed intention not to convey to the centre of the highway.

45 Me. 9.

"The termination at the southerly post of a pair of bars, being on the road first named, * * * merely designates the course and place of the line running to the road, but does not limit or restrict it from extending to the centre of the road. It runs to a monument on the road, and that is all. It could not well run to one in the road."

59 Me. 105; 13 N. H. 584; 45 Me. 18.

Hunt v. Rich, 38 Me. 195, is a case exactly in point, the bound commencing "on the western side of the road," and the court held that the deed, on its face, conveyed to the centre of the road.

If the plaintiff owns to the centre of the highway, including the land upon which the acts of the defendant complained of were done, she can maintain trespass for the injury, unless the defendant can in some way justify.

Ang. & D. Highways, §§ 301-309; 2 Waterman, *Trespass*, § 392; 28 Am. Dec. 300, and note; *Robbins v. Borman*, 1 Pick. 123; *Stackpole v. Healy*, 16 Mass. 38; *Hunt v. Rich*, *supra*.

The only effect the grant or license from the city can have is to protect the company from any prosecution for disturbing the public rights.

2 Dill. 548; 25 Conn. 19; 69 Am. Dec. 662, note; 67 Ill. 445; 68 N. Y. 397; *Green v. Portland*, 32 Me. 431.

The purpose—a horse railroad—becomes one which will accommodate the public presumably; and the privilege is one which the Legislature has power to grant upon one condition—that provision shall be made for compensation for any private property taken for such purpose.

Me. Const. art. 1, § 21; Cooley, *Const. Lim.* 560; Dill. *Mun. Corp.* § 477; 1 Redf. R. R. 248; 2 Kent, *Com.* 248; 2 Johns. 167; 7 Am. Dec. 536; 24 Am. Dec. 550; 45 Am. Dec. 61; 61 Am. Dec. 283; 13 Wall. 178 (80 U. S. bk. 20, L. ed. 560); 51 N. H. 531; 33 Conn. 548.

In some States, where the owner is held to part with the fee of his land when the highway is laid out, there is no question that the Legislature may authorize the use of the street for the purpose either of a horse or steam railroad, without any provision for payment of damages.

Dill. *Mun. Corp.* 574, and notes.

As to the rule in States where the owner does not part with the fee, we find *Williams v. New York Cent. R. R. Co.* 16 N. Y. 97, 69 Am. Dec. 663, and note, to be a leading and carefully-considered case, overruling the position previously taken by the court of that State (New York).

We are aware that this is opposed to the decisions in Massachusetts and some other States; but it is followed by the courts of many States, and we think the reasoning by which the result is reached is sound.

"The right of the public in a highway is an easement, and one that is vested in the whole

public. Is not the right of the railroad company, if it has a right, to construct its track upon the road, also an easement? This cannot be denied; nor that the latter easement is enjoyed, not by the public at large, but by a corporation."

Williams v. New York Cent. R. R. Co. supra.

This case arose in reference to a steam railroad; and at first an attempt was made to confine its application to these, but in *Craig v. Rochester, C. & B. R. R. Co.* 39 Barb. 494, overruling the case, *Brooklyn Cent. & J. R. R. Co. v. Brooklyn City R. R. Co.* 38 Barb. 420, it was held to apply alike to horse railroads.

See also 89 N. Y. 407.

"The feature which most widely distinguishes a railroad from an ordinary highway is that the former is a strict monopoly, excluding all idea of competition."

Davis v. Mayor, 14 N. Y. 506; 38 Am. Dec. 516.

"The uses to which streets in towns and cities may legitimately be put are greater and more numerous than with respect to ordinary roads or highways in the country."

2 Dill. Mun. Corp. § 544, and note; 1 Redf. R. R. 315, note; 11 Barb. 414; 12 Iowa, 246.

Where the public have only an easement in a street or highway, the use of the street or highway for a steam railroad is an additional burden which cannot be imposed without compensation to the proprietor for such new servitude.

Dill. Mun. Corp. 557, and cases cited; Cooley, Const. Lim. 549; Redf. R. R. § 76, p. 316; 16 N. Y. 97; 25 N. Y. 526; 14 Ohio, 523; 22 Conn. 74; 34 Conn. 579; 20 N. J. Eq. 61; 16 Wis. 640; 3 Foster, 83; 6 Foster, 266; 21 Mo. 580; 9 Ind. 438, 467; 29 N. J. L. 393; 31 Am. Dec. 818; 56 Am. Dec. 396.

Messrs. Frank W. Dana, and Willard F. Estey, for defendant:

Defendant was acting under the direction and authority of the city of Auburn, which, by the general statutes of the State and the common law, could lawfully authorize and empower its street commissioner, or others not officers of the city, to perform the work of amending and grading its highways.

Rev. Stat. chap. 18, § 75. See City Ordinances, chap. 8, § 5.

In *Callender v. Marsh*, 1 Pick. 418, which was an action of trespass against a surveyor of highways for lowering a street in Boston, in front of the plaintiff's lot, it was held that "a surveyor has authority by statute to dig down or raise a street; and if he does it with discretion, and not wantonly, a party injured cannot maintain an action against him, nor, it seems, against any other person."

In *Oyr v. Dufour*, 68 Me. 501, in referring to the opinion of this court in *Hunt v. Rich*, 38 Me. 195, Mr. Justice Barrows says: "Here seems to be a distinct recognition of the power of a highway surveyor, by virtue of his official authority, to change the course of travel within the limits of a highway legally located," and that "our statutes defining the powers, duties, and responsibilities of surveyors of highways were derived from, and are essentially the same that existed in, Massachusetts when this State was a part of that Commonwealth;" and, after conceding that the opinion

of the court in *Todd v. Rowley*, 8 Allen, 51, in some particulars differed from the doctrine held in the case at bar, the same learned judge says: "But it does not follow that they would regard the officer (surveyor of highways) as a trespasser upon the landowner whose property had been lawfully subjected to an easement in favor of the public, for doing upon such property only those acts which were necessary to the proper enjoyment of the easement which the public had acquired. This much protection we think his official character would give him."

See *Cool v. Crommet*, 13 Me. 255; *Muzzey v. Davis*, 54 Me. 368; *Fitz v. Boston*, 4 Cush. 365; Cooley, Const. Lim. 285 *et seq.*; Ang. & A. Corp. §§ 111, 239; *State v. Ferguson*, 33 N. H. 430. See also Dill. Mun. Corp.; *Hovey v. Mayo*, 43 Me. 335.

If the order of the city government as passed was made for the accommodation of public travel and business, then it was within the scope of its authority; and neither the city, nor one acting under its direction, would be liable in damages for acts done under said order.

Green v. Portland, 32 Me. 434.

The defendant contends that placing its railroad track in the public streets of Auburn, and operating it there, did not impose a new servitude upon the land upon which it was laid. Its roadbed is constructed like that of all street railways. Its rails, as laid down, do not obstruct the passage of vehicles of other descriptions than those used by the company; and, at the point in question, it was constructed on the side of the street, in the ditch, where previously it was impossible to pass with a team. It is said: "When a common highway is made a turnpike or plank road, upon which tolls are collected, there is much reason for holding that the owner of the soil is not entitled to any further compensation. The turnpike or the plank road is still an avenue for public travel, subject to be used in the same manner as the ordinary highway was before, and, if properly constructed, is generally expected to increase, rather than diminish, the value of the property along its line."

Cooley, Const. Lim. 682 *et seq.*, 700, 687; *Commonwealth v. Wilkinson*, 16 Pick. 175; *Murray v. Berkshire County*, 12 Met. 455; *Benedict v. Golt*, 3 Barb. 459; *Wright v. Carter*, 27 N. J. L. 76; *State v. Laverack*, 34 N. J. L. 201; *Chagrin Falls Plank Road Co. v. Cane*, 2 Ohio St. 419; *Douglas v. Boonsborough Turnpike R. Co.* 22 Md. 219.

It will be found, upon examination of the cases in the reports, in which the courts have held that the laying down and operation of a railroad track in the public streets is an additional burden, and entitles the adjoining owner to further compensation, that these were railroads operated by steam, and employing the common steam locomotive, and having a roadbed and track adapted to that method of operation.

Cooley, Const. Lim. 687.

Such an adaptation of a street is, no doubt, inconsistent with its use as originally contemplated. The peculiar construction of its roadbed is such as to exclude the public from passing over it in vehicles of a general description. It takes exclusive and permanent possession of

a portion of the way, and appropriates it exclusively for its own particular mode of conveyance. No one can travel on or over the rails laid down, except the railroad company, and with their cars specially adapted to the tracks.

Cooley, Const. Lim. 688; Wood, R. R. 724, and notes.

A horse railroad, on the contrary, will interfere very little with the ordinary use of the way, by the public, even upon the very line of the traveled road; and in many cases it would be a relief to an overburdened way, rather than an impediment to the previous use.

Ibid.

In Connecticut, after it had been decided in *Imley v. Union Branch R. R. Co.* 26 Conn. 255, that the owner of the fee, subject to a highway, could have compensation when the highway was appropriated for a common railroad, it was likewise held in *Elliot v. Fairhaven & W. R. R. Co.* 82 Conn. 579, 586, that the authority to lay and use a horse-railway track in a public street was not a new servitude imposed upon the land, for which the owner of the fee was entitled to damages, but that it was part of the public use to which the land was originally subjected when taken for a street. The touchstone by which it may be ascertained whether an adjoining owner is entitled to further compensation for a secondary use of the way appears to be this: When an easement in land is acquired under the power of eminent domain, for a particular use, it cannot be devoted to another inconsistent use without compensation to the owner. To determine whether the use is inconsistent, it is not so much the similarity of results accomplished by the changed use which determines the right to make the change, as it is whether the burdens upon the estate of the owner of the fee are increased by such change in a manner not contemplated by the condemnation of the land for the original purpose.

Wood, R. R. 721 *et seq.*

This test seems to be the result as deduced from an examination of all the latest cases upon the subject. And in the work last quoted from, on page 739, the author, in applying this principle to street railways when located in an existing highway, says they do not impose a new burden, and that "they are treated as merely presenting a new and improved mode of transit, not excluded by the purposes for which the land for streets and highways is taken." And *Judge Dillon* says: "There is solid ground to distinguish between horse railways in streets, as ordinarily laid and used, which do not exclude the public, and common railways, which are generally so constructed as altogether to exclude a portion of the street from public use in the accustomed modes."

Dill. Mun. Corp. 2d ed. § 578.

Among the later decisions upon this branch of the case, that in the case of *Atty. Gen. v. Metropolitan R. R. Co.* 125 Mass. 515, seems conclusive. This was an application to the court by information, to obtain an injunction to restrain the respondent from laying down additional street-railway track along that portion of Washington Street in Boston which is usually most crowded with teams, cars, and foot-passengers, on the ground that such additional

track was a nuisance. It was held generally that a license by municipal authority, under a statute, to a street-railroad corporation, to reasonably use a highway, is not the appropriation of an additional easement in the highway, which will, without special provision therefor, entitle abutters to compensation, and is constitutional.

See also *Citizens Coach Co. v. Camden Horse R. R. Co.* 83 N. J. Eq. 267; *Crushing v. Boston*, 123 Mass. 175; *Porter v. North Mo. R. R. Co.* 33 Mo. 128; *Hobart v. Milwaukee City R. R. Co.* 27 Wis. 194; *Cincinnati, etc. Street R. Co. v. Cumminsville*, 14 Ohio St. 528; *Hamilton v. N. Y. & H. R. R. Co.* 9 Paige, 171; *Adams v. Saratoga & W. R. R. Co.* 11 Barb. 414; *Plant v. Long Island R. R. Co.* 10 Barb. 26; *Chapman v. Albany & S. R. Co.* 10 Barb. 360.

Assuming, for the purpose of discussion, that the description as given in the writ does not expressly exclude the highway, the defendant submits that the same rule which applies to land bounded "upon or by" a highway, etc., as between the grantor and grantee in a deed of conveyance, does not obtain, as between the plaintiff and defendant in an action of trespass *quare clausum*. In the former case, the reason is one of public policy (see 2 Smith, Lead. Cas. 217); in the latter, the object is to give the defendant notice of the particular place upon the face of the earth where the trespass was committed.

White v. Moseley, 5 Pick. 230. And see *Hall v. Mayo*, 97 Mass. 419 *et seq.*

Great care is necessary to avoid a mistake in the boundaries or description.

1 Taunt. 495; 1 Saund. 299; Willes, R. 223; 1 Salk. 453.

In *Pickering v. Shearer*, 11 Gray, 153, which was an action of trespass for breaking and entering a close, described in the writ as bounded on a highway, and cutting down trees, there was evidence of a public use of a way, and conflicting testimony upon the question whether its location included the trees; but no record of its location was shown. The judge declined to instruct the jury that any act committed within the line of the highway would not be a trespass described in the writ; but, instead thereof, instructed them that they should exclude every part of the highway, as not coming within the premises described in the writ, and, in the absence of record evidence of a location, might consider the evidence of use by the public, in connection with other evidence, in ascertaining the boundaries; and that, as a general principle, the right acquired by user would be commensurate with the way actually used. Held, "that the defendant had no ground of exception."

Evidence of a trespass committed on a part of the premises which is without the close described in the writ is inadmissible.

White v. Moseley, *supra*; *Longfellow v. Quincy*, 29 Me. 196; *Elliot v. Shepherd*, 25 Me. 378; 34 Me. 200; 83 N. H. 415; 13 Met. 109.

If the plaintiff cannot recover by reason of a failure of proof of a breaking and entering of that portion of plaintiff's premises lying outside the limits of the street, she cannot recover for injuries resulting from the breaking and entering that portion of her premises included within the lines of the street.

The gist of the action of trespass *quare clau-sum* is the being disturbed in the possession of the land upon which the wrongful entry is made.

Anderson v. Neemith, 7 N. H. 167.

If the close is illegally entered, a cause of action at once accrues; and whatever is done after the breaking is but an aggravation.

Brown v. Manler, 2 Foster, 468.

Emery, J., delivered the opinion of the court:

A strip of the plaintiff's land in Auburn had been lawfully taken by public authority, for a public highway, and just compensation had been made to the owner therefor. The defendant company had subsequently constructed a street railroad (commonly called a "horse railroad") in this highway, and over the strip of land thus taken from the plaintiff's land. Early in 1885, the company lowered the grade of their rails on this strip; whereupon the plaintiff brought this action, alleging said acts of the defendant company to be a trespass on her land.

All of these acts of the defendant were within the limits of the highway, and were done under express license from the city council of Auburn, and from the Legislature. They would not therefore constitute any trespass on the plaintiff's land, if such license conferred lawful authority. The plaintiff contends, however, that the license invoked in this case has no validity, and confers no authority, because it undertakes to make a new and different use of her land, without providing a just compensation therefor.

We do not think the construction and operation of a street railroad in a street is a new and different use of the land from its use as a highway. The modes of using a highway strictly as a highway are almost innumerable, and they vary and widen with the progress of the community. When a highway is first established in some unfrequented locality, it may exist for a time as a rude road, with a narrow track, and only occasionally used. With the growth of population and business, and the transformation of the lonely neighborhood into a thriving and increasing city, the highway may also go through the transformations of being turn-piked, planked, macadamized, and paved for its entire width. From bearing an occasional rude cart, it may come to sustain an endless succession of wagons, drays, coaches, omnibuses, and other vehicles of travel and traffic. There is a continual march of improvement in streets and vehicles. It cannot be that the landowner must be compensated anew, at each new improvement in street or vehicle, or with any increase of traffic. All the land originally taken was taken for a highway, and for all time, if needed; and the compensation was estimated on that basis. The taking and the payment were once for all. The public, at the first taking, acquired an untrammelled right of way over every part of the land taken, with full right to do all things upon the land to facilitate its use as a highway, and make it sufficient at any time for the increasing need of the public for a highway. There is in such cases no stipulation limiting

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the public to any particular kind of road or vehicle.

The laying down rails in the street, and the running street cars over them for the accommodation of persons desiring to travel on the street, is only a later mode of using the land as a way,—using it for the very purpose for which it was originally taken. It may be a change in the mode, but it is not a change in the use. The land is still used for a highway. The weight of authority is so manifestly in favor of this proposition, it is unnecessary to cite particular decisions.

Our attention is called to the fact that this defendant company is authorized to use steam as a motor on this same railroad, and we are cited to decisions of courts holding that the ordinary steam-railroad companies must make additional compensation to landowners before taking a street for their railroads. The argument is that, however it may be as to horse railroads, steam railroads must make compensation.

We do not think the motor is the criterion. It is rather the use of the street. If the railroad company exclusively occupy the land, shut off the street from it, deprive it of its character of bearing the easement of a street, use it, not for street traffic, but for what is known as railway traffic, the company may perhaps be said to make a new and different use of the land. But we have no occasion now to express any opinion on that question. This defendant company is using the land as a street. Its railroad is a street railroad. Its cars are used by those who wish to pass from place to place on the street. A change in the motor is not a change in the use.

If public authority can lawfully authorize the construction and operation of a street railway in a public street without providing for additional compensation to the landowner (as we think it can), it can also lawfully authorize a change of grade for that purpose without committing a trespass upon the landowner.

The officers of municipalities, charged with the duty of making the streets safe and convenient for the use of an increasing traffic, have large authority and wide discretion in all matters of construction and improvement, including grade. It has been held that the lowering the grade of a street by a person acting under municipal authority and in good faith, without wantonness, is not a trespass against the landowner. *Hovey v. Mayo*, 43 Me. 382. In this case the lowering of the grade was done under the authority of the city council, and of the commissioner of streets. There is no suggestion of want of good faith.

We think the plaintiff is confined to the remedy provided by statute,—§ 16 of city charter of Auburn, and Rev. Stat. chap. 18, § 68. These statute provisions will afford a remedy, if she be entitled to any compensation. She cannot maintain this action of trespass.

Judgment for defendant.

Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, JJ., concurred.

William F. SEELE

v.

INHABITANTS OF DEERING.

A town is not liable for the acts of its officers in digging a ditch across the land of one of its citizens, by which foul water was conducted over and upon the premises of another, and there created a nuisance, when the acts were not done in the execution of a corporate duty imposed by law upon the town.

(Cumberland—Decided April 5, 1887.)

ON exceptions by the plaintiff. *Overruled.*

Action on the case to recover damages sustained by reason of a nuisance alleged to have been created by the acts of town officers. A demurrer to the declaration was sustained.

The point is stated in the opinion.

Messrs. John J. Perry and D. A. Meaher, for plaintiff:

A demurrer admits all such matters of fact as are sufficiently pleaded.

Lowell v. Morse, 1 Met. 475; *Troy & G. R. R. Co. v. Newton*, 1 Gray, 544.

A general demurrer to a declaration containing several counts will be overruled if one of the counts is good.

Dole v. Weeks, 4 Mass. 451; *Sweett v. Patrick*, 11 Me. 181; *Blanchard v. Hoxie*, 34 Me. 376; *National Exchange Bank v. Abell*, 63 Me. 346.

"The causing or suffering any offal, filth, or noisome substance to collect or remain in any place, to the prejudice of others; * * * the corrupting or rendering unwholesome or impure the water of a river, stream, or pond; the unlawfully diverting it from its natural course or state, to the injury or prejudice of others,—are nuisances."

Rev. Stat. chap. 17, § 5.

Any person injured in his comfort, property, or the enjoyment of his estate, by a common and public, or by a private, nuisance, may maintain against the offender an action on the case for his damages, unless otherwise specially provided.

Rev. Stat. chap. 17, § 12.

There has been a series of cases in this State in which the court has decided that cities and towns are not liable for the unlawful acts of health officers in providing for "smallpox" patients, and further guarding against the spread of the disease.

Mitchell v. Rockland, 52 Me. 118; *Brown v. Vinalhaven*, 65 Me. 402; *Lynde v. Rockland*, 66 Me. 309; *Barbour v. Ellsworth*, 67 Me. 294.

A careful examination of these cases will show that there was no question of law involved applicable to the case.

This court has decided, at least in one case, that a town is liable for the "unauthorized" acts of its officers.

Dover v. Robinson, 64 Me. 183.

Where a street commissioner, in removing a fence, appropriated land outside of the limits of the street, it was held that the city under whose authority and by whose direction he was acting was liable for damages to the owner.

Woodcock v. Calais, 66 Me. 284.

And in Massachusetts, where the agent of a town, in repairing a highway, entered a close

without the consent of the owner, and took away stone to repair a bridge, it was held that the town was liable in tort to the owner of the close.

Hawks v. Charlemont, 107 Mass. 414.

These quasi corporations are liable for an act done by the officers having competent authority either: (1) by express vote of the city government; or (2) by the nature of the duties and functions by which they are charged by their offices to act upon the general subject-matter; or, (3) if the act was done with an honest view to obtain for the public some lawful benefit or advantage; and (4) if their acts were ratified by the towns or cities for whom they were acting.

Thayer v. Boston, 19 Pick. 511; *Dayton v. Pease*, 4 Ohio St. 80.

An action of tort lies against a city by the owner of land through which its agents have unlawfully made a sewer.

Hildreth v. Lowell, 11 Gray, 345.

A municipal corporation which creates a private nuisance is *prima facie* liable for its continuance.

Pennoyer v. Saginaw, 8 Mich. 584.

If a city or town negligently constructs or maintains culverts in a highway across a natural watercourse, so as to cause the water to flow back upon and injure the land of another, it is liable to an action of tort, to the same extent that any corporation or individual would be liable for doing similar acts.

Anthony v. Adams, 1 Met. 284; *Lawrence v. Fairhaven*, 5 Gray, 110; *Perry v. Worcester*, 6 Gray, 544; *Parker v. Lowell*, 11 Gray, 336; *Wheeler v. Worcester*, 10 Allen, 591.

So, if a city, by its agents, without authority of law, makes or employs a common sewer on the property of another, to his injury, it is liable to him in action of tort.

Locks & Canals v. Lowell, 7 Gray, 223; *Hildreth v. Lowell*, *supra*; *Haskell v. New Bedford*, 108 Mass. 208.

For neglect in the construction or repair of any particular sewer, whereby private property is injured, an action may be maintained against a city or town.

Child v. Boston, 4 Allen, 41; *Emery v. Lowell*, 104 Mass. 18; *Merrifield v. Worcester*, 110 Mass. 216; *Hill v. Boston*, 122 Mass. 344.

Taking the decisions of the courts in this and other States already cited, it settles the question of liability of the defendant town.

See *Woodcock v. Calais*, 66 Me. 284; *Hawks v. Charlemont*, 107 Mass. 414; *Thayer v. Boston*, 19 Pick. 511; *Hildreth v. Lowell*, *supra*.

Messrs. Nathan & Henry B. Cleaves and Drummond & Drummond, for defendants:

The allegation in the second count, that the defendant, by its agents duly authorized, and acting within the scope of their authority, etc., did the acts complained of, is but a statement of a conclusion of law, which is admitted by demurrer. Upon this point the declaration is defective in not stating the facts necessary to enable the court to judge for itself whether that conclusion of law has any foundation in fact.

Hopper v. Covington, 118 U. S. 149 (1885). L. ed. 190.)

The nuisance complained of was a "common"

nuisance," and therefore not a special and peculiar damage to the plaintiff, for which he could maintain an action.

Cole v. Sprawl, 35 Me. 161; *Norcross v. Thoms*, 51 Me. 504; *Brayton v. Fall River*, 118 Mass. 329.

A town derives all its powers from statute. *Hooper v. Emery*, 14 Me. 375.

There is no general authority conferred upon towns by any statute, authorizing them in their corporate capacity to lay out or construct drains or sewers.

Lemon v. Newton, 134 Mass. 479.

That authority is conferred by statute (Rev. Stat. chap. 16, p. 229, § 2) upon the municipal officers of a town. While they can lay out and construct drains and sewers at the expense of the town, no authority is conferred upon them to dig ditches across private lands, for the purpose of diverting water from its natural course, or for any other object.

A municipal corporation is not liable for the wrongs of acts of its officers.

Davis v. Bangor, 42 Me. 522; *Small v. Danville*, 51 Me. 359; *Lynde v. Rockland*, 66 Me. 309.

When authority is conferred upon municipal officers to perform public duties, like laying out and constructing public sewer, ways, and establishing watering troughs, the vote of a town authorizing or instructing them to do so in particular localities has been held as unauthorized and void, because it was the intention of the statutes that the municipal officers should exercise their discretion upon the subject.

Cushing v. Bedford, 125 Mass. 526; *Kean v. Stetson*, 5 Pick. 492.

The recent case of *Lemon v. Newton*, 134 Mass. 476, is directly in point.

A town cannot be held responsible for damages resulting from work done under the supposed authority of illegal and void votes.

Anthony v. Adams, 1 Met. 284; *Cushing v. Bedford*, *supra*.

In the case of *Cavanagh v. Boston*, 139 Mass. 435, the court decides that the city is not responsible for damages resulting from work done under illegal votes, and it is immaterial that the work was done in a negligent manner.

The rule which makes the employer liable for neglect of his servant or agent does not apply to towns.

Walcott v. Swampscott, 1 Allen, 102; *White v. Phillipston*, 10 Met. 110.

The case of *Woodcock v. Calais*, 66 Me. 234, is not inconsistent with the late case of *Lemon v. Newton*, *supra*.

The case of *Hawks v. Charlemon*, 107 Mass. 418, cited in *Woodcock v. Calais*, *supra*, comes within the same principle.

The ditch described in plaintiff's writ cannot be magnified into a public drain or sewer. But for any negligence in constructing a sewer and keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is injured.

Johnston v. Dist. of Columbia, 118 U. S. 19 (Bk. 30, L. ed. 75); *Mills v. Brooklyn*, 32 N. Y. 489.

The cases cited by plaintiff, like *Hasckell v. New Bedford*, 108 Mass. 308; *Child v. Boston*, 4 Allen, 41; *Emery v. Lowell*, 104 Mass. 18, and

Franklin Wharf v. Portland, 67 Me. 46, have no direct application to the present case.

Virgin, J., delivered the opinion of the court:

Assuming—what the demurrer admits—the allegations in the declaration to be true, it is obvious that a most unmitigated nuisance has been created on and about the premises of the plaintiff, to his great injury; and were the defendant an incorporated city, its alleged acts would constitute *prima facie* such a cause of action as might render it liable, in the absence of any justification (*Cumberland & O. C. Corp. v. Portland*, 62 Me. 505); but we have looked in vain through both counts for any allegations which, in our view, render the defendant town liable for the alleged acts which have resulted so injuriously to the plaintiff's property.

The authority and liability of our *quasi*-public corporations known as towns, as distinguished from municipal corporations incorporated under special charters, are generally only such as are defined and prescribed by general statutory provisions. Some things they may lawfully do, and other things they have no authority for doing. To create a liability on the part of a town, not connected with its private advantage, the act complained of must be within the scope of its corporate powers as defined by the statute. If the particular act relied on as the cause of action be wholly outside of the general powers conferred on towns, it can in no event be liable therefor, whether the performance of the act was expressly directed by a majority vote, or was subsequently ratified. *Morrison v. Lawrence*, 98 Mass. 219.

So a town is not liable for the unauthorized and illegal acts of its officers, even when acting within the scope of their duties (*Brown v. Vinahaven*, 65 Me. 402; *Small v. Danville*, 51 Me. 359); but it may become so when the acts complained of were illegal, but done under its direct authority previously conferred or subsequently ratified. (*Woodcock v. Calais*, 66 Me. 234, and cases there cited.)

The difficulty with the counts is that the allegations therein do not bring the acts complained of within the scope of the corporate powers of the town, or aver that they were performed by its officers in the execution of any corporate duty imposed by law upon the town. *Anthony v. Adams*, 1 Met. 284. There is no intimation that the acts were done in connection with the making or repairing of any highway or townway, which the law imposed upon the town, or in relation to any drain or sewer laid out, or attempted to be laid out, by the town authorities, under Rev. Stat. chap. 16, for which it might under certain circumstances become liable (*Estes v. China*, 56 Me. 407; *Franklin Wharf v. Portland*, 67 Me. 46); or in emptying a common sewer upon the property of the plaintiff outside of the public works, as in *Locks & Canals v. Lowell*, 7 Gray, 223. But the principal allegations are that the defendants "wrongfully opened and dug a ditch across the main road * * * in Deering, and into an artificial ditch in the rear of a tripe and bone-boiling establishment, from which a cesspool of stagnant and filthy water was then and there collected, and then and there continued said ditch across the land of Samuel

Jordan, 200 feet in the direction of the plaintiff's land, and out of the natural course of said water, and on to the plaintiff's land, and along through the same into his millpond."

It is quite evident that a town, independent of any statutory authority, has no corporate power to dig ditches across another's land. Such an act is *ultra vires*; and any express majority vote based on a proper article in a warrant calling a meeting of the defendants directing such acts, would create no liability on the part of the town. *Cushing v. Bedford*, 125 Mass. 526; *Lemon v. Newton*, 184 Mass. 476.

Whether or not the declaration can be amended so as to make the town liable, we cannot, in the absence of a knowledge of the facts, now determine.

Exceptions overruled.

Peters, Ch. J., Libbey, Emery, and Haskell, JJ., concurred; **Walton, J.**, did not sit.

STATE of Maine

v.

William BEATON.

A complaint for a criminal offense, which does not state the day, as well as the month and year, when the offense was committed, is bad.

(Lincoln—Decided March 14, 1887.)

ON exceptions by the defendant. *Sustained.* Appeal from the decision of a magistrate on a complaint charging the respondent with catching lobsters in violation of law. The exceptions were to the ruling of the court in 448

overruling the appellant's demurrer to the complaint.

The case is stated in the opinion.

Messrs. Hilton & Huston, for defendant:

No time is alleged with certainty. If "on or about" a certain day prove insufficient, as held in *State v. Baker*, 84 Me. 52, surely the statement, "on sundry and divers days and times between the 23d day of September, 1885, and the 30th day of September, 1885," must be regarded as fatally defective.

The allegations as to time or place in a complaint or indictment should be certain.

State v. Hanson, 39 Me. 337.

These defects in the complaint as to time and place are fatal on general demurrer.

Ibid.; *Moody v. Hinkley*, 34 Me. 200.

Mr. Raswell S. Partridge, County Attorney, for the State.

Walton, J., delivered the opinion of the court:

Neither a complaint nor an indictment for a criminal offense is sufficient in law, unless it states the day, as well as the month and year, on which the supposed offense was committed. In this particular, the complaint in this case is fatally defective. It avers that "on sundry and divers days and times between the 23d day of September, A. D. 1885, and the 30th day of September, A. D. 1885," the defendant did the acts complained of. But it does not state any particular day on which any one of the acts named was committed. Such an averment of time is not sufficient. *State v. Baker*, 84 Me. 52; *State v. Hanson*, 39 Me. 337, and authorities there cited.

Exceptions sustained. Complaint quashed.

Peters, Ch. J., Virgin, Libbey, Emery, and Haskell, JJ., concurred.

NEW HAMPSHIRE.

SUPREME COURT.

Elbridge G. BOODY *et al.*

v.

William D. WATSON *et al.*

1. The public right of enforcing a tax-payer's obligation to contribute his share of public expense is created by a legislative division of the common burden, in execution of the social contract, and not by a judicial assessment.
2. An ordinary tax assessment of a town is a judicial act of the selectmen; and they are not liable, in an action for damages, to a person injured by their exemption of taxable property, in pursuance of an illegal vote of the town.
3. The exemption is an erroneous judgment of a court of assessment, and is reversible by the common-law power of general superintendence for correcting errors of courts of inferior jurisdiction, where the laws have not expressly provided a remedy.
4. This power is affirmed by Gen. Laws, chap. 208, § 1; and the invention and use of judicial process and procedure necessary for its exercise are required by the common law and the statute.
5. The judicial ascertainment of a statutory share of public expense, and process for its collection, may be necessary for the exercise of the corrective power.
6. Correctional authority to reverse a tax exemption that can be reversed only by a tax assessment is authority to make the assessment, or cause it to be made.
7. The statutory authorization of certain writs, "and all other writs and processes," is a confirmation of the common-law power of issuing process that is necessary "for the furtherance of justice, and the due administration of the laws."
8. The question of form of action is not considered when time spent upon it would be wasted on a matter of no practical importance.
9. A petition or motion to bring an action forward, and reverse or modify a judgment rendered at the trial term of the supreme court, is an ample, simple, and convenient remedy; and for that reason a writ of error does not lie in such a case. For a similar reason, a judgment of a lower court that is reversible here on a common-law writ may be reversed here on a petition.
10. The record of the lower court need not be brought up by a writ of error or certiorari, for the correction of error by the common law power of superintendence, but may be proved and found with the other facts of the case, at the trial term.
11. A statement of the error, as the

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ground of complaint and cause of action, is required, in the petition, by the essential rules of common-law pleading, for the ascertainment of the precise point in controversy, and the production of distinct issues of law and fact; and on a sufficient petition, the question is whether there is an error correctible by the superintending power, and not whether it is correctible on writ of error, writ of false judgment, certiorari, mandamus, audita querela, or prohibition.

12. A suit for an exercise of the superintending power can be brought by petition in a case for which no remedy is expressly provided by law, and for which no formal writ has been invented.
13. The power of an inferior court of tax assessors to correct their erroneous judgment of exemption is not a common-law or statutory test of the correctional power of the supreme court.
14. An action for a reversal of the judgment, brought at the earliest possible term, is seasonably commenced.
15. In such an action, seasonably brought, the plaintiff is entitled to ample remedy after, as well as before, the expiration of the tax year during which the error could be voluntarily corrected by the lower court, under Gen. Laws, chap. 57, § 10.
16. A continuance of the case by the supreme court for advisement is an act of the law that works no wrong.
17. The erroneous judgment, when reversed, is not left in force; it cannot be effectually reversed without an enforceable assessment of the wrongfully-exempted property; and the law authorizing a correction of the error puts in requisition the means of correcting it.
18. One who can obtain a reversal of the judgment in a direct proceeding cannot impeach the original assessment collaterally on account of the error.
19. In the correction of judicial errors, the common law preserves as far as possible what is right, and destroys only what is wrong. This rule is applicable to errors in the assessment of taxes.
20. In a legal process addressed to the board of selectmen and their successors in their official capacity as a continuous court of assessment, they need not be personally named.

(Carpenter and Bingham, JJ., dissent.)

(Rockingham—Decided February 26, 1887.)

PETITION, against the selectmen of Northwood for an order upon them to assess a tax, for a writ of mandamus,* and for general

*The following mandate was issued:

[SEAL.] The State of New Hampshire, } ss.
Rockingham,
To the selectmen of the town of Northwood in said county:

relief. Reported 63 N. H. 320, 1 New Eng. Rep. 2. After the case was decided at the June Term, 1885, the question was raised whether

the writ could be issued after the expiration of the tax year during which the selectmen were authorized to make a reassessment by the Act

Whereas, the following judgment has been rendered:

The State of New Hampshire, } ss.
Rockingham,

In the Supreme Court of the said State, at the law term held at Concord on the first Tuesday of December, 1888.

Elbridge G. Boody, Irving Dow, Charles F. Cate, Lewis E. Kimball, Caleb W. Hanson, Charles A. Hill, Charles Wingate, William Knowles, John C. Hill, John R. Dow, Warren P. Swan, N. Rollins, M. P. Knowlton, Joseph S. Trickey, and J. A. Cate, all of Northwood, in said county, plaintiffs,

Against

William D. Watson, Enoch Fogg, and James W. Hoyt, all of said Northwood, defendants.

On a petition, for that said plaintiffs complain against said defendants, "and say that the plaintiffs are owners of real and personal estate in said town of Northwood, and are legal voters and taxpayers there; that, at the annual meeting holden within and for said town on the second Tuesday of March, 1884, said Watson, Fogg, and Hoyt were duly elected and qualified as selectmen of said town for the year next ensuing; that as such selectmen they are bound by law to take an invoice of all the estate liable to be taxed on the 1st day of April, 1884, and seasonably thereafter to assess thereon all State, county, town, and other taxes which by law they might be required to assess; that on said 1st day of April, John I. Pillsbury and Alpha J. Pillsbury, both of said Northwood, and doing business under the name and style of Pillsbury Bros., were the owners of certain real and personal estate in said Northwood, of the value of \$15,000, liable to be taxed; that warrants from the treasurers of the State of New Hampshire and the county of Rockingham aforesaid were duly furnished to said selectmen, whereby they were required to assess a tax amounting to a large sum, to wit, the sum of \$1,500; that certain taxes were also voted by said town for the year aforesaid, amounting to a large sum, to wit, the sum of \$2,000, all of which taxes said selectmen were by law bound to assess upon the aforesaid property of said Pillsbury Bros.; yet the said selectmen, although notified and requested to assess said taxes upon said estate, neglect and refuse so to do. And your petitioners say that they have no other remedy at law than the writ of *mandamus*. Wherefore they pray that the said Watson, Fogg, and Hoyt, selectmen as aforesaid, may be ordered and commanded by this court to assess the taxes aforesaid upon the estate aforesaid, and that a writ of *mandamus* may be issued by said court, directed to them for the purpose aforesaid, and for such other relief as may be just."

The foregoing petition of the plaintiffs was filed on the 3d day of June, 1884, was entered at the law term of said court held at Concord on the first Tuesday of June, 1884, and was then postponed for notice, returnable August 28, 1884, at which time all parties appeared, and it was ordered that the facts be found at the trial term of said court.

At the next trial term, held on the third Tuesday of October, 1884, the parties agreed that the following are the facts:

"The Pillsbury Bros., named in said petition, are residents in the town of Northwood, and shoe manufacturers, and have been engaged in said business since about 1867, and during the whole time have had invested in their business, as shoe manufacturers, a capital exceeding \$10,000.

"At a legal meeting of said Northwood, holden on the 21st day of June, 1873, the following resolution was passed, in accordance with an article inserted in the warrant therefor, under Gen. Stat. chap. 49, § 9: 'Resolved, that we exempt from taxation any shoe manufactory, or any other manufactory that has been or may be established in this town, for the term of ten years,—provided there shall be invested in such manufacturing business at least \$10,000,—and is established prior to January 1st, 1875.'

"During the period of ten years fixed by said resolution, the Pillsbury Bros.' establishment and capital invested therein were not taxed by said town.

"On September 23, 1882, at a legal meeting of said town, the following vote was passed, in accordance with an article inserted in the warrant therefor, under Gen. Laws, chap. 53, § 10, that 'the town will * * * exempt from taxation any shoe manufac-

turing establishment, and the capital used in operating the same, for the term of ten years, which has been or may be established in said town, or any other manufacturing establishment that has been or may be established, provided there shall be invested in any such manufacturing business at least \$10,000, and may be established prior to January 1, 1884.'

"It was under this last vote that the exemption of the Pillsbury Bros.' establishment and capital invested therein was claimed April 1, 1884. When the vote of June 21, 1873, and that of September 23, 1882, were passed, there was in said town no shoe manufactory except that of the Pillsbury Bros., and no other was then contemplated.

"There being some question as to the sufficiency of said vote of September 23, 1882, the town, at a legally-holden meeting on July 24, 1884, under an article in the warrant therefor, passed the following vote: 'Voted to exempt from taxation, for the term of ten years, the shoe manufacturing establishment of Pillsbury Bros. in this town, and the capital used in operating the same; said manufacturing establishment and the capital used in operating the same exceed in value the sum of \$5,000.' At the time of the passage of the vote of September 23, 1882, the capital invested by the Pillsbury Bros. was much larger than that invested at the time of the passage of the vote of June 21, 1873.

"Defendants proved that after the passage of the vote of September 23, 1882, and relying upon it, the Pillsbury Bros. reorganized their business, and expended several thousand dollars that they otherwise would not; and that they continued their business in said town, relying upon said vote of 1882."

This cause came on to be heard on the foregoing agreed facts, and was argued by counsel, and thereupon all and singular the premises being seen, and by the court now here fully understood, and mature deliberation being thereupon had, it appears to this court, and it is accordingly considered and adjudged, that the said votes of the town of Northwood of September 23, 1882, and July 24, 1884, in the record mentioned, so far as they purport, or were intended, to exempt from taxation the manufacturing establishment and capital, or any property, of the said Pillsbury Bros., are repugnant to the law of said State, and so not valid; and, therefore, that the selectmen of said Northwood, as a municipal court of assessment, erred in their judicial judgment and action upon said invalid votes, and in their assessment of taxes for the year 1884, whereby taxable property of said Pillsbury Bros. was, by the said erroneous judgment and action of said court, illegally exempted from taxation; and that the said court ought to have assessed to said Pillsbury Bros. the taxable property illegally exempted as aforesaid. Whereupon, it is considered, ordered, and adjudged by the court now here that the exemption allowed and adjudged by the said court of assessment as aforesaid, and the judgment of said court of assessment, so far as it illegally exempts taxable property as aforesaid, be, and the same are hereby, reversed and annulled; that the error of exemption in said assessment be corrected; that an assessment of a tax be made to said Pillsbury Bros. on their property illegally exempted as aforesaid, at its value on the 1st day of April, 1884, and at the rate of that year; that the tax thus assessed be collected by suit or otherwise; that the foregoing orders of assessment and collection be carried into execution by the defendants' successors in the office of selectmen of said Northwood, as a municipal court of assessment; and it is by this court now here further ordered and adjudged that a special mandate do go from this court to the selectmen of said Northwood as such, and as a municipal court of assessment, to carry into execution the foregoing orders of assessment and collection; that if any judgment heretofore rendered in this cause is not compatible with this judgment, it be so modified as to conform thereto; that if any mandate, writ, or other process for the execution of any judgment in this case has issued, the same be recalled and cancelled; and that execution be issued in favor of the plaintiffs against the defendants for their taxable costs.

Now, therefore, we command you, the selectmen of said Northwood, to carry into execution the foregoing orders of assessment and collection.

Witness, Charles Doe, Esquire. C. G. Conner, the 26th day of February, 1887. Clerk.

of 1878 (Gen. Laws, chap. 57, § 10), which provides: "If the selectmen, before the expiration of the year for which a tax has been assessed, shall discover that the same has been taxed to a person not by law liable, they may, upon abatement of such tax, and upon notice to the person liable for such tax, impose the same upon the person so liable. And also, if it shall be found that any person or property shall have escaped taxation, the selectmen, upon notice to the person, shall impose a tax upon the person or property so liable." *Judgment for plaintiffs.*

Messrs. Marston & Eastman, for plaintiffs:

Under Gen. Laws, chap. 53, § 10, the town of Northwood had no authority to exempt the property of Pillsbury Bros. from taxation for a second term of ten years. To pronounce the vote of 1883 valid is in effect creating a perpetual exemption; for if the town may add a second term to the first, it may add a third, and so on *ad infinitum*. A statute that grants a perpetual exemption is unconstitutional, and therefore void.

Bill of Rights, art. 12; Const. art. 5.

In *Opinion of the Justices*, 58 N. H. 628, the statute in question is declared valid. In the same case the court, in their opinion, say that the true purpose of the law was to increase the future revenues of the State, the counties, and the towns by inducing home capital to remain, and foreign capital to come for permanent investment here, subject to taxation after the expiration of the temporary exemption. It is further said that the exemption in each case is limited to ten years, thus unmistakably indicating that the court understood that a single term of ten years was intended. This construction is reasonable, and must now, we submit, be regarded as the settled law of the State. If so, it is decisive of the principal question in the case at bar.

Statutes exempting persons or property are construed strictly; and the exemption will be denied unless so clearly granted as to be free from fair doubt. Such statutes will be construed most strongly against those claiming the exemption.

Academy v. Exeter, 58 N. H. 307; 2 Dill. Mun. Corp. § 776; *Providence Bank v. Billings*, 4 Pet. 514 (29 U. S. bk. 7, L. ed. 939); *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 (36 U. S. bk. 9, L. ed. 773); *Jefferson Bank v. Skelly*, 1 Black, 436 (66 U. S. bk. 17, L. ed. 173); *Philadelphia & W. R. R. Co. v. Maryland*, 10 How. 393 (51 U. S. bk. 13, L. ed. 468); *Trask v. Maguire*, 18 Wall. 391 (85 U. S. bk. 21, L. ed. 938).

The statute provides that "towns may, by vote, exempt from taxation, for a term not exceeding ten years, any establishment therein." The language of the statute is clear and distinct. It leads to no absurd results. It must therefore be construed in the light of its obvious meaning.

Wood v. Adams, 35 N. H. 35.

The statute declares an exemption to be a contract, and upon the ground that it is a contract it has been sustained.

Opinion of the Justices, supra; Cox Needle Co. v. Guilford, N. H. Aug. T. 1883.

N. H.

A contract must be supported by a sufficient consideration. This is elementary.

It may be argued that the advantage arising from a continuation of the business in the town affords a sufficient consideration. But the Legislature manifestly intended nothing of this sort; nor has the court, we submit, so construed it.

See *Opinion of the Justices, supra*.

The article in the warrant for the meeting in 1883, by which the town undertook to exempt something or somebody from taxation, is too general in its terms. It should have specified the particular establishment proposed, or offered by some person or persons, to be erected or put in operation.

Cox Needle Co. v. Guilford, supra.

Plaintiffs' additional brief after order of mandamus issued.

I. Upon the petition in this case the court have directed that a writ of *mandamus* should issue, thereby establishing the fact that the selectmen neglected and refused to perform their duty as set forth in the petition. Does the fact that the writ did not issue within the year (Gen. Laws, chap. 57, § 10) prevent the court from issuing the writ now?

The petition was filed within the year, and the order that the writ of *mandamus* issue should be an order *nunc pro tunc*. The writ could then issue as of a time within the year, and would be directed to the defendants of record and their successors in office, or simply to the selectmen of Northwood. The proceeding is against the selectmen in their official, not their individual, capacity.

Davis v. Bradford, 58 N. H. 480; *State v. Gates*, 22 Wis. 210; High, Ex. Leg. Rem. § 441; Wood, Mand. 139.

The order for the writ of *mandamus* could have been made within the tax year 1884-85; but if for any reason the court did not see fit to make it then, it may do so *nunc pro tunc*.

Rapalje, L. & L. Dict. 887; *Turner v. London & S. W. R. L. R.* 17 Eq. 561.

II. The object to be accomplished in this case is to collect the tax due from Pillsbury Bros., in the town of Northwood, for the year 1884. If this result cannot be attained by a writ of *mandamus*, is there any other remedy? Can the tax be collected without an assessment by the selectmen? The amount of the tax to be paid is ordinarily determined by an assessment; but neither the amount nor the obligation to pay rests upon a foundation so shallow and technical as an assessment by the selectmen.

Edes v. Boardman, 58 N. H. 587, 588; *State v. United States & C. Express Co.* 60 N. H. 251; *Morrison v. Manchester*, 58 N. H. 538; *Carpenter v. Dalton*, 58 N. H. 616; *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455.

In accordance with the doctrine laid down in these cases the constitutional duty of paying taxes is created by mutual contract, and must be regarded of the strongest obligation, based on first principles. Neither errors of law nor errors of fact, in an apportionment by the selectmen, can defeat it. Errors may be corrected; the duty remains; and its performance may in some way be enforced. The liability to pay being thus firmly established, the

amount of the Pillsburys' tax can be definitely ascertained.

Taxation is but an equal division of the public expense.

State v. United States & C. Express Co. supra.

In order to make an equal division, so far as the Pillsburys are concerned, it is only necessary to find the value of their property for the year 1884, and the average rate of the appraisal made that year by the selectmen.

Manchester Mills v. Manchester, 58 N. H. 88.

The assessors may blunder in their computation, err in judgment, or be willfully moved by prejudice in making the appraisal, but the just share of the public expense to be borne by each taxpayer remains fixed by absolute legal rules.

The liability to pay, and the amount to be paid, having been settled and determined, Laws 1879, chap. 28, § 1, provides a remedy for the collection of the tax.

In this State, to-day, legal technicalities are abolished; form is nothing; substance is everything.

Davis v. Bradford, 58 N. H. 480; *Walker v. Walker*, 68 N. H. 821, 1 New Eng. Rep. 250; *Metcalf v. Gilmore*, 59 N. H. 417; *Rutherford v. Whitcher*, 60 N. H. 110; *Webster v. Hall*, Id. 7; *Buzzell v. State*, 59 N. H. 61.

If, from lapse of time, or other cause, the ends of justice cannot now be accomplished in this case by means of the process originally adopted, the plaintiffs ought not to be compelled to bring a new action for the same cause; but it is the duty of the court to allow such amendments or change in the form of the present suit as will effect the result desired. If no sufficient remedy exists, one may be created.

Walker v. Walker, supra.

III. No objection exists to the collection of the tax now, so far as a final distribution of the money is concerned, that has not existed all the time since April 1 of the tax year 1884-85.

The want of specific direction in disposing of the money after its collection furnishes no excuse for the nonpayment of the tax. Gen. Laws, chap. 57, § 10, makes no provision for the disposition of the tax when collected.

It is said that plaintiffs' remedy was by abatement (Gen. Laws, chap. 57, § 11, 12). Suppose the fact that the property had not been taxed was not discovered until after the expiration of the nine months named in § 12. What remedy do the plaintiffs, and all the other taxpayers, then have? Clearly none. We submit, moreover, that parties cannot be excused from paying a tax because somebody did not apply in season for an abatement. The provisions of the statute relating to abatements have nothing to do with the case at bar.

Messrs. Bingham & Mitchell, for defendants:

I. The power of taxation being legislative, the method indicated by the statute must be followed in the assessment, collection, or abatement of taxes.

The Legislature has made ample provision for means to meet the public expenses, through taxation, and also to relieve those who are unjustly burdened by assessment.

The annual invoice must be taken in April. Gen. Laws, chap. 55, § 1.

The taxpayer must make return before April

15 (Id. § 3), unless prevented by accident, mistake, or misfortune. In such case he can return it by May 1 (Id. § 8).

The taxes must be assessed and the invoice returned to the clerk's office before July 1.

Gen. Laws, chap. 57, § 6.

Property omitted or wrongly taxed may be properly taxed within the year.

Id. § 10.

For good cause selectmen may abate any tax.

Id. § 11.

If the selectmen neglect or refuse, relief may be granted by the court within nine months after notice of the tax, provided the taxpayer has furnished the proper inventory.

Id. § 12.

The year within which the selectmen could impose a tax upon property which had escaped taxation has elapsed, and the selectmen are devoid of power to impose such tax now. The court cannot, by a writ of *mandamus*, create or confer such right. It can simply, by the writ, compel the performance of a pre-existing, clearly-defined official duty.

High, Ex. Leg. Rem. § 7.

If the plaintiffs had a grievance resulting from excessive taxation, they should have applied for relief in the method provided by statute,—by abatement. This was their only remedy.

The selectmen, on application, and for good cause, might do it.

Gen. Laws, chap. 57, § 11.

If the selectmen neglected or refused to abate the tax, the application might be made to the supreme court "within nine months after notice of such tax, and not afterward."

Id. § 12.

The existence of this statutory method is a bar to the remedy by *mandamus*.

High, Ex. Leg. Rem. § 16.

"And the fact that the person aggrieved has, by neglecting to pursue his statutory remedy, placed himself in such a position that he can no longer avail himself of its benefit, does not remove the case from the application of the rule, and constitutes no ground for interference by *mandamus*."

Ibid; *State v. Sheboygan County*, 29 Wis. 79; *Cooley, Tax*, 540; *Boerett's App.* 71 Pa. 216.

The party who is sought to be coerced by *mandamus* must be able to perform the act at the time the writ issues, "and it is therefore a sufficient return to an alternate *mandamus* that the respondent has no power to do the act required."

High Ex. Leg. Rem. § 14.

This extraordinary remedy is only granted or employed when there is a clear legal right to be enforced, or a duty which can and ought to be performed, and when there exists no other specific and adequate legal remedy to enforce the right or compel the performance of the duty.

Id. § 9.

It is not granted in doubtful cases, or where it would be inoperative from the incapacity of the party against whom it was directed to perform the act commanded.

Id. §§ 9, 10, 140; *Wood, Mand.* pp. 17, 19; *Burr. Tax.* pp. 379, 457; *Spiritual Athenaeum Soc. v. Selectmen of Randolph*, 1 New Eng. Rep. 680; *Lacoste v. Duffy*, 80 Am. Rep. 122; & C.

49 Tex. 767; *Beard v. Lee County*, 51 Miss. 542; *State v. Washington County*, 3 Pinney (Wis.), 552; *People v. Oldtown*, 88 Ill. 205; *State v. New Haven & N. Co.* 45 Conn. 832; *Colonial L. Assur. Co. v. Supervisors*, 24 Barb. 186; *People v. Supervisors*, 12 Barb. 217.

The case of *Spiritual Athenæum Soc. v. Seletmen of Randolph*, *supra*, is directly in point.

Doe, Ch. J., delivered the opinion of the court:

By express statute, the shoe factory of the Pillsbury Bros., located in Northwood, was taxable in that town in 1884. Gen. Laws, chaps. 53, 54. Under chap. 53, § 10, it had been exempted, by a vote of the town, for the term of ten years; and that term had expired July 31, 1885. It was decided in this case that the exemption law did not authorize the second vote of the town, continuing the exemption for another term of ten years; that the second vote was void, and no defense to this suit; that the omission of the factory in the assessment of 1884, in pursuance of the illegal vote, was error, and a violation of the public right of taxation; and that the plaintiffs were entitled to judgment for a correction of the error. *Boody v. Watson*, 63 N. H. 320, 1 New Eng. Rep. 2. They were entitled to relief in this suit when it was brought in 1884, and until April 1, 1885. The merits of the case having been decided in their favor, the only remaining question is one of remedy. The defense now is, not a denial of the adjudicated violation of the plaintiffs' legal and equitable right, nor a defect of remedy when the suit was brought, nor a mistake in the alterable form of action, nor any delay in bringing or prosecuting the suit, nor any fault or laches of the plaintiffs at any time; but an alleged failure of remedy happening ten months after the suit was brought, while the court were forming the opinion that the plaintiffs were entitled to a reversal of the exemption. The question whether their adjudicated right can now be vindicated by a judgment for the correction of the defendants' adjudicated error, or whether the remedy expired on the last day of March, 1885, brings into consideration the origin and nature of the right, and the distinction between the right and its remedy.

"All government of right originates from the people, is founded in consent. * * * When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others. * * * All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents. * * * Every member of the community has a right to be protected by it in the enjoyment of his life, liberty, and property. He is therefore bound to contribute his share in the expense of such protection." Bill of Rights, arts. 1, 8, 12. "The people inhabiting the territory formerly called the province of New Hampshire do hereby solemnly and mutually agree with each other to form themselves into a free, sovereign, and independent body politic, or State, by the name of the State of New Hampshire. The supreme legislative power within this State shall be vested in the Senate and House of Representatives." Const. arts. 1, 2.

N. H.

In the exercise of authority given by the social contract thus made as the origin and organic law of the State (*State v. United States & C. Express Co.* 60 N. H. 219, 253), the legislative agents of the community, determining by a general rule the shares of public expense which the owners of this factory, and the owners of other property, are bound to contribute, have decided what the law shall be. Other public agents decide what the tax law is, and what the facts are in a particular case, apply the law to the facts, and state the result in a tax assessment.

In determining what property was taxable, and what was exempt, the defendants acted judicially; and they are not liable, in an action for damages, for errors in their decision. *Hayes v. Hanson*, 12 N. H. 284, 289; *Perkins v. Langmaid*, 84 N. H. 315, 326; *Edes v. Boardman*, 58 N. H. 580, 584, 585, 596; *Salisbury v. Merrimack County*, 59 N. H. 359, 362; *Barnardiston v. Soume*, 6 St. Tr. 1063, 1096, 1097, 1119; *Colman v. Anderson*, 10 Mass. 105, 118, 119; *Weaver v. Devendorf*, 3 Denio, 117; *Williams v. Weaver*, 75 N. Y. 30, 38; *S. C.* 100 U. S. 547, 548 [Bk. 25, L. ed. 709]; *Strusburgh v. Mayor*, 87 N. Y. 452, 455; 15 Am. L. Rev. 502; *Cooley, Tax*, 2d ed. 786-795. In *Barhyte v. Shepherd*, 85 N. Y. 288, 250, 251, an action against assessors, for assessing the plaintiff and refusing to exempt him the court says: "The plaintiff is a resident of the town of Spencer, having in his occupancy a farm of 147 acres, and owning personal property. The assessors are not bound to know that there is any reason why this property should not be assessed with the other property of their town; or, if there may be a right of exemption, they have no means of knowing that the plaintiff would desire to claim the benefit of it. He is therefore, in the first instance, properly chargeable, on the assessment roll, with the property owned by him. He may, and in the present case he did, appear before the assessors, and claim an exemption or a reduction, on two grounds. First, he claimed an abatement from his personal property on the ground that he owed debts equal to its value, which, by another provision of the law, entitled him to such deduction. This fact he was bound to establish by oath, and subject to a cross-examination by the assessors, who, after hearing his evidence and deliberating upon it, would decide the question, and allow or disallow his claim, as the truth should require. He also claimed a deduction on the ground that he was a minister of the Gospel, and gave his own evidence on this point, and was cross-examined by the assessors. They disallowed his claim, holding, as I conclude, upon the evidence he gave them, that the calling of a minister must be exclusive, and that his occupation as a farmer during the week days prevented him from claiming the benefit of the deduction allowed to a minister. In each and all of the cases I have suggested under this statute, the action of the assessors is eminently judicial in its nature. To administer oaths, to hear evidence, to weigh its effect, to compare it with the law, and to decide the question presented, are of the essence of judicial action. To make the figures indicating a deduction, and to make the deduction itself, on the assessment roll, may be con-

ceded to be a ministerial act; but to arrive at the conclusion, by hearing and weighing evidence, judging of its credibility, and comparing the evidence with the provisions of law, that the plaintiff was entitled to a deduction, is as far from a ministerial act as can well be imagined. The defendants had jurisdiction of the subject-matter of the proceeding, and of the person of the party interested."

The defendants' immunity "does not depend at all on the grade of the office, but exclusively upon the nature of the duty." *Cooley, Torts*, 881. "It is not necessary that a magistrate or board should act formally as a court, or that they should be usually so designated or considered. If they are bound to notify and hear parties, and can only decide after weighing and considering such evidence and arguments as the parties choose to lay before them, their action is judicial." *Sanborn v. Fellows*, 22 N. H. 473, 488, 489. "The selectmen or assessors shall, on the first Monday of April in each year, give public notice of the times and places where they will be in session for the purpose * * * of hearing all parties in regard to their liability to taxation." Gen. Laws, chap. 55, § 6. In Kansas it has been held that an ascertainment of the value of property is an incident of the legislative power of taxation; that the Legislature may assess a tax upon an appraisal made by themselves; that an appraisal made by a certain board of assessors could be annulled by legislative action; that the Legislature cannot open a judicial decision and give a new trial,—the assessors' appraisal was not such a decision; that the power of determining the value of property for the purpose of taxation, being legislative, cannot be judicial. *Auditor of State v. Atchison, T. & S. F. R. R. Co.* 6 Kan. 500. The valuation made by these defendants was judicial administration of a general statute of taxation; and being judicial, it was not legislative. *Cooley, Tax*, 409, 410. "Where a tax is levied on property, not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, * * * the officers, in estimating the value, act judicially." *Hagar v. Reclamation Dist.* 111 U. S. 701, 710 [Bk. 28, L. ed. 569, 572]. "The abatement of a tax by selectmen is a judicial act." *Melvin v. Weare*, 56 N. H. 436, 439. With some possible exceptions not affecting this case, questions of abatement are questions of assessment. Judicially determined in this court on abatement appeals, they are judicially determined by the decisions appealed from. Though not entitled to jury trial (the case being one in which it "was otherwise used and practiced" before the adoption of the Constitution,—*Cocheco Mfg. Co. v. Stafford*, 51 N. H. 455, 458), persons assessed have a constitutional right to be heard, in some stage of the proceedings, on the judicial questions of liability. *Cooley, Tax*, 2d ed. 47-53, 361-366; *Edes v. Boardman*, 58 N. H. 530, 585. In some cases, the inconveniences resulting from assessors holding an exercise of the legislative power of taxation to be void are evidence of a legislative intention that the execution of tax laws and tax votes should not be suspended by assessors. *Edes v. Boardman*, 58 N. H. 580, 595; *School Dist. v.*

Carr, 63 N. H. 201. But such an intention does not alter the nature of a question of tax liability, correctly or incorrectly decided by the court of assessment.

The validity of the town's vote exempting this factory for a term of ten years was a judicial question, depending on the legal construction of chapter 53, § 10; and the defendants' construction was erroneous. The unauthorized vote did not empower them to release the factory from the share of public expense allotted to it by the Legislature. Notwithstanding their unauthorized and voidable exemption of it, and their transfer of its statutory share to the plaintiffs and other taxpayers, its liability remained undischarged, as the liability of the owners of all the farms in the town would have remained if the assessment had exempted them, and put upon the factory the share assigned by statute to the farms. The whole sum to be paid by the owners of taxable property, and the share to be paid by each, were fixed by legislative action (State and municipal), which the assessors could not annul. Many liabilities, created by statute or the common law, are ascertained on judicial inquiry, declared in judgments, and enforced by executions. A taxpayer's liability to contribute his share of the common burden, judicially ascertained by a court of special and limited jurisdiction, declared in a judgment called an assessment, and enforced by an execution called a warrant, is not created by the assessment. The Pillsburys' nonpayment of their statutory share would be a compulsory payment of that share by their neighbors, and in effect a payment to the Pillsburys, for their private use, of their neighbors' money. The Pillsburys' payment of their own share was the plaintiffs' statutory and constitutional right. *State v. United States & C. Exp. Co.* 60 N. H. 219, 231, 232. For the defendants' violation of this right, there is no remedy in an action for damages. And available remedies in an action at law for damages, on a bill in equity, and by indictment, would not have been a bar against the plaintiffs' petition for a *mandamus*. *High, Ex. Leg. Rem.* §§ 17, 18, 20, 36.

The plaintiffs' primary and substantive right is based, not on the defendants' duty of judicial assessment, or on their or our correctional duty, but on the legislative assignment to the factory of its share of the common expense incurred in the execution of the social contract. Before an action can be maintained by Northwood for the recovery of the share of the public expense due from the Pillsburys as owners of the factory, the Legislature has required the share and the payers of it to be judicially ascertained and recorded, either by the selectmen or in some proceeding for the correction of the selectmen's error. But this ascertainment of the payers and the sum to be paid, like a jury's ascertainment of the payer and the sum to be paid, in an action of assumpsit on a promise of contribution, is judicial procedure, and not the origin of contributory liability. An absolute obligation to pay money may be a debt before it is due, and before it is judicially assessed. Within the meaning of some statutes and some contracts, taxes may not be debts, either before or after assessment. *Lane County v. Oregon*, 7 Wall. 71 [74 U. S. bk. 19, L. ed. 101];

Meriwether v. Garrett, 102 U. S. 472, 518, 531 [Bk. 26, L. ed. 197, 204, 210]; *Cooley*, Tax. 2d ed. 15. Within the meaning of other statutes and other contracts, they may be debts before assessment as well as afterwards. Under statutes enacting that certain duties shall be levied, collected, and paid on imported goods, the duties are personal debts of the importers, recoverable by the government in common-law actions, without previous assessment. *United States v. Lyman*, 1 Mason, 482; *Meredith v. United States*, 18 Pet. 486, 493, 494 [38 U. S. bk. 10, L. ed. 258, 262]. Five per cent taxes laid by statute upon the undistributed earnings of savings banks are debts recoverable by the government in common-law actions, without previous assessment. *Dollar Sav. Bank v. United States*, 19 Wall. 227, 240 [86 U. S. bk. 22, L. ed. 80]. A debt due from plaintiff to defendant cannot be set off unless a right of action existed thereon at the commencement of the plaintiff's action. Gen. Laws, chap. 227, § 8. "A right of action," in this provision, was held by a majority of the court, in *Hibbard v. Clark*, 56 N. H. 155, to mean a right to commence and maintain an action; and upon this construction, in an action against a town, a tax due to the defendant from the plaintiff could not be allowed in set-off if it could not be collected by suit. The statute making taxes collectible by suit, like other debts (Laws 1881, chap. 28; *Dana v. Colby*, 63 N. H. 169, 171), has removed the ground on which *Hibbard v. Clark* was decided; and whether any other ground remains (Dill. Mun. Corp. §§ 576, 577; *Meriwether v. Garrett*, 102 U. S. 472, 501, 518, 518, 525, 526 [Bk. 26, L. ed. 197]; *Galling v. Carteret County Comrs.* 92 N. C. 536) is a question that need not now be considered. In whatever sense and for whatever purpose a tax, collectible by suit, with or without previous assessment, is or is not a debt (Dill. Mun. Corp. §§ 815-817; Smith (N. H.), 523), the public right to the factory's constitutional and statutory share of public expense is not to be confounded with the incidental and remedial right of having that share judicially assessed by the selectmen, or by another court effectually reversing the selectmen's erroneous judgment of exemption.

For some errors of assessment, abatement is an appropriate relief; but it is not the only relief in all cases. The nonassessment of the factory cannot be corrected by an abatement of an excessive assessment of the plaintiffs. They were entitled to such process as would carry into effect the expressed will of the Legislature that made the Pillsburys liable, as owners of the factory, for a proportional share of the common burden. The plaintiffs were entitled to this, not by the Act of 1878, chap. 68 (Gen. Laws, chap. 57, § 10), which authorized the defendants and their successors to correct the defendants' error before the expiration of the tax year, but by the statutory division of public expense among the taxpayers of Northwood, including the Pillsburys and the plaintiffs. Under this division of burden there were obligations and rights. The Pillsburys' liability and the plaintiffs' correlative right, not being derived from the selectmen's judicial power of assessment and correction, were not extinguished by the nonuser of those powers.

N. H.

The question of remedy is whether the plaintiffs have lost all judicial means of maintaining their surviving legal right, and enforcing the Pillsburys' surviving legal obligation. The defendants' contention is that, if they had not been authorized to reverse their judgment, it could not have been reversed by this court, and there would have been no specific or adequate remedy for their violation of the statute and the Constitution.

"In every well-constituted government, the highest judicial authority must necessarily have a supervisory power over all inferior or subordinate tribunals." *Strong's Case*, 20 Pick. 484, 495; *Atty-Gen. v. Boston*, 123 Mass. 460, 472; *Hall v. Selectmen*, 39 N. H. 511, 517. "The necessity of a superintending power to revise the proceedings and correct the irregularities" of such tribunals "cannot be questioned." *Lynde v. Noble*, 20 Johns. 80, 83; *Lawton v. Comrs.* 2 Cal. 179, 182. From this necessity arises the common-law jurisdiction of general superintendence. It is not a branch of chancery. *Lane v. Morrill*, 51 N. H. 422, 423. By the English common law, the Court of King's Bench has jurisdiction to "correct all and all manner of errors in fact and in law, of all the judges and justices of the realm, in their judgments, process, and proceeding in courts of record," and not only "errors in judicial proceeding, but other errors and misdemeanors extrajudicial, tending to the breach of the peace, or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that this shall be reformed or punished in one court or other by due course of law. As, if any person be committed to prison, this court, upon motion, ought to grant an *habeas corpus*, and, upon return of the cause, do justice and relieve the party wronged. And this may be done though the party grieved hath no privilege in this court. It granteth prohibitions to courts temporal and ecclesiastical, to keep them within their proper jurisdiction. Also this court may bail any person for any offense whatsoever. And if a freeman in city, burgh, or town corporate be disfranchised, albeit he hath no privilege in this court, yet this court may relieve the party." 4 Inst. 71. "The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy." 3 Bl. Com. 42. "It is the peculiar business of the Court of King's Bench to superintend all inferior tribunals." 3 Bl. Com. 110. "The Court of King's Bench, having a superintendency over all inferior courts and magistrates, will oblige them to execute that justice which the party is entitled to, and which they are enjoined by law to do." Bac. Abr. *Mandamus*, D. "Wherever any new jurisdiction is erected, * * * they are subject to the inspections of this court by writ of error, or by *certiorari* and *mandamus*." *Cardiffs Bridge Case*, 1 Salk. 148; *S. C.* 1 Ld. Raym. 580. "No court can be in-

tended exempt from the superintendency of the King in this court of B. R. It is a consequence of every inferior jurisdiction of record that their proceedings be removable into this court to inspect the record, and see whether they keep themselves within the limits of their jurisdiction." *Groenewelt v. Burwell*, 1 Salk. 144. "The statute does not give authority to this court to grant a *certiorari*, but it is by the common law that this court will examine if other courts exceed their jurisdictions." *S. C. 1* Ld. Raym. 454, 469; *Cooke's Petition*, 15 Pick. 284, 286. Exceeding their jurisdiction is one of many errors that are subject to correction. Their illegal proceedings in a case and upon a question of which they have jurisdiction are reversible. On a writ of error the general question is not whether the bounds of jurisdiction have been passed, but whether there is error of law. "In cases of absolute necessity—as where the inferior court refuses to award execution—this court will grant a *certiorari* after judgment, for the sake of doing justice between the parties." Tidd, Pr. 3d ed. 381. Omission is as correctible as commission. *Ballou v. Smith*, 29 N. H. 530; *Johnson v. Randall*, 7 Mass. 340, 341; *Hill v. Goodwin*, 56 N. H. 441.

In the absence of statutory regulation, in this country, the general judicial superintendence is vested by the common law in the highest court of general common-law jurisdiction. *Lawton v. Comrs.* 2 Cal. 179, 182; *Lynde v. Noble*, 20 Johns. 80, 82; *Le Roy v. Mayor*, 20 Johns. 430, 438; *Barrell v. Benjamin*, 15 Mass. 354, 357. By the New Hampshire Judiciary Act of 1699, § 4, this court had "cognizance of all pleas and causes, as well civil (not under the value of £20, except where title of land is concerned) as criminal, as fully and amply, to all intents and purposes whatsoever, as the Court of King's Bench, Common Pleas, and Exchequer within His Majesty's kingdom of England have or ought to have;" and this jurisdiction has been continued to the present time, without any abridgement that affects the present case. N. H. Laws, ed. 1771, p. 6, § 4; Acts 1771, 1776, 1791, 1813, 1816, 1829, 1832, 1855, 1874, 1876; *Cocheo R. v. Farrington*, 26 N. H. 438, 437-442; *State v. Albee*, 61 N. H. 423, 426, 427. In 1842, the Legislature affirmed the common-law supervision, declaring that this court has "the general superintendence of all courts of inferior jurisdiction, for the prevention and correction of errors and abuses, where the laws have not expressly provided a remedy," and "authority to issue writs of error, *certiorari*, *mandamus*, prohibition * * * *quo warranto*, * * * *habeas corpus*, and all other writs and processes to courts of inferior jurisdiction, to corporations, and individuals, for the furtherance of justice, and the due administration of laws." Rev. Stat. chap. 171, §§ 3, 4. The meaning of this re-enactment of common law is not altered by its subsequent condensation. Gen. Stat. chap. 189, § 1; Gen. Laws, chap. 208, § 1; *Jewell v. Holderness*, 41 N. H. 161, 163. Fully affirming the general superintendence of lower courts, the Legislature left the bounds of the jurisdiction to be determined by the reasons of natural justice and practical necessity on which it rests in the common law of this State. *Wash-*

burn v. Phillips, 2 Met. 296, 298; *Cole v. Lake Co.* 54 N. H. 242, 236. One object to be accomplished is the execution of the laws, when they have not provided specific modes of preventing and correcting the errors and abuses of courts of inferior jurisdiction. *Mendon v. County Comrs.* 2 Allen, 463, 465; *Connecticut R. R. Co. v. County Comrs.* 127 Mass. 50, 56, 59. The illegal exemption of the Pillsbury's factory, by one of those courts acting upon a judicial misconstruction of the exemption law, is a typical case of error within the remedial purpose of our common law and the letter and reason of the statute, and is correctible by the general power of judicial revision, unless the wrong is made incurable by some exceptional and latent defect in the law of remedy.

However much the operation of the correctional principle may have been obstructed and narrowed, in other jurisdictions, by inadequacy of remedy, the plaintiffs' violated right of assessment does not encounter an impediment of that kind. The writs named in the statute are not restricted to the uses that have been made of them. They may be modified and adapted to the wants of particular cases "on grounds of convenience and expediency." *Hayward v. Bath*, 85 N. H. 514, 524. By a principle of our common law, for ascertaining, establishing, and vindicating legal rights, such procedure is to be invented and used as justice and convenience require. *Walker v. Walker*, 63 N. H. 321, 1 New Eng. Rep. 250; *Owen v. Weston*, 63 N. H. 599, 2 New Eng. Rep. 717. "The court may * * * prescribe forms of proceedings in all cases not provided for." Gen. Laws, chap. 208, § 6. The statutory authorization of certain writs "and all other writs and processes" is a confirmation of the common-law power of issuing whatever process is necessary "for the furtherance of justice and the due administration of the laws." Until a change is made in the established common-law procedure of this State, "all other writs and processes" will include the best that can be invented. It being settled that the plaintiffs were entitled in this suit, in 1884, and in the first three months of 1885, to an enforcement of the Pillsbury's liability, by a correction of the defendants' judicial error, a demonstration or decision that a writ of *mandamus* limited by precedent is not the remedy would merely show the duty of issuing some other writ, or a *mandamus* not limited by precedent, or adopting some other mode of defending a right that is as easily maintained as if such forms of action as *mandamus*, *certiorari*, and writ of error had not been devised. *Ella v. Goss*, 20 N. H. 52, 53; *Same v. Same*, 20 N. H. 53, 55-57.

Every writ issuing out of the office of the clerk of this court is a written command, given in the name of and by the State, requiring some act to be done or omitted by the person to whom it is addressed. Const. art. 87. A writ containing an order to enforce the Pillsbury's liability by assessment is an appropriate remedy in this case; and it is not material whether the words "of *mandamus*" are used or omitted in the petition, judgment, and final process. Neither is it necessary to inquire whether any command that can be issued is a common-law or a statutory *mandamus*, or one

of the "other writs" authorized, but not named, by the statute. The efficacy of process does not depend upon the record's giving it a technical name in a dead or a living language. There is no law for turning the plaintiffs out of court on a question of terminology.

The distinction between substantive rights and their common-law remedies recovered its original importance when rights were liberated from the oppressive yoke of remedial form, which materially confounded the distinction and inculcated false ideas of law. The question of form of action is not considered when it is of no practical consequence, and time spent upon it would be wasted. *Peaslee v. Dudley*, 68 N. H. 220. No statute of this State forbids the correction of errors of lower courts by writ of *certiorari* or writ of *mandamus*, in causes which proceed according to the course of the common law, or by writ of error, in those which proceed otherwise. No statute of this State provides that the selection of a common-law writ for this work shall be governed by the rank of the tribunal in whose proceedings error is alleged, or by the technical test of its being a court of record; that an actual or imaginary removal of a record or case from the lower court to the higher is necessary on error and *certiorari*, and not necessary on *mandamus*; that a good judgment on the merits can be rendered in place of a bad one, when the latter is reversed on error, and not when the proceedings are quashed on *certiorari*; that the power of one court to correct an error of another depends upon the correctional power, or the continued existence of the latter, when the form of action is called writ of *mandamus*, but not when it is called writ of error, or writ of *certiorari*; or that either of these writs is necessary in any case of correction by the common-law power of superintendence. In this case, such technicalities are useless, and no time is to be wasted upon the inconvenient peculiarities of writs that cannot suppress or obstruct the best inventible procedure. A petition or motion to bring an action forward, and reverse or modify a judgment rendered at the trial term of this court, is an ample, simple, and convenient remedy; and for that reason a writ of error does not lie. *Abbott v. Renaud*, 64 N. H. 89, 2 New Eng. Rep. 869. For a similar reason, a judgment of a lower court that is reversible here on a common-law writ may be reversed here on a petition. "In any case brought in any court, process may be served and notice given by duly-attested copy." Laws 1883, chap. 22. Cumbersome machinery for bringing up the record of the lower court is unnecessary. *Ableman v. Booth*, 21 How. 506, 511, 512, 514, 522, 526 [2 U. S. bk. 16, L. ed. 169, 171, 175, 176]. The record can be proved and found, with the other facts of the case, at the trial term, on a petition as well as in an action of debt or a writ of entry. *Ellis v. Goss*, 20 N. H. 52; *Same v. Same*, 20 N. H. 53. A statement of the error as the ground of complaint and cause of action is required in the petition by the essential rules of common-law pleading, for the ascertainment of the precise point in controversy, and the production of distinct issues of law and fact. On a sufficient petition the question is whether there is

an error correctible by the superintending power, and not whether it was committed by a court of record, or whether it is correctible on writ of error, writ of false judgment, *certiorari*, *mandamus*, *audita querela*, or prohibition. The judgment rendered on the issues presented by the petition and other pleading is the conclusive paper; and whether any writ that may be needed for its enforcement is called a mandate, *mandamus*, or other appropriate name descriptive of final process, is not material.

The plaintiffs' petition, setting forth the facts that entitled them to the specific remedy of an assessment of the factory, concludes with a prayer for an order upon the defendants to make the assessment, for a writ of *mandamus*, and for general relief. A *mandamus* was properly asked. Upon the narrowest precedents, and the most technical definitions, it was the plaintiffs' remedy when they filed their petition, June 3, 1884, and during the subsequent months of that year, and the first three months of the next year. In March, 1885, the writ could have been issued to the defendants' successors, without a prayer to that effect, and without an amendment of the petition joining them as defendants (*School Dist. v. Carr*, 68 N. H. 201, 206); and an amendment was no more necessary in April than in March. The prayer for special and general relief was a sufficient call for a correction of the error by any necessary exercise of the superintending power at the December Term, 1884, or afterwards.

When a person assessed as a taxpayer of a school district seeks an abatement, claiming that he has been set off to another district, his claim may be more properly tried in a suit brought by him in which he will be bound by the judgment than on a petition prosecuted for his benefit by the former district. *School Dist. v. Selectmen*, 68 N. H. 277. The questions whether this suit should have been brought in the name of the State or the attorney-general (*Hill v. Goodwin*, 56 N. H. 441, 453; *Ballou v. Smith*, 29 N. H. 530; *Clark v. Nichols*, 52 N. H. 298; *Union P. R. R. Co. v. Hall*, 91 U. S. 343, 354 [Bk. 23, L. ed. 428, 432]; *Pumphrey v. Mayor*, 47 Md. 145; *People v. Halsey*, 37 N. Y. 344, 347; *Wellington's Petition*, 16 Pick. 87, 105; *Harrington v. County Comrs.* 22 Pick. 263; *Dodge v. County Comrs.* 3 Met. 380; *Pearsons v. Ranlett*, 110 Mass. 118, 126; *Gilman v. Bassett*, 33 Conn. 298, 305; *Lyon v. Rice*, 41 Conn. 245, 250; *New Haven, M. & W. R. R. v. Chatham*, 42 Conn. 465; High Ex. Leg. Rem. §§ 430-439); whether the Pillsburys, being defendants in interest, should have had notice (*Rea v. Barker*, 3 Burr. 1265, 1269; *Commonwealth v. Peters*, 8 Mass. 239; *Kent v. County Comrs.* 10 Pick. 521; *Worcester & N. R. Co. v. R. R. Comrs.* 118 Mass. 561, 563, 564); whether they should have been joined as defendants or been made sole defendants (High, Ex. Leg. Rem. §§ 440-447); and whether the petition could have been joined with an appeal for an abatement,—have not been raised by either party. If an objection on the ground of a want of proper parties had been seasonably presented, and been found to be valid, it could have been obviated by amendment. *Hill v. Goodwin*, 56 N. H. 441, 453; *Owen v. Weston*, 68 N. H. 599, 604, 2 New Eng.

Rep. 717. The defendants in interest have not made an objection which would not help them if it were sustained. The case has not been opened for the discussion of any point which they could have raised when the suit was brought, and which they did not seasonably present before the reported decision was made. The question whether the present board of selectmen should be made defendants is the only question of proper parties that could be raised upon anything that has happened since the suit was brought; and that question was settled in *School Dist. v. Carr*, 63 N. H. 201, 206.

The amount in controversy is not too small for the constitutional jurisdiction of this court. On appeal we try personal common-law actions in which the legal right involved, as well as the amount of damages demanded, or the value of property claimed, is nominal; and for such suits, our jurisdiction may be made original, as it is in real actions of equal insignificance. *Stevens v. Chase*, 61 N. H. 840. The maxim that the law does not concern itself about trifles is not a bar to an action brought, as this was, for the vindication of a violated legal right. No objection having been made to the institution and prosecution, in the plaintiffs' names, of the action for the maintenance of the public right, the petition stands as well as if the objection had been made, and had been obviated by an amendment making the State plaintiff of record. *Hill v. Goodwin*, 56 N. H. 441, 453. The public right asserted in the petition, and adjudicated in the former and the present decision, is not a trifle in fact or in contemplation of law. The question whether the wrongfully-exempted property should be appraised at \$40,000, or at \$40,004, would be one which the law would not require the parties to settle by protracted and expensive litigation. *Manchester Mills v. Manchester*, 58 N. H. 38, 39. But the questions whether the exemption in the court below was illegal, and whether a legal exemption was effected by the continuance of the case for consideration in this court, are not of a trivial character; and the public right in controversy includes a substantial sum of money. If there were a discretionary power to render judgment against the plaintiffs, it would not be exercised in favor of the substantial inequality of illegal taxation, resulting from a substantial and illegal exemption effected in this court in a mode that would cast undesired reproach on the law.

The Constitution does not provide that judicial duties of tax assessment shall not be imposed upon the highest judicial tribunal. On appeal, for relief by abatement, all questions of assessment can be brought hither from the municipal and State boards. Gen. Laws chap. 57, § 12; chap. 61, § 9; *Edes v. Boardman*, 58 N. H. 580, 584, 596. "There is a uniformity of procedure conducive, and perhaps necessary, to the operation of the principle of equality. On appeals from municipal and State assessors, the facts are found; upon the facts, the law is decided and reported; the assessments are equalized by a uniform rule; and the taxpayer, the Legislature, and the public have convenient means of knowing what are the decisions of the separated questions of law and fact, and what defects call for alterations of the law. Under this system of procedure, we have both

parties—the taxpayer and the taxpayer—availing themselves of the right to be heard; and the result is a thorough public investigation of all questions of law and fact." *Boston, C. & M. R. R. v. State*, 60 N. H. 87, 94, 95. "The questions of liability and amount are questions of indebtedness, and are of a judicial nature. The decision of those questions, upon the existing law, with or without notice, is essentially an exercise of a judicial faculty. And when they are decided after notice and an opportunity for both parties to be heard, and with a power of carrying the decision into execution, the proceeding is not constitutionally excluded from the judicial jurisdiction." *Edes v. Boardman*, 58 N. H. 580, 585.

In one class of tax cases, our jurisdiction of the questions of liability and amount has been original. From 1843 to 1878, the statute required the railroad tax to be assessed by the justices of this court. Rev. Stat. chap. 89, § 4; Laws 1843, chap. 34, §§ 3, 4; Gen. Stat. chap. 57, §§ 1-6. The obligatory force of this law has not been an open question since the judicial character of the assessment has been fully admitted. It was decided in 1866 that the wood and lumber of a railroad company, kept for immediate use on their road, could not be taxed by selectmen, because it was a part of the railroad property assessed by this court. "In determining the value (of the capital stock), the entire railroad, including the franchise, the track, land, buildings, and fixtures, and also the rolling-stock, tools, and whatever is necessary to the complete equipment of the road, should be taken into the estimate; and among them must be included, we think, the fuel and timber provided for immediate use, * * * Such wood and timber must enter into, and be included in, the value of the stock, and must, therefore, in that form, be taxed as part of the railroad. Such is the settled practice of the justices of this court in assessing the railroads. * * * The wood and lumber provided by railroads for present use are already taxed as part of the railroads, and if properly so taxed, it must be decisive of the question before us. Upon the point whether these materials are properly so taxed, the long and settled practice of the court might well be considered as conclusive." *Fitchburg R. R. v. Prescott*, 47 N. H. 62, 67. Whatever doubt or opinion may have been entertained by any or all of the judges before the judicial nature of the work was seen and acknowledged, the record shows that, for at least eighteen years,—the latter half of the period during which the railroad tax was assessed by us and our predecessors,—the assessors understood they were acting in the official capacity of justices of the court. But the constitutionality of a judicial correction of a judicial error of tax assessment need not be supported by the authority of precedent until some argument is advanced against it upon legal principle. Whether our jurisdiction of cases of judicial assessment shall be original, appellate, or superintending is a legislative question. If the objection that no power can be conveyed by the old writ of *mandamus* were not met by the plenitude of new and adequate process, and could not be otherwise answered or obviated, a superintending power of corrective assessment that could not be conveyed

would necessarily be exercised without conveyance. Under an Iowa statute empowering the court to direct that an act commanded by a writ of *mandamus* should be done by the plaintiff or some other person appointed by the court, the Federal court ordered its marshal to satisfy a judgment that had been rendered against a county, out of a county tax to be by him assessed and collected. *Supervisors v. Rogers*, 7 Wall. 175 [74 U. S. bk. 19, L. ed. 162]. Broader power is given by our statute in suits for the reversal of illegal exemptions, and the correction of other errors of inferior courts.

All process necessary for the "general superintendence," "furtherance of justice, and the due administration of the laws," is authorized in comprehensive terms, with no express limitation of form, substance, time, or method. No other limitations can be implied than those of common-law remedies; and in the common law of this State there is no remedial restriction that can cut off the public right of taxation asserted by the plaintiffs in this case. In *Supervisors v. Rogers*, *supra*, the power of assessment and collection could not have been exercised by the marshal without the order of the court. The same power can be exercised, under the order of a court having "general superintendence of all courts of inferior jurisdiction, to prevent and correct error and abuses," by the best process that can be invented. If the best inventible procedure were insufficient, the difficulty could not be overcome by further legislation, or any human effort. Whether a grant be contractual, testamentary, statutory, or common-law, it conveys the right and powers without which it would be of no effect, or the means reasonably necessary for the enjoyment of the granted property or right, the exercise of the granted power, and the accomplishment of the object of the grant. *Burke v. Concord R. R.* 61 N. H. 160, 238, 237, 244. There is authority to do whatever is necessary to be done to accomplish the purpose of the superintendence of lower courts, "for the prevention and correction of errors and abuses, where the laws have not expressly provided a remedy." The duty of correction being imposed by law, everything requisite to attain the end is implied. *Hollamb's Case*, 5 Coke, 115; 1 Kent. Com. 464; Broom, —Leg. Max. 866; Sedg. Stat. & Const. L. 2d. ed. 74; Potter's Dwar. Stat. 123; Cooley, Const. Lim. 63; Story, Const. § 430; 2 Inst. 306; 12 Rep. 130, 131; *Stief v. Hart*, 1 N. Y. 20, 28, 30. The revisory jurisdiction is a branch of governmental power, and not a department of advice. Its writs and other instruments of revision did not create it, and do not control it. It is not bounded by the precedents of *mandamus*, and is not restricted by the inability of that writ, operating according to precedent, to confer power upon those to whom it is addressed. An assessment is authorized by the law that imposes upon this court the duty of causing the error of exemption to be corrected. A grant of a way of necessity is implied by the rule that whoever grants a thing is understood also to grant that without which the grant itself would be of no effect. Washb. Easem. 31. By the same common-law principle, the sheriff, in the execution of a writ, is armed with power of the county. *Miller v. Knox*, 4 Bing. N. Cas. 574, N. H.

582, 583. Municipal capacity to contract debts or execute public works includes an implied power to assess and collect taxes; and their assessment and collection may be enforced by judicial process. *United States v. New Orleans*, 98 U. S. 381 [Bk. 25, L. ed. 225]; Dill. Mun. Corp. § 741. When a statute delegating the imposition of local taxes is silent respecting the method of collecting them, authority to collect by suit is implied from the necessity of procedure for exercising the power expressly granted. Dill. Mun. Corp. § 818. By fair implication, the union of courts of law and chancery prescribes whatever new proceedings are needed to give due effect to the union. *Metcalf v. Gilmore*, 69 N. H. 417, 438. When the law commands a thing to be done, it puts in requisition the means of executing its command. From tribunals charged with the correction of judicial errors, indispensable process is not withheld. Correctional authority to reverse a tax exemption that can be reversed only by a tax assessment is authority to make the assessment, or cause it to be made.

The Pillsburys were entitled, in the court below, to an assessment subject to the superintending correction of illegal exemptions. The exemption was illegal; and under a superintending judgment for its reversal, for an assessment of a tax on their wrongfully-exempted property, at its value on the 1st day of April, 1884, and at the rate of that year, and for the collection of the tax by suit or otherwise, they will contribute that property's share of the common burden of that year, in exact compliance with the 12th and 28th articles of the Bill of Rights, and every constitutional, statutory, and common-law provision relating to the subject. The assessment which the law commands to be now made by an exercise of the correctional jurisdiction of this court, will follow the law's prescribed course as rigorously as if it had been correctly made in the lower court of original jurisdiction, without the intervention of the superintending power. If the court below had not erred, the assessing judgment would have been rendered in strict compliance with the statute establishing the correctional duty of that court. It will now be rendered in strict compliance with the statute of superintendence establishing the correctional duty of this court. The fact that the Legislature has seen fit to lay down the duties of the two courts in different chapters does not authorize this court to refrain from that strict compliance with the law which the plaintiffs ask, and which the defendants in interest are endeavoring to prevent.

The statute dividing public expense, assigning to this factory its due share, and imposing upon the selectmen the judicial duty of assessment, and the duty of issuing process or instituting suit for collection, is all the exercise of the legislative power of taxation that is needed in this case. The selectmen's exemption of the factory was a judicial error of the same legal character as their exemption of all the property and all the persons they were bound to assess. The duty of correcting such an error, imposed by the common law upon this court when it was established in the seventeenth century, has not been annulled. If there has been a time when this court or the

King's Bench would have refused to correct such an error, on the ground that the lower court could not correct it, the misrule would have been an instance of judicial legislation nullifying the common-law principle which provides the remedial procedure required by justice and convenience for the ascertainment and vindication of legal rights. We are not entrusted with the power of infringing substantive rights by withholding the necessary incident and appurtenant right of complete remedy; the common-law duty of inventing necessary forms of action, pleading, trial, judgment, and initial, intermediate, and final process, is as imperative now as it was during the ages in which its performance produced all the common-law procedure that is obsolete, and all that is now in use; the precedent to be followed is the performance of this duty, and not a violation of it. *Davis v. Bradford*, 58 N. H. 476, 480; *Metcalf v. Gilmore*, 59 N. H. 417, 433-435; *Rutherford v. Whitcher*, 60 N. H. 110, 112; *Burke v. Concord R. R.* 61 N. H. 160, 241, 242; *Fletcher v. Chamberlain*, 61 N. H. 438, 496; *Walker v. Walker*, 63 N. H. 321, 326, 1 New Eng. Rep. 250; *Owen v. Weston*, 63 N. H. 599, 600, 2 New Eng. Rep. 717. Without overruling this doctrine, a judgment that would leave the exemption in force cannot be rendered against the adjudicated right of the plaintiffs; and the settled doctrine cannot be overruled without holding that all the common-law remedies and procedures of a thousand years are judicial usurpations of law-making powers.

The alleged want of reversing power in this court is an alleged infirmity of a writ of *mandamus*. We need not inquire whether there are jurisdictions in which an exempting violation of statute is upheld by the defect of ancient process now brought to the defense of this wrong. When New Hampshire law of person, property, and equal taxation is arranged under such heads as *assumpsit*, *mandamus*, and other insufficient forms of action, the inverted classification does not subject supreme rights to the domination of servient and incompetent remedies of judicial origin. The statute provides for the correction of the error of the lower court. The present position of the defendants in interest is that the error of the nominal defendants cannot be corrected because *mandamus* does not convey corrective power. This is in effect a claim that the court should disobey the law because, among the writs constructed by them and their predecessors, there is none adapted to this case. It is, at most, an overruled objection to the introduction of a new form of action. *Walker v. Walker*, 63 N. H. 321, 1 New Eng. Rep. 250. If such objection had prevailed in former times, there would have been no common-law procedure. But no new form of action is necessary. A suit for an exercise of the superintending power can be brought by petition in a case "for which no remedy exists by any formal writ, and for which it may be said that no express remedy is provided by law." *Ella v. Goss*, 20 N. H. 52, 53; *Same v. Same*, 20 N. H. 53, 55, 56. Such was the law in 1849; and since that time there has been no enactment of the proposition that judges can curtail legal rights by framing inadequate remedies for them. In behalf of a taxpayer endeavoring to

throw upon others his share of the common burden, the law was formerly perverted by strained and quibbling interpretation, a strict observance of frivolous formality, and a disregard of substance and principle. Since the discontinuance of that judicial usurpation in this State, tax cases have been no exception to the rule that the correctional duty is not suspended by the judicial invention of defective process. Cases in which the only question was whether there was error are not authorities on the question of corrective power. To refuse to reverse this illegal exemption would be an exercise of a power of sacrificing legal rights to remedial infirmities invented by a court. This arbitrary and aggressive power, capable of nothing but wrong, is the one that does not exist.

An error of a lower court, not correctible where it occurred, might not be within some peculiar superintending jurisdiction derived from or dependent upon the corrective power of the lower court. But it is not the general rule that the superior jurisdiction is derived from, or depends upon, the inferior, or that the power of the latter to correct its errors is a test of their curability. When the superintending court, reversing a judgment of the lower, proceeds to render, not such a judgment as the latter can give at the time of reversal, but such as ought to have been given, and to try the case,—if a new trial is necessary to ascertain what the judgment should be (*Hillsborough v. Deering*, 4 N. H. 86, 96; *Holman v. Kingsbury*, 4 N. H. 104, 106; *Davies v. Pierce*, 2 Durf. 125).—the reversing power and continued existence of the lower court are not essential to the correction of its error. The corrective power of superintendence depends on no irrelevant conditions of that kind. In many cases this power is sufficiently exercised by reversing or quashing illegal proceedings, because new proceedings may be instituted. The court of general superintendence is not always required to do everything that should have been done in the lower court. In the present case, an assessment of the factory is as necessary as a new trial and a new judgment can ever be when a judgment is reversed. The ample remedy to which the plaintiffs are as much entitled now as when they brought this suit is not an inoperative reversal of the exemption that will leave it in full force. Anything less than an enforceable assessment will fail to answer the purpose for which the law has established the court for the correction of errors.

The exemption of the factory could have been reversed here March 31, 1835, not because the court had invented a writ of *mandamus* for the work of that day, but because the exemption was illegal, and at the common law, affirmed by statute, the illegal exemption was an error of a court of inferior jurisdiction, reversible in the court of correction. Why could not the exemption be reversed in the same court the next day? The only answer that has been suggested is that it could not then be reversed by the voluntary action of the court below, and a writ of *mandamus* had been contrived which would compel them to exercise their reversing power on the last day of March, but would not convey a reversing power to them the next day. The alleged inadequacy of *mandamus*

for the business of April 1 does not exclude the use of adequate process. If the statute which affirms the common-law power of superintendence had named a writ of error as the only writ to be used in the correction of error, the exemption of the factory could have been reversed, on such a writ, on the last day of March, 1885, or the next day, or at this term. Using that writ, the court could render the judgment of assessment that ought to have been rendered in the court below; and instead of being restricted to the use of one writ, the corrective power is left free to use any convenient, appropriate, and adequate process that has been or can be invented. The superintending power of reversal existed in April, and there was no more difficulty in devising a method of exercising it than in drawing a reversing *mandamus* in the previous month. The statute is that the supreme court shall "have general superintendence of all courts of inferior jurisdiction, to prevent and correct errors and abuses." Gen. Laws, chap. 208, § 1. The Legislature could have added this proviso: "But no error of a court of inferior jurisdiction shall be corrected by the superintending power unless the inferior court is in existence, and can making the correction without the intervention of that power, when the supreme court, after necessary hearing, investigation, and deliberation, is ready to render a correctional judgment." This extensive repeal of common-law remedies would have deprived many common-law, statutory, and constitutional rights of needed protection. Had the Legislature inserted such a proviso, questions would have arisen that need not be considered under the statute in its present form. Under such a proviso, a plea in bar of the further maintenance of an action for an exercise of the superintending power, alleging that, since the commencement of the suit, the court below had been abolished, or had become unable to make a voluntary correction of its error, would stand on ground that does not now exist. Under the statute as it is, such a plea in this case would give a superfluous reason for the further maintenance of the action.

When an erroneous public or corporate record, or official paper, is amended by order of this court on motion, it is not material whether the officer who committed the error has power to correct it voluntarily, or whether he is in or out of office. "The right to have the amendment made cannot depend upon the question whether the officer has again been elected." *Gibson v. Bailey*, 9 N. H. 168, 176. The court decides what the error is, and what amendment will be true. The order sets out in terms the precise alteration to be made. The officer, acting as scrivener without responsibility, decides nothing, and discharges no duty but obedience. Such amendments are made by the corrective power of superior courts of general jurisdiction. *Pierce v. Richardson*, 37 N. H. 306, 311; *Flanders v. Atkinson*, 18 N. H. 167. "Unless some statute confers upon them the authority, it is not very clear," says Judge Cooley, "whence they derive it, nor how a township officer, or one who has been such, can in this collateral way have authority conferred upon him to do anything which, without such authorization, would be an illegal N. H.

act." Cooley, Tax. 2d ed. 320. Our common-law principle of the inviolability of legal right requires specific and adequate remedies and convenient procedure. The correction of errors, on motion, of this class of cases, illustrates the breadth of the principle. The legal right and its specific remedy depend no more upon the life of the officer than upon his reelection. In this State his successor may be employed as scrivener. The amendatory relief, whether sought by motion or *mandamus*, is given on the same legal ground, and by the same authority. The clerical service of the writer or signer of an erroneous record or contract is not necessary for its judicial correction. In a suit for the reformation of a deed of New Hampshire land, the defendant would not deprive the plaintiff of his specific remedy by eluding final process, or submitting to imprisonment for contempt. If this factory had been wrongfully omitted in a conveyance made by the Pillsburys to the plaintiffs, it could be inserted by an amendment, without new signatures of the grantors. The alteration of the deed, like the alteration of a highway, could be established by a judgment. The Act of 1878 neither gave nor took away the plaintiffs' right of equal taxation, or their remedy in this action. Neither in terms nor by implication did it introduce a ground for holding that their right was not violated by the exemption; that the exemption was not reversible in this suit; that a judgment of reversal became impossible during the pendency of the suit in which they were entitled to it; or that this court is disabled to issue process for the execution of a judgment which it has power to render. If it is an enabling Act, it extends to the end of the tax year, the time in which the selectmen, of their own motion, can correct certain errors by amendment. *Harwood v. N. Brookfield*, 130 Mass. 561, 564; *Noyes v. Hale*, 137 Mass. 266, 271. If it is a statute of limitation merely, it restricts their time of voluntary action. Which ever it is, the time it prescribes for their corrective procedure may be claimed to be a measure of the reasonable time within which an aggrieved party should seek the ancient remedy attainable in the common-law and statutory jurisdiction of general superintendence. But no reasonable construction can raise an implied bar against the latter remedy in a suit seasonably brought. Had the Legislature intended to introduce, in bar of the further maintenance of such a suit, a lapse of the lower court's power of voluntary amendment, the statute would have contained some allusion to such an unprecedented and anomalous limitation. *Evans v. Cleveland*, 72 N. Y. 486.

In the law requiring this factory and all other property taxable in Northwood to be assessed before the 1st day of July, the limitation of time is directory. *Scammon v. Scammon*, 28 N. H. 419, 431; *Orford v. Benton*, 36 N. H. 395, 403. If the defendants had not made the assessment before the expiration of the limited time, they or their successors could have made it, and by *mandamus* could have been compelled to make it, afterwards. *School Dist. v. Greenfield*, 64 N. H. 84, 85, 2 New Eng. Rep. 908; *School Dist. v. Carr*, 63 N. H. 201, 206; *Williams v. School Dist. No. 1*, 21 Pick. 75, 82; Cooley, Tax. 2d ed. 280-290. "In the case of

Rez v. Sparrow, 2 Strange, 1123, the justices had been guilty of a neglect in not appointing overseers," of the poor "within due time; and this court issued a *mandamus* to compel them to do it afterwards, for the sake of the poor. The poor could not have had a specific remedy in that case unless the justices might do it after the precise time, in obedience to the *mandamus*." *Rez v. Loxdale*, 1 Burr. 445, 447. If there are reasons for holding that, while the limitation of the time of assessing all property (Gen. Laws, chap. 57, § 6) is directory, the limitation of the time of assessing omitted property in § 10 of the same chapter, is mandatory, there is no reason for construing the latter to be a bar against the further maintenance of this action. In *State v. Gibbs*, 13 Fla. 55, a board of canvassers was abolished, and no provision was made for pending proceedings, or duties left unperformed. In this State there would be a question of construction upon the retrospective effect of such legislation. In *Commonwealth v. Comrs.* 6 Pick. 501, 508, a board of commissioners was abolished, another was established, and duties were transferred from the former to the latter. The court says: "There is no such thing as a vested right to a particular remedy. The Legislature may always alter the form of administering right and justice, and may transfer jurisdiction from one tribunal to another. If there is a vested right, it is not invaded, * * * for the new statute makes sufficient provision for all cases under the former statute." In such a case, in our practice, the new board could be made defendants by amendment. In *Miller's Case*, 1 W. Bl. 451, the repeal was the act of a body that possessed an unlimited power of retrospectively abolishing remedies and rights. The New Hampshire Act of 1878 abolished neither the right of equal taxation, nor any superintending remedy for its violation. If that Act had not been passed, there would have been a question whether the illegality of the assessment of 1884 could have been obviated by the defendants or their successors voluntarily making a new assessment before or after April 1, 1885. *Pond v. Negus*, 3 Mass. 230; *Libby v. Burnham*, 15 Mass. 144, 148; *Bangor v. Laney*, 21 Me. 472; *Himmelmänn v. Cofran*, 36 Cal. 411; *Perrin v. Benson*, 49 Iowa, 325; *Cooley*, Tax. 849, 350. But it is not necessary to inquire into the power of voluntary correction vested in the assessors' court, since it is not made the basis of our duty by the common law or the Act of 1878.

Suppose that Act had not been passed, or had been repealed; and suppose a case in which Northwood's share of public expense for 1884 was \$5,000,—the Pillsburys' factory was worth \$5,000,—and in the assessment the defendants, instead of exempting the factory, exempted all polls, and all property except the factory. In such a case, a mere equalizing abatement would wholly exempt the Pillsburys (*Manchester Mills v. Manchester*, 57 N. H. 309; 58 N. H. 38; *Boston, C. & M. R. R. v. State*, 60 N. H. 87, 95, 96; Laws 1881, chap. 53, §§ 1, 2), but would not enable them to enjoy their statutory right of public education, or enable the community to perform its duty of protecting them in the enjoyment of life, liberty, and property. Entitled to process required by justice and con-

venience for the maintenance of their legal rights, the Pillsburys could obtain in this court an enforcement of the tax liabilities imposed by the Legislature as the means of enabling society to accomplish the objects of its organization. They might be bound to apply for relief in a reasonable time. *Boston & A. R. R. v. County Comrs.* 116 Mass. 78, 82; *Noyes v. Springfield*, 116 Mass. 87; *People v. Syracuse*, 78 N. Y. 56, 61-63; *State v. Bishop*, 3 N. H. 312; *Tucker's Petition*, 27 N. H. 405, 410; *True v. Melvin*, 43 N. H. 503, 508. But if their application were seasonably made, and a denial of their right could not be grounded upon an absence of remedy in the lower court, the inability of that court to voluntarily repair its error would be a reason for repairing it in the general jurisdiction from which the correction of such an error is not excepted. The defendants' want of power to voluntarily abate a tax, or to voluntarily make a second assessment after the first was left with the town clerk, would not show that the legal right of the Pillsburys was not infringed by laying the whole tax of \$5,000 on their factory, or that their only remedy was an injunction, or other quashing or prohibitory process, against the whole tax revenue of the town.

It has been held that the proceedings of inferior tribunals may be impeached collaterally when the law has not provided a mode in which their proceedings can be revised. *Gurnsey v. Edwards*, 26 N. H. 224, 229. This doctrine applied to the case of an assessment of the entire municipal revenue upon the factory would defeat the collection of the whole tax, and leave the local government disabled by bankruptcy. The omission of a single citizen's entire taxable property in the assessment, remedied only by collateral impeachment, or abatement, or other negative and reducing process of complete equalization, would have the same effect. The Northwood assessment of 1884, including the action of the selectmen on the Pillsburys' claim of exemption, was a proceeding by which the plaintiffs would have been bound if they had not sought a revision of it in an appropriate suit. They could not resist it collaterally when the law had furnished ample means of direct contestation. It is not apparent how collateral impeachment can be superseded by a direct and less destructive statutory remedy, if a mode of revision was not provided by the sweeping terms of the Revised Statutes. Understood in its literal, natural, and ordinary sense, the law authorizes a direct course of curative procedure; and the probable purpose of the Legislature is indicated by the mischief of a different construction.

On grounds of public convenience, an ordinary tax assessment, based on an illegal exemption, has been held to be an exception to the rule that quashes, or treats as wholly void, a proceeding collaterally or directly impeached. *Dillingham v. Snow*, 5 Mass. 547, 558; *Ingle v. Bonworth*, 5 Pick. 498, 501; *Bruller v. Worcester*, 112 Mass. 541, 556; *Kelso v. Boston*, 120 Mass. 297, 299; *LeRoy v. Mayor*, 20 Johns. 439, 441; *Strusburgh v. Mayor*, 87 N. Y. 452, 455. In the correction of judicial errors, our common law preserves as far as possible what is right, and destroys only what is wrong. *Lisbon v. Lyman*, 49 N. H. 558, 568. This rule is ap-

pliable to judicial error in the assessment of taxes. *Edes v. Boardman*, 68 N. H. 580, 586; *Cummings v. Nat. Bank*, 101 U. S. 153 [Bk. 25, L. ed. 903]; *Strusburgh v. Mayor*, 87 N. Y. 452; *Hills v. Exchange Bank*, 105 U. S. 819, 322 [Bk. 26, L. ed. 1053]. In this case, it reverses the exemption without invalidating the whole assessment, and without inventing an exception for the decision of tax cases.

"Where an erroneous order of the court below is quashed on *certiorari*, and the merits of the cause are left undecided, if the constitution of the court below interposes no practical difficulty, the effect of awarding the writ is limited to the erroneous order, and the cause is remitted, with instructions to proceed. And the rule requiring the whole proceeding to be quashed is applied only in cases where the court below has no power to take up the cause after the erroneous order has been vacated, and proceed to determine the merits." *Hayward v. Bath*, 85 N. H. 514, 527. In the present case, the erroneous exemption cannot be reversed without an enforceable assessment of the factory. There being no express statute providing by whom or in what book of records the assessment shall be made, the duty of this court to make it, or cause it to be made, is to be performed in a reasonable and appropriate manner, with no unnecessary departure from the usual and convenient course of public business. The town book is a proper place for the record; and the present board of selectmen, or their successors, are proper officers to make the assessment; and they can be authorized and required to make it, by order of this court. There is nothing in the constitution of the court below that presents any practical difficulty. Selectmen are not a committee appointed for a special occasion, or for the performance of a single act. Their office, though filled by annual elections, is as continuous as that of any other court; and the lack of stated terms for the transaction of their judicial business is a circumstance that does not affect any right involved in this case. It is as clearly within the reason and rule of our common law that the present board, or their successors, may be compelled to make the assessment the defendants ought to have made, as that any duty wrongfully left unperformed by a lower court can ever be laid before it with instructions to proceed, notwithstanding a personal succession by which, for such a purpose, the official continuity and identity of the tribunal is not impaired. The federal reversal (4 Wheat. 518, 17 U. S. bk. 4, L. ed. 629) of the judgment rendered against Dartmouth College (1 N. H. 111) would not have been prevented by the expiration of the official term of the judges of the State court, or by their resignation or decease, and a continued vacancy. The superintending duty of causing a tax to be assessed upon the Pillsburys' factory will be performed in the reasonable, appropriate, and convenient manner which the law requires, by a judgment for an assessment to be made by the present board or their successors. Their authority and duty under the judgment will come from the law of superintendence which imposes upon this court the duty of reversing the exemption, and causing an assessment to be properly made. There is no more need of a judgment against them, or an amendment of N. H.

the petition making them defendants, than there was of a judgment against the officers to whom the *mandamus* was issued in *Superior v. Rogers*, 7 Wall. 175 [74 U. S. bk. 19, L. ed. 162], or a judgment against the selectmen to whom the *mandamus* was issued in *School Dist. v. Carr*, 68 N. H. 201, 206. All persons whose violation of law is the plaintiffs' cause of action are now defendants of record.

What errors are correctible in the superintending jurisdiction is determined by common-law principles and statutory provisions applicable in each case. In some of the authorities, confusion arises from loose and ambiguous definitions. A decision of a question of fact is described as an exercise of discretion; an exercise of judgment is spoken of when the meaning is that the question on which the judgment is exercised is not one of law; and the superintending power is said to be restricted to ministerial, as distinguished from judicial, error, when the distinction intended is the difference between a question of law and a question of fact. The common law does not give a universal right of appeal from inferior courts for the mere purpose of granting a new trial of issues of fact. The superintending power is generally limited to such matters of law and fact as must be tried and decided in order to correct errors of law. When the Legislature intends a court's decision of questions of fact shall be revisable by another tribunal, on a new trial of the whole case, whether there is error of law or not, an appeal is ordinarily provided. *Richardson v. Smith*, 59 N. H. 517; *Doughty v. Little*, 61 N. H. 365; *Ex parte R. Co.* 101 U. S. 711, 720 [Bk. 25, L. ed. 872, 875]; *Commonwealth v. Westborough*, 3 Mass. 406; *Commonwealth v. Roxbury*, 8 Mass. 457; *Re Fay*, 15 Pick. 243, 254; *Carpenter v. County Comrs.* 21 Pick. 258, 529; *Thorpe v. County Comrs.* 9 Gray, 57, 58; *Re Randall*, 11 Allen, 473, 478; *Farmington R. W. P. Co. v. County Comrs.* 112 Mass. 206; *Commonwealth v. Scott*, 123 Mass. 418, 420; *Freeman v. Selectmen*, 34 Conn. 406, 415; *Howland v. Eldredge*, 43 N. Y. 457, 460; *People v. Troy*, 78 N. Y. 83, 40; *Queen v. Justices of Kesteven*, 3 A. & E. N. S. 810, 819; *Seymour v. Ely*, 37 Conn. 103, 106; Dill. Mun. Corp. §§ 832-837. The value of property is a question of fact; and the fair exercise of the defendants' appraising judgment was not controllable except on appeal. *Cooley, Tax*. 2d ed. 727, 730, 755, 758; *Goddard v. Seymour*, 30 Conn. 394, 399; *Manchester Mills v. Manchester*, 75 N. H. 809. But the legality of the town's exempting vote was a question of law not submitted to the defendants for final determination. If their decision had been right, its correctness could have been contested on appeal; and the legislative purpose was that it should be equally open to review, whether in favor of exemption or against it.

The construction is that the remedy of abatement on appeal shall be employed in cases to which it is applicable (Gen. Laws, chap. 57, § 12; *Edes v. Boardman*, 68 N. H. 580; *Locke v. Pittsfield*, 63 N. H. 122); that a method prescribed by any enactment shall be used for the purpose for which it was designed; and that cases of judicial error revisable by the general power of superintendence, though not within any specifically-enacted course of procedure,

are not beyond the range of all process necessary for administering the laws. The defendant's resignation of the office, and a prolongation of the vacancy, or an abolition of the office, would not abrogate or suspend the duty of reversing the illegal exemption by operative process required by the exigency of the case. A complete statutory specification of the corrective work of the general jurisdiction, being impossible, is not attempted. Authority to issue all writs and processes needed in the performance of the general duty (inferable from the duty, if it were not expressly granted) avoids the necessity of a multifarious and insufficient enactment of specific remedies, and prevents such a failure of legal justice as occurred in *Thompson v. Allen County*, 115 U. S. 550 [Bk. 29, L. ed. 472].

The power of the lower court to correct this error of exemption is not the common-law limit of the correctional power of this court. The Legislature has not made an express exception authorizing us to abstain from correcting all errors of lower courts that cannot be corrected by the voluntary action of those courts; and there is no evidence from which a legislative intention to make all such errors irremediable can be inferred. There is a strong presumption against the existence of a remedial defect caused by a lack of administrative authority, or by any inoperative provision of law. Obligations created by statutes which prescribe no methods of remedy are enforced by the appropriate procedure of the common law. When courts of special jurisdiction are not charged with the duty of vindicating rights secured by laws designed to be, and capable of being, judicially administered, the inference is that the duty is laid upon a general jurisdiction. The abolition of the board of equalization would not exempt railroads from the shares of public expense assigned to them by Gen. Laws, chap. 62, § 1, but would leave the judicial work of their assessment in the general jurisdiction, where it was before the board was established, and where the shares could be recovered in common-law actions, without previous assessment and collection, if the statute were silent on the subject of assessment. *United States v. Lyman*, 1 Mason, 482; *Meredith v. United States*, 18 Pet. 486, 498, 494 [38 U. S. bk. 10, L. ed. 258, 262]; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 240 [36 U. S. bk. 22, L. ed. 80, 81]; *United States v. New Orleans*, 98 U. S. 881 [Bk. 25, L. ed. 206]; Dill. Mun. Corp. § 818. A repeal of the Act of 1878 (Gen. Laws, chap. 57, § 10) would not deprive the public of any remedy in this court for a violation of the right of assessment; but would merely abolish either the remedy of selectmen's voluntary reassessment, or the year's limitation of it. A repeal of every statute that authorizes the assessment of taxes by tribunals of special and limited jurisdiction would evince, not a design to bring all local government to an end by cutting off its revenue, or to bankrupt or cripple the body politic (formed by the first article of the Constitution, and entitled, by the eighty-fourth article, to legislative allegiance and support), but an intention that such statutes as Gen. Laws, chaps. 58, 54, dividing the public expense, and imposing contributory liability, if executable in no other way, should be

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carried into effect by the court of general jurisdiction performing its ordinary duty of rendering judgment and issuing process in cases in which there is no other judicial mode of administering the law. Nothing less than a positive declaration of an intent to render all such statutes inoperative could justify a belief that the law-making power had adopted a measure so subversive of civil society.

The objection that a supplementary assessment of the factory will make the whole assessment of the town too large could be waived by the taxpayers who had that grievance, as it could be if the defendants or their successors had voluntarily reversed the exemption before April 1, 1885. All who were excessively taxed could obtain abatements, or waive the objection by making no complaint. Some might choose to avoid the cost which might not deter others from litigation. This suit would not be barred by the plaintiffs' election not to incur the expense of an appeal for an abatement. By contributing more than their share of the common burden, they would not waive their right to the payment of the Pillsbury's share.

A failure of justice sometimes caused by difficulties of a practical nature is no argument against the correction of the defendants' error. The inability of a sheriff to overcome resistance is not a legal reason for withholding a writ. The inability of a plaintiff to find property for the satisfaction of his just claim is no cause for rendering judgment against him, or refusing either to render judgment in his favor or to issue process of enforcement. By the expiration of an estate for years, or a term of office, during the pendency of a suit for its recovery, the title, whether vested in the plaintiff or the defendant, is terminated. In the present case the subject of litigation has not ceased to exist. The public right to the factory's share of expense was not limited in duration to the year in which the defendants and their successors could voluntarily give the remedy of a supplementary assessment. If the error of exemption had not been committed, or had been repaired, the right would not have expired on the last day of March, 1885; and the continued existence of the right did not depend upon its escaping violation in the court of assessment.

The year's limitation of the time of voluntary amendment in that court might be relevant on the question of the reasonable time within which this suit could be brought. By analogy to statute, a person's death may be presumed from his not being heard from for seven years. *Smith v. Knowlton*, 11 N. H. 191, 196. In cases where the Legislature has not fixed a precise rule of limitation, rights may be acquired and barred by a prescription of such length of time as is prescribed by a statutory rule in analogous cases. *Wallace v. Fletcher*, 30 N. H. 434, 447. Reasonable notice of legal proceedings, and the reasonable time for redeeming land from a mortgage, may be determined in a similar manner. *Trus v. Melvin*, 43 N. H. 503, 507; *Murphy v. N. H. Sav. Bank*, 63 N. H. 862. It might be claimed that, by analogy to the statute allowing selectmen, of their own motion, to make a reassessment within the tax year, or the statute allowing an

appeal for an abatement of a tax, within nine months after notice of its assessment, the reasonable time for the plaintiffs' application to this court was either the tax year, or nine months after notice of the nonassessment of the factory. Whatever was the limit of reasonable time (High. Ex. Leg. Rem. §§ 300, 204, 269), their action, brought at the June Term, 1884,—the first term at which it could be entered after the wrong was done,—was seasonably commenced. There was no delay of prosecution, and no fault on their part; and their right was not lost by our taking necessary time to establish it in the former decision. It is not now denied that the plaintiffs were entitled to judgment when they brought this suit, and for ten months afterwards. The legal construction of statutes is the ascertainment of the fact of legislative purpose from competent evidence. *Edes v. Boardman*, 58 N. H. 580, 592; *Burke v. Concord R. R.* 61 N. H. 160, 233; *State v. Hayes*, 61 N. H. 264, 330; *Sargent v. Union School Dist.* 68 N. H. 528-580, 3 New Eng. Rep. 290; *Whitney v. Whitney*, 14 Mass. 88, 92. And upon sound principles of construction we cannot find the fact that the Legislature intended mere lapse of time should bar the plaintiffs' right of action, while it was in the custody of the law and they could do nothing but wait for the judgment. The intention of the Legislature was that such suits should be brought, and submitted to the court for decision, and that judgment should be rendered for the reversal of such illegal exemptions. And the risk, on the one hand, of rendering judgment against the legal merits, upon insufficient deliberation, and the certainty, on the other hand, of a judgment entirely regardless of the merits, if time were taken for their due consideration, would be a needless dilemma that cannot be respectfully attributed to the purpose of the law-making power. The decision which the Legislature meant the court should make is upon the merits, and after requisite investigation.

It is an old doctrine that things happening by an invincible necessity, though they be against common law or an Act of Parliament, shall not be prejudicial. "When statutes are made, there are some things which, exempted and fore-prized out of the provision thereof by the law of reason, though not expressly mentioned,—thus, things for necessity's sake, or to prevent a failure of justice,—are excepted." Potter's Dwar. Stat. 123. "The law itself, and the administration of it, must yield to that to which everything must bend,—to necessity. The law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling them to impossibilities; and the administration of laws must adopt that general exception in the consideration of all particular cases." *The Generous*, 2 Dods. 322, 323; *Hall v. Sullivan R. R.* 21 Monthly Law Rep. O. S. 188, 147. The general exception is a general rule of statutory construction.

"As a general rule, when a duty is at the proper time asked to be done, and improperly refused to be done, the right to compel it to be done is fixed, and is not destroyed by the lapse of the time within which, in the first place, the duty ought to have been done." *Lewis v. Mar-*

shall County, 16 Kan. 102, 108. A statute provided that certain located lands should be surveyed within twelve months, or the location should be void. The public surveyor having refused to do his duty, a *mandamus* was issued against him; but the survey was not completed within the year. It was held, nevertheless, that the survey was valid, on the ground that the Legislature did not intend to compel a locator to do an act wholly out of his power. *Edwards v. James*, 13 Tex. 52. The general rule of construction in regard to the exception of impossibilities prevailed against the express provision that the location should be void if the survey were not made within the year. The surveyor's duty was not judicial; and if he had refused to obey the *mandamus*, the survey would not have been made by the court; but he would not defeat the right of survey by going to jail for the remainder of the year for contempt, or by going out of the State and remaining beyond the reach of process, or by dying at the end of the year, leaving his duty unperformed. The statute did not expressly authorize the work to be done by any other surveyor than the one in office during the year; but the Legislature did not mean that he should be the only one to whom a *mandamus* could issue. If a *mandamus* to his successor were necessary, it would be such an appropriate and adequate remedy as the Legislature intended the locator should have. By the ordinary rule of construction, if the locator were in no fault, in such a case, the limitation of time would be suspended till a surveyor came into office who would obey a *mandamus*. By the same rule, statutory limitations of time are suspended when causes of action are fraudulently concealed, and when courts are closed, and remedies of action or appeal are stayed, by war. *Hanger v. Abbott*, 6 Wall. 532 [78 U. S. bk. 18, L. ed. 939]; *The Protector*, 9 Wall. 687 [76 U. S. bk. 19, L. ed. 812.]

When a statute extending the term of a patent-right provides that the right shall cease if it becomes vested, at any one time, in a certain number of persons, otherwise than by devise or succession, an involuntary assignment in bankruptcy, being an act of the law, is an implied exception. Dwar. Stat. 124. In *Mattingly v. Boyd*, 20 How. 128 [61 U. S. bk. 15, L. ed. 845], on a process of foreign attachment, the trustee was restrained from paying his debt by an order of court. The suit abated by the plaintiff's death after the restraining order had been in force twenty-six years. During that time, the right of action of the trustee's creditor, and the Statute of Limitations, were suspended because the fund was in the control of the law. The intended exception of such a case, not expressed in the statute, was implied by the general rule of construction.

Mara v. Quin, 6 Durnf. 1, was an action of debt against an executrix. In Michaelmas Term, 1791, she pleaded *plene administravit*. The plaintiff then cited the defendant in the spiritual court to exhibit an inventory, but could not obtain an account until July, 1793. This delay prevented his entering up judgment until Michaelmas Term, 1793, when he took judgment for his debt, to be paid out of assets that should afterwards come to the hands of the executrix. He afterwards discovered

that assets had come to her hands before judgment and after plea. For the purpose of reaching those assets, it was held, in 1794, in *scire facias* on the judgment, that the judgment would then be rendered as of Michaelmas Term, 1791, if justice required such an amendment. The defendant did not fail to argue that there was not a single precedent to warrant such a proceeding, and that, if the judgment could be altered so as to carry it back two years, it could be altered and carried back a longer time. Lord Kenyon said, "The forms of the court are always best used when they are made subservient to the justice of the case." An amendment made in 1794, by which the judgment of 1793 would be called a judgment of 1791, and by which it would be rendered *nunc pro tunc*, would not change the time when it was rendered. The fact that it was recovered in 1793 would remain apparent on the record; no amendment could alter the fact, or impair the conclusive proof of it; and the law would not falsely pretend to deceive itself by giving the judgment a wrong date. An amendment antedating the judgment two years would be a mere technical form of recording the decision that the law gave the judgment the effect it would have had if it had been rendered in 1791. A useless appearance of falsification would be avoided by a clause inserted in the judgment when it was rendered, or by an amendment afterwards, declaring that the judgment was payable out of assets coming to the hands of the executrix after Michaelmas Term, 1791, or expressing more accurately the effect of the judgment, and providing out of whose and what property it was payable, and by what execution it should be enforced.

Springfield v. Worcester, 2 Cush. 52, 62, was an action for the support of a pauper. After verdict for the plaintiff, the case was continued for the consideration of questions of law, and before those questions were decided the statute on which the action was brought was repealed. Judgment was rendered for the plaintiff as of the term when the verdict was rendered; this course was held to be authorized by the common law; and the result would have been the same if the facts, instead of being found by the jury, had been agreed by the parties. If the statute by which the Pillsburys' liability was imposed, and on which this suit was brought, had been repealed March 31, 1885, *Springfield v. Worcester* would be an authority for an assessing judgment rendered now as of December Term, 1884. The decision in that case not being shown to be wrong, the question here is, not of legal right, but of mere remedial method; and by our settled law of procedure, "the forms of the court are * * * subservient to the justice of the case." The rendition of the judgment in *Springfield v. Worcester* as of a former term was a judicially-invented mode of recording the decision that the judgment had the legal effect it would have had if it had been rendered at the former term. A more direct and specific record would be, "It is further considered and adjudged by the court that this judgment has and will have the legal effect it would have had if it had been rendered before the repeal of the statute which created the plaintiff's right and the defendant's

liability." While the judgment would not have been weakened by inserting this conclusion of law, it would not have been void if it had contained no evidence of the decision on the repeal of the statute. The rights of the parties were not affected by the repeal. That was the law to be administered, with or without the supposititious procedure of *nunc pro tunc*. Upon that law, Springfield was entitled to an execution for damages and costs, whether the judgment falsely purported to be rendered at a former term, or truly asserted its effect to be the same as if the statute had not been repealed, or were silent on the subject. Its validity did not depend upon its containing either a statement of its legal effect on this point, or any other matter of law decided by the court, announced in their reported opinion, and involved in the adjudication that the plaintiff recover damages.

If the question of exemption in this case had been decided at the March adjourned Term, 1885, a *mandamus* would have issued to the selectmen of Northwood and their successors, in their official capacity. There would have been no more need of their names in the writ than of the name of the sheriff in an execution addressed to that officer. *Davis v. Bradford*, 58 N. H. 476; *School Dist. v. Carr*, 68 N. H. 201, 206; *People v. Champion*, 16 Johns. 61, 65; *People v. Supervisors*, 8 N. Y. 317, 330; *Omura v. Sellen*, 99 U. S. 624 [Bk. 25, L. ed. 333]; *State v. Warner*, 55 Wis. 271; Dill. Mun. Corp. § 886. By defiance or evasion of the writ until the 1st day of April, 1885, they would not have defeated the public right. The impossibility of the plaintiffs' obtaining an assessment of the factory within the year by *mandamus* was like the failure of the plaintiff in *Edwards v. James*, 13 Tex. 52, to obtain a survey of land within the same time by the same process, and like the inability of the plaintiff in *Springfield v. Worcester*, 2 Cush. 52, to recover judgment before the repeal of the statute on which the action was brought. If there is a year's limitation of the corrective power, it has been suspended in this case by the court's deliberation, as it would have been during a delay caused by a belligerent closure of the court, or the death or sickness of the judges, or a continuance for argument on account of a press of judicial business. *Actus curia neminem gravabit* is an application of the principle *actus legis nemini facit injuriam*. Broom, *Leg. Max.* 86, 89. A continuance for advisement is an act of the law; and when a party dies after such a continuance and before judgment, the law can work out its scrupulous abstention from injury by imagining a judgment rendered at a former term, refusing to see in its own record explicit proof of the date, and finding in the fiction a mode of applying the rule that its own act works no wrong. A mode of applying the rule without artifice would be found in an undisguised record of the adjudication that the judgment has the same effect as if it had been rendered before the party's death. If fictitious proceedings were needed for the application of the rule in this case, they would easily be supplied. The tax could be assessed by the court in a judgment rendered as of December Term, 1884. But the provision, implied by the ordinary statutory construction,

against the requirement of an impossibility, and against the infliction of a wrong by an act of the law, can be administered without antedating the assessment. The law has kept on foot its superintending duty of correction while it continued the case for advisement, and withheld from the plaintiffs the judgment and process to which it had given them a good title, and for which it had invited and induced them to incur the expense of this suit. Their promised protection has been unavoidably delayed; but the law does not wantonly destroy the right which its promise has drawn into its judicial possession, and has no occasion to resort to any other than a straightforward mode of announcing and recording the date and effect of its judgment.

Judgment for the plaintiffs.

Clark, J., did not sit; **Allen, Smith, and Blodgett, JJ.**, concurred.

Carpenter, J., dissenting:

The question for consideration arises upon the objection of the defendants, made after the judgment reported in 68 N. H. 820, 1 New Eng. Rep. 2, was pronounced, that the writ cannot issue against them because the tax year 1884 and their term of office have expired, and they consequently have no power to make the assessment.

Argument has taken a wide range. Many questions have been discussed, a decision of which, in the present state of the pleadings, is not necessary. The questions whether the defendants' successors in office, or any persons other than the defendants, can be required to make the assessment; whether the court can itself assess the tax, or adjudge in general terms that it shall be assessed; and various other questions incidentally presented and argued,—do not properly arise. Without, as well as with, the prayer for "such other relief as may be just," the plaintiffs may have any relief against the defendants to which they are found entitled. It is the duty of the court to render such judgment between the parties as, upon the whole record, appears to be proper, but no judgment can be rendered for or against persons who are not parties. If it has been held in other jurisdictions that final judicial process may issue against persons not parties to the proceeding, and who have had no notice and no opportunity to be heard, such is not the law of this State. *Brown v. Scoggell*, 22 N. H. 548, 552; *Horn v. Thompson*, 31 N. H. 574; *Bruce v. Cloutman*, 45 N. H. 37, 38; *Wilbur v. Abbot*, 60 N. H. 40; *Holbrook v. Bowman*, 62 N. H. —; *Eastman v. Dearborn*, 68 N. H. 884, 1 New Eng. Rep. 66; *Pennoyer v. Neff*, 95 U. S. 714, 782 [Bk. 24, L. ed. 565, 572]; *Secretary v. McGarrahan*, 9 Wall. 298 [76 U. S. bk. 19, L. ed. 579]; *United States v. Boutwell*, 17 Wall. 604, 608 [84 U. S. bk. 21, L. ed. 721, 722]. Neither the defendants' successors in office nor the Pillsburys are parties. They have had no notice of the proceeding. They have had no hearing, and no opportunity to be heard. They are not concluded or affected by the facts found. *Ball v. Danforth*, 63 N. H. 420, 1 New Eng. Rep. 56. A judgment against the selectmen now in office, requiring them to assess the tax, or against the Pillsburys, that a tax be assessed by the court or by anyone un-

der its direction, would be a judgment rendered without jurisdiction.

The plaintiffs can have no relief against the defendants except the writ of *mandamus* specifically prayed for. If they are not entitled to that remedy, their petition (in default of an amendment bringing in other parties) must be dismissed. The defendants, being selectmen of Northwood for the year 1884, neglected to assess on the property of Pillsbury Bros. a tax which the law required them to assess. Their term of office, as well as the tax year 1884, has long since expired. The sole question before the court is whether it can lawfully order them to do now that which they ought to have done while in office. It is not material whether a Latin, English, or other name be given to a judicial order of this character. To its lawful issue under any name, or in any form, two essential requisites must concur, namely: (1) a right in the plaintiff to have the thing in question done; and (2) power in the party against whom the order is sought to do it. If either is wanting, the application must be denied. Here both are wanting. The defendants have no power to assess the tax, and the plaintiffs have no right to its assessment.

By the Constitution (Bill of Rights, arts. 12, 28, pt. 2, arts. 5, 6) and the uniform practice under it for more than a hundred years, no property can be taxed except such as is declared taxable by the Legislature. Property not expressly subjected by statute to taxation is exempt. *Opinion of the Justices*, 4 N. H. 570; *Brewster v. Hough*, 10 N. H. 143; *Nashua Sav. Bank v. Nashua*, 46 N. H. 392, 395, 396. Much property always has been and still is untaxed. Acts February 7, 1789, February 8, 1791, February 22, 1794, December 26, 1798, December 24, 1803, December 16, 1812, July 3, 1830, and January 4, 1833; Rev. Stat. chap. 39; Gen. Stat. chap. 49; Gen. Laws, chap. 58.

Selectmen are public officers whose powers and duties are prescribed by statute. They have no authority to assess taxes or to do any official act, except such as is conferred upon them by the Legislature. Although they exercise some functions of a judicial nature (*Edes v. Boardman*, 58 N. H. 580), they are not, within the meaning of the Constitution (Bill of Rights, arts. 38, 35, 37, pt. 2, arts. 4, 46, 78–82) or of Gen. Laws, chap. 208, § 1, judges, judicial officers, or a court.

They are required to take annually in April an invoice of all the polls and estate liable to be taxed in their town on the first day of that month, and upon it to assess all taxes for the year following; to make a fair record of the invoice and of the taxes assessed, and, before July 1 to leave it, or a copy of it, with the town clerk to be recorded, and kept "open to the inspection of all persons." Gen. Laws, chap. 55, § 1; chap. 57, §§ 1, 3, 6. Until the Act of August 17, 1878 (Gen. Laws, chap. 57, § 10), they had no authority to modify or amend the record after its delivery to the clerk. When their invoice and assessment were completed and recorded, their taxing power was exhausted. *Bristol Mfg. Co. v. Gridley*, 27 Conn. 227; *Clark v. Norton*, 49 N. Y. 243; *People v. Delaney*, 49 N. Y. 655; *Overing v. Foote*, 65 N. Y. 263. Errors not curable by abatement, under Gen. Laws, chap. 57, §§ 11, 12, were irre-

diable. Assessed taxes might, for good cause, be abated, but no other or additional tax could be assessed. It happened, not unfrequently, that in taking the invoice, taxable property was overlooked or set down to a person not liable to be taxed for it. All such property, however speedily after the completion of the record the mistake were discovered, escaped taxation. To remedy in some degree this mischief, the statute of 1878 (Gen. Laws, chap. 57, § 10), was enacted. It is not a restrictive, but an enabling and remedial Act. It confers upon the selectmen a power which they did not possess. *Harwood v. N. Brookfield*, 130 Mass. 561, 564, 565; *Noyes v. Hale*, 187 Mass. 266, 271. By it they are authorized to correct, at any time before the expiration of the tax year, and not afterwards, two classes of errors, viz.: omissions to tax taxable property and the taxation of it to persons not liable. Other mistakes quite as serious, and quite as likely to happen, they cannot correct. An error of undervaluation, for example, may effect as great inequality of taxation as an omission to assess, but, though discovered immediately after the record is delivered to the clerk, it is irremediable, except by a proportional abatement of all other taxes, which would be in most cases impracticable, and in many impossible. The Legislature might, if it thought proper, authorize a correction of all errors, and at any time, as well after as before the expiration of the tax year. It has not seen fit to do so. For reasons satisfactory to the legislative judgment, it has restricted the exercise of the corrective power to the errors mentioned, and to the tax year. It may have considered that a revision, by the selectmen, of the doings of their predecessors, would produce greater mischief than the occasional escape of taxable property from taxation. Whether the Legislature has acted wisely or unwisely is not material. Under the law as it stands, the selectmen of Northwood, holding the office in the tax year beginning April 1, 1884, and ending March 31, 1885, and they only, were authorized to correct, within the year and not afterwards, the error of omitting to tax the Pillsbury property by assessing upon it a tax for that year. This proposition is not denied. The plaintiffs concede that the defendants cannot now, of their own motion, assess the tax, but insist that they may nevertheless be authorized and compelled to assess it, by the court. In this view it is immaterial that they were, in 1884, selectmen of Northwood. If the court can confer the power, it may give it as well to any other person as to them, and this petition might have been as properly brought against the county commissioners, the sheriff, or any private citizen of Northwood or of the State, as against the defendants.

It is the province of courts to vindicate legal rights and redress legal wrongs; to administer, not abstract justice, or justice as they may think it to be, but justice as declared by law. *Freeman v. Tranah*, 12 C. B. 413, 414. They may ascertain rights under the established law, award compensation for their violation, and in some cases restrain the commission of threatened wrong and compel the performance of duty. Beyond this they have no power to go. To create obligations, to impose duties,

and to confer powers, are functions, not of the law-administering, but of the law-making, branch of the government. "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing." *Osborn v. United States Bank*, 9 Wheat. 806 [23 U. S. bk. 6, L. ed. 234]. In proper cases they may issue their mandate to a public officer, requiring him to perform his official duty. But by it no new duty is imposed or power conferred. By virtue of it the officer is charged with no obligation not previously incumbent upon him, and can take no action which he could not take without it. "No court," says Strong, J., in *United States v. Clark County*, 95 U. S. 769 [Bk. 24, L. ed. 545], "will, by *mandamus*, compel * * * officers of a State to do what they are not authorized to do by the laws of the State. A *mandamus* does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, where its exercise is a duty." "The court never grants a *mandamus* except it indisputably sees that there is a power lodged in the person to whom the *mandamus* is prayed." *King v. Bishop of Ely*, 1 W. Bl. 58. "It is used merely to compel action and coerce the performance of a pre-existing duty. In no case does it have the effect of creating any new authority, or of conferring power which did not previously exist; its proper function being to set in motion, and to compel action with reference to previously-existing and clearly-defined duties. It is therefore in no sense a creative remedy, and is only used to compel persons to act where it is their plain duty to act without its agency." High, Ex. Leg. Rem. §§ 7, 9, 10, 14, 24, 25, 32, 36, 37, 39, 80-99. No case has been cited, and none has been found, in which it has been held that a writ of *mandamus* or other precept may be lawfully directed to a person not by law authorized and bound to execute it. In *Superior v. Rogers*, 7 Wall. 175 [Bk. 19, L. ed. 163], a *mandamus* to assess a tax was directed to the marshal under a statute authorizing it to be so directed. *Barkley v. Leece Comrs.* 93 U. S. 264, 265 [Bk. 23, L. ed. 896]. In the last-named case (p. 258), a *mandamus* was denied for the sole reason that the defendants were not authorized by law to execute the command.

The court cannot lawfully issue an order to any person not bound by law, independent of the order, to obey it. Power to command implies the duty of obedience. The fact that no person is bound by law to obey a particular command is conclusive evidence that the court cannot lawfully make it. The sheriff is obliged to execute a precept of the court, not by force of the court's command, but because it is by the statute (Gen. Laws, chap. 216, § 2) made his duty. If it has ever been held that an order of the court, in any form or under any name, can be legally made, except to enforce the performance of an obligation by law incumbent upon the party to whom it is directed, the case has not been cited. If the Court of King's Bench possessed the power to compel individuals to do that which they were not required by law to do, or which they had no lawful power to do, no instance of its exercise has been called to our attention. The

questioned authority of that court to keep all inferior tribunals within their jurisdiction, and to correct their errors of law, does not include the power to create such tribunals, to confer upon them authority, or to do the work which the law declares shall be done exclusively by them.

The Legislature has imposed duties of a judicial nature upon a great number of public officers and official bodies, and has given them, in many cases, final and exclusive jurisdiction of the matters entrusted to their determination. So it is, for example, in the case of supervisors regulating the check list (Gen. Laws, chap. 80); the school committee dismissing a teacher (Gen. Laws, chap. 89, § 7), or a scholar (Gen. Laws, chap. 91, § 3); county commissioners locating a schoolhouse (Gen. Laws, chap. 88, §§ 6, 7); selectmen dismissing a prudential committee (Gen. Laws, chap. 87, § 15), or ordering mill-owners to repair or build (Gen. Laws, chap. 141, §§ 2, 4, 7, 8); fence-viewers (Gen. Laws, chap. 142); health officers acting under Gen. Laws, chap. 111, § 3; chap. 112, §§ 2, 7; chap. 113, §§ 2, 3, 5, 7; courts-martial under Gen. Laws, chap. 104, §§ 8, 13, 25, 26; railroad commissioners in fixing tables of maximum charges under Laws 1883, chap. 101, § 4; and of a justice of the peace removing an incumbrance from the highway, under Gen. Laws, chap. 76, § 5. In these and other similar cases the supreme court has no authority under the statute (Gen. Laws, chap. 208, § 1), or at common law, except to keep the tribunals within their jurisdiction, and see that their proceedings are regular. It may quash their doings for want of jurisdiction, or for irregularity, but cannot revise their decisions upon the merits, or do what they ought to have done. It cannot remove incumbrances from the highway, dismiss teachers, locate schoolhouses, divide fences, etc., for the plain reason that it has no jurisdiction of the subject-matter. *Reg. v. Bolton*, 1 Q. B. 66, 72; *Re v. Monmouthshire*, 8 B. & C. 187; *Re v. Glamorganshire*, 1 Ld. Raym. 580; *Owen v. Hurd*, 2 T. R. 643; 1 Tidd, Pr. 8d Am. ed. 398; *East Anglian R. Co. v. Lythgoe*, 10 C. B. 726; *Bessnick v. Boffey*, 9 Exch. 815; *Fraser v. Pothergil*, 14 C. B. 298; *London & N. W. R. v. Grace*, 2 C. B. N. S. 555; *Carr v. Stringer*, E. B. & E. 123; *Olifton v. Furley*, 7 H. & N. 783; *Freeman v. New Haven*, 34 Conn. 406, 415; *Commonwealth v. Westborough*, 3 Mass. 406; *Commonwealth v. Roxbury*, 3 Mass. 457; *Commonwealth v. Ellis*, 11 Mass. 466, 467; *Farmington R. W. P. Co. v. Comrs.* 112 Mass. 206, 213; *Kempton v. Saunders*, 132 Mass. 466, 468; *Petition of Land-off*, 34 N. H. 163, 173, 176, 178; *Hayward v. Bath*, 35 N. H. 525, 526; *Boston & M. R. R. v. Folsom*, 46 N. H. 64, 66; *Richardson v. Smith*, 59 N. H. 517, 519.

The fact that this action was begun during the tax year of 1894, while the defendants were in office and had power to assess the tax, and while the plaintiffs were entitled to have it assessed, is immaterial. In civil suits the rights of the parties are generally determined as of the time when the action was commenced, because that is the question presented by the pleadings. The cases, however, are numerous in which a cause of action good in the beginning is lost while the suit is pending. If, at

any time before final judgment, matter arises showing that the plaintiff is not entitled to the relief he seeks, and is properly brought to the attention of the court, his action fails; as if, for example, he becomes an alien enemy, is outlawed, or—suing as administrator—his letters are revoked, or if the defendant obtains his discharge in bankruptcy. In these instances, and many others of like character, judgment goes against the plaintiff, although he set out with a good cause of action. Some matters of defense accruing after the commencement of the suit must be specially pleaded. Others, as in this case, consist of facts judicially noticed, which need never be pleaded. In all legal proceedings courts are bound *ex officio* to give such judgment as appears upon the whole record to be proper, without regard to the issues found, or to the prayer for judgment. *Kitteredge v. Emerson*, 15 N. H. 227, 239; *Rochester v. Whitehouse*, 15 N. H. 468, 474; *Le Bret v. Papillon*, 4 East, 502; Broom, Leg. Max. 188. The general principles of pleading prevail in petition for *mandamus*, so far as the nature of the proceeding admits of their application. High, Ex. Leg. Rem. §§ 448, 451, and cases cited; *People v. Baker*, 35 Barb. 105; 118; *S. C.* 14 Abb. Pr. 19, 32; *State v. Elkington*, 30 N. J. L. 335. *Mandamus* cannot issue to an officer if, pending the suit, he has resigned his office (*Secretary v. McGarahan*, 9 Wall. 298 [76 U. S. bk. 19, L. ed. 579]); *United States v. Boutwell*, 17 Wall. 604 [84 U. S. bk. 21, L. ed. 721]; *State v. Elkington*, *supra*; *State v. Guthrie*, 19 Rep. (Neb.) 246; *Mason v. School Dist. No. 14*, 20 Vt. 487; if his authority to act has been taken away by a repeal of the law (*Miller's Case*, 1 W. Bl. 451, more fully reported under the name of *Re v. Justices of London*, 3 Burr. 1456; *Commonwealth v. Hampden*, 6 Pick. 501), or has expired by limitation of law (*Williams v. Lincoln Co.* 35 Me. 345; *State v. Waterman*, 5 Nev. 823); if it will expire before the act sought to be enforced can be performed (*King v. Commissioners*, 1 Ld. Raym. 1479; *Woodbury v. County Comrs. of Piscataquis*, 40 Me. 304); if the act has in the meanwhile been done (*State v. Schofield*, 41 Mo. 88); or to restore to office one who before final judgment has become disqualified to hold it (*Weber v. Zimmerman*, 23 Md. 46). And generally the petition must be dismissed if, at any time before the writ is granted, it appears that the plaintiff is not entitled to it. *People v. Batchellor*, 53 N. Y. 128.

Judgment *nunc pro tunc* cannot be rendered; the nature of the proceeding forbids it. The only judgment which can be rendered for the plaintiffs is that the writ issue commanding the defendants personally to assess the tax. Judgments of this kind, requiring for their execution the personal action of a defendant, stand on widely different grounds in this respect from those to the effective operation of which no such action is necessary, and which may be performed by his administrator, or satisfied out of his estate. Judgments of the latter character may in proper cases be rendered, after a party's death, as of a term of the court when he was living. *Blaisdell v. Harris*, 52 N. H. 191; *Freeman v. Tranah*, 12 C. B. 406. Obviously in *mandamus* such a judgment cannot be effectively rendered against a dead defendant.

With no more reason can it be lawfully rendered against a defendant to compel official action after the expiration of his official life. *Commonwealth v. Hampden*, 6 Pick. 501, was an application for *mandamus* to the commissioners of highways. While it was pending, the Act creating the office was repealed. In reply to a suggestion that the writ might be awarded *nunc pro tunc*, Parker, *Ch. J.*, says: "The cases in which this discretionary power has been exercised were wholly dissimilar to this, and we do not feel authorized to extend the principle further than it has heretofore been applied. * * * We should, by so doing, give power and jurisdiction, by a fiction, to a tribunal which had, by the Act of the Legislature, ceased to exist, and this would be legislative power which we are not authorized to assume." If the board of censors in *Gage v. New Hampshire Eclectic Med. Soc.* 68 N. H. 92, had, pending the litigation, come to an end by limitation or a repeal of the statute creating it, the court could not, without a usurpation of legislative power, have prolonged its existence, or have required the persons formerly composing it to give the plaintiff a trial, and adjudge whether he was or was not entitled to a license. The way in which an officer's authority is terminated—whether by expiration of his term of office, by repeal of the statute creating it, by other acts of the law, by his resignation, removal, or death—cannot be material. In no one of these instances is the power of official action more effectively gone than in another. The court is no more incapable of restoring it by the law of nature in one case than it is in others by the law of the land.

The plaintiffs have no right to have the assessment made. It is not the plaintiffs' constitutional right to equal taxation, but their statutory right to the assessment of the particular tax on the Pillsbury factory, which is in question. The plaintiffs assert, under the statutes, a specific right which, in the absence of the statutes, confessedly does not exist. The inequality of taxation if any, produced by them, is immaterial, except upon the questions of their construction, if that is doubtful. It is also immaterial, for reasons already stated, that the right existed during the tax year of 1884. The question is upon its existence now. The Pillsburys have rights. Any view of the case which leaves them out of consideration is inadequate and deceptive. The plaintiffs' right and the Pillsburys' liability to the assessment are coextensive and correlative; the former cannot exist without the latter. If there is no provision of the statute requiring the assessment to be made, it is the Pillsburys' right that it shall not be done.

One "great end for which men entered into society was to secure their property." By the common law "that right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law, for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man, by common consent, gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever

so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing. * * * If he admits the fact, he is bound to show, by way of justification, that some positive law has empowered or excused him." Lord Camden in *Entick v. Carrington*, 19 How. St. Tr. 1066. Every charge upon the subject must be imposed by clear and unambiguous language. Durr. Stat. 646; *Cal-laday v. Pilkington*, 12 Mod. 513; *Davison v. Gill*, 1 East, 64; *Rea v. Oroke*, Cowp. 26; Loft, 488, 489. "The rule of law," says Wilde, *Ch. J.*, in *Goosing v. Veley*, 12 Q. B. 407, "that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax rate or toll, except upon clear and distinct legal authority established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it." "The law of England is most careful to protect the subject from the imposition of any tax except it be founded upon and supported by clear and distinct lawful authority." *Goosing v. Veley*, 4 H. L. Cas. 726, 727, 781. If the government seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however clearly within the spirit of the law the case may appear to be. *Partington v. Atty-Gen.* L. R. 4 H. L. 122. The doctrine that a person's property cannot be taken to satisfy either his debts to individuals or his obligations to the public, or for any other purpose, except in conformity with the provisions of law authorizing it to be taken, has never, it is believed, been departed from by the courts of any jurisdiction where the common law prevails. The cases are numerous in which levies of executions upon the property of a debtor have been held invalid by reason of a noncompliance with particular provisions of the statutes. *Mead v. Harvey*, 2 N. H. 495, 497; *Lidbey v. Copp*, 3 N. H. 45; *Simpson v. Coe*, Id. 85, 87, 89; *Woodward v. Gates*, 4 N. H. 548; *Rice v. Johnson*, 5 N. H. 520; *Coggswell v. Mason*, 9 N. H. 43, 50; *Whittier v. Varney*, 10 N. H. 291, 295, 296; *Rangleley v. Goodwin*, 18 N. H. 217; *Avery v. Bowman*, 39 N. H. 893; *Welch v. Ossipes V. T. C. S. Bank*, 58 N. H. 147; *Saunders v. Bank*, 61 N. H. 81.

By Gen. Laws, chaps. 237, 238, all real estate except the homestead right is declared liable for the payment of the owner's debts. But if a debtor's land happens to be so situated that a levy of an execution cannot be made upon it in the mode pointed out by the statute, his creditors cannot take it. *Russell v. Dyer*, 40 N. H. 178. "No doctrine" says Bell, *Ch. J.*, (pp. 183, 184), "has received more universal assent than that, in disposing of a debtor's land by compulsory proceedings, under a statute, for the payment of his debts, the course is to be strictly followed. A failure to comply with any of the substantial requirements of the statute renders the proceedings void, and leaves his title to the land unaffected. * * * If proceedings of this essential character cannot be had in conformity to the statute in reference to lands situated in unincorporated or uninhabited places, * * * the authority,

under the statute, to sell a debtor's right of redemption does not extend to lands so situated." Upon a motion for a rehearing, this doctrine was affirmed. *Russell v. Dyer*, 43 N. H. 396. The court there says (p. 401) that, while it was the avowed object of the statute to make all a debtor's property, except specific exemptions, liable for the payment of his debts, "the creditor who would make it available for his benefit must in every instance show an exact compliance with the provisions of the statute as to the mode of the set-off. No discretion was left to the creditor or officer, or to the court, as to the way in which the debtor's lands were to be subjected to the payment of his debts. The statute provisions must be explicitly followed. * * * Where a statute makes any part of a man's property liable for the payment of his debts, it also provides a way in which it may be taken and sold; and unless all the provisions of the statute are followed, the benefits to be derived from the statute cannot be gained. And if a statute of this kind fails to provide a way in which any right or property may be sold, then there is no provision for its sale at all." In *Lebanon v. Griffin*, 45 N. H. 563, the court says: "We regard the decision in *Russell v. Dyer* as settling the question that, where a party relies upon the provisions of the statute on which his claim or right depends, he must show a compliance with the terms and conditions of the statute. It is not enough that he shows he did all that was in his power to comply with them."

The cases in which the doctrine has been applied to the assessment and collection of taxes are much more numerous. A few of those decided in other jurisdictions are collected in Cooley, Tax. 209, 257, 258, 290, 296, 326, 354, and in Cooley, Const. Lim. 4th ed. 643-649. In all without, it is believed, an exception, it is held essential to the validity of an assessment that every material requisite of the statutes be complied with. "Taxation for public purposes is a conceded power of government, but it must be enforced strictly according to law, or it becomes the most obnoxious means of confiscation." Church, *Ch. J.*, in *National Bank v. Elmira*, 53 N. Y. 59.

The doctrine has always, from the earliest period, been rigorously maintained by this court. The cases are cited below.*

If in some of them it has been misapplied,

their authority for the present purpose is not weakened. Its continued maintenance is of infinitely more importance than that the plaintiffs be reimbursed whatever they may have paid beyond their just share of the public expense in Northwood. *Manchester Mills v. Manchester*, 58 N. H. 39.

In *Pike v. Hanson*, 9 N. H. 491, it was held that where the statute required the selectmen, before entering upon their duties as assessors, to take and subscribe an oath to make a just and true appraisal of all ratable estate, an assessment made by them without taking the oath was void. The court says: "This provision of the statute cannot be deemed merely directory. It was designed for the protection and security of the citizen, whose rights are in some degree in the discretion of the assessors. The Legislature intended, by the special oath thus required formally to be taken and subscribed by the assessors, to guard as far as possible against all abuse of this discretion; and we cannot dispense with so important a requisition." Selectmen cannot adopt an appraisal made at their request by another, "because the law intends that they should exercise their own judgment." *Hayes v. Hanson*, 12 N. H. 289. "If unauthorized persons unite with them in making the appraisal, their assessment is void." *Perkins v. Langmaid*, 34 N. H. 316, 326, 327; *S. C.* 36 N. H. 502, 507, 508. The assessment of a tax larger, by the smallest sum, than is authorized by the statute, is fatal to its validity. *Wells v. Burbank*, 17 N. H. 394, 412. See Laws 1871, chap. 9, § 1; Gen. Laws, chap. 57, § 4; *Taft v. Barrett*, 58 N. H. 450. In *Lisbon v. Bath*, 21 N. H. 325, 326, the court says: "The power of taxation is one of the highest elements of sovereignty. It cannot be enforced upon the citizen, unless by clear and distinct provisions of law. * * * Hence, whenever money is to be raised by taxation, the specific purpose for which it is required must not only be inserted in a legal warrant, but, must be voted at a legal meeting of the town, and be assessed and collected in a legal way." In *Weeks v. Waldron*, 64 N. H. 149, 2 New Eng. Rep. 852, decided at the last term, it was held that a tax sale of nonresident land is invalid if the number of acres in the taxed parcel is not inserted in the collector's list, as required by Gen. Laws, chap. 59, §§ 1, 2. The court says: "Whether there was any sufficient reason, in our opinion, for

**Harris v. Willard*, Smith (N. H.), 63, 66; *Brown v. Smith*, 1 N. H. 36; *Johnston v. Wilson*, 2 N. H. 202; *Haverhill & F. I. Manufactory v. Barron*, 3 N. H. 36; *Brown v. Dinamoore*, Id. 103; *Tidd v. Smith*, Id. 178; *Gove v. Lovering*, Id. 202; *Waldron v. Tuttle*, Id. 340; *Eastman v. Little*, 5 N. H. 200; *Cardigan v. Page*, 6 N. H. 182; *Nelson v. Pierce*, Id. 194; *Cambridge v. Chandler*, Id. 271; *Brewster v. Hyde*, 7 N. H. 206; *Cloutman v. Pike*, Id. 209; *Walker v. Cochran*, 8 N. H. 163; *Gibson v. Bailey*, 9 N. H. 168; *Smith v. Burley*, Id. 423; *Pike v. Hanson*, Id. 491; *Cavis v. Robertson*, Id. 524; *Brewster v. Hough*, 10 N. H. 138; *Pickering v. Pickering*, 11 N. H. 141; *Hayes v. Hanson*, 12 N. H. 284; *Blake v. Sturtevant*, Id. 507; *Bellows v. Parsons*, 13 N. H. 256; *Henry v. Sargeant*, Id. 321; *Homer v. Cilley*, 14 N. H. 85; *Wells v. Burbank*, 17 N. H. 393; *Smith v. Messer*, Id. 420; *Bean v. Thompson*, 19 N. H. 290; *Grafton Bank v. Kimball*, 20 N. H. 107; *Lisbon v. Bath*, 21 N. H. 318; *Ainsworth v. Dean*, Id. 400; *Osgood v. Blake*, Id. 550; *Chase v. Sparhawk*, 22 N. H. 124; *Osgood v. Clark*, 23 N. H. 807; *Rice v. Wadsworth*, 27 N. H. 104; *Gordon v. Clifford*, 28 N. H. 402; *Gordon v. Rundlett*, Id. 435; *Lyford v. Dunn*, 32 N. H. 8.

H. 86, 87; *Perkins v. Langmaid*, 34 N. H. 315; *Perkins v. Langmaid*, 36 N. H. 501; *Davis v. Handy*, 37 N. H. 69; *Pierce v. Richardson*, Id. 306; *Clark v. Bragdon*, Id. 562; *Lamprey v. Batchelder*, 40 N. H. 522; *Copp v. Whipple*, 41 N. H. 273; *Rogers v. Bowen*, 42 N. H. 102; *Lefavour v. Bartlett*, Id. 555; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Fitchburg R. R. v. Prescott*, 47 N. H. 62; *Wells v. Jackson I. Mfg. Co.* Id. 235; *Jaquith v. Putney*, 48 N. H. 138; *Fletcher v. Drew*, Id. 180; *Wells v. Jackson I. Mfg. Co.* Id. 491; *Rockingham Ten Cent Sav. Bank v. Portsmouth*, 52 N. H. 17; *Cahoon v. Coe*, Id. 518; *Pickering v. Coleman*, 53 N. H. 424; *Bailey v. Aukerman*, 54 N. H. 527; *Roberts v. Holmes*, Id. 560; *Bowles v. Clough*, 55 N. H. 383; *Paul v. Linscott*, 56 N. H. 347; *Thompson v. Gerrish*, 57 N. H. 85; *Cahoon v. Coe*, Id. 556; *Taft v. Barrett*, 58 N. H. 447; *Sawyer v. Gleason*, 59 N. H. 140; *Buttrick v. Nashua & S. L. Co.* Id. 392; *Perley v. Stanley*, Id. 587; *Weeks v. Gilmanton*, 60 N. H. 500; *Thompson v. Ela*, Id. 502; *French v. Spaulding*, 61 N. H. 395; *Mowry v. Blandin*, 64 N. H. 3, 2 New Eng. Rep. 551; *Burpee v. Russell*, 64 N. H. 62, 2 New Eng. Rep. 898; *Weeks v. Waldron*, 64 N. H. 149, 2 New Eng. Rep. 852.

the Legislature to make this provision, is of no importance. * * * The language of the statute is plain, and the legislative will as expressed cannot be disregarded. When the requirements of a constitutional statute are plain and positive, courts are not called upon to give reasons why it was enacted. It is never lawful, in the construction of statutes, to impute useless or frivolous conduct to the Legislature."

In *Cahoon v. Coe*, 57 N. H. 556, it was held, upon the greatest consideration, that if in any case the provisions of the statute relating to the collection of a tax cannot be complied with, the result is, not that the statute may be dispensed with, but that the tax cannot be collected. *Russell v. Dyer*, 40 N. H. 173, 43 N. H. 396, was cited and approved. Stanley, J., says (p. 570) that the old maxim of the law, that every statute authority to divert the title of one without his consent, and transfer it to another, must be strictly pursued, or the title will not pass, is "founded firmly upon principles of equity and natural justice." Cushing, Ch. J., says (p. 579): "It does not appear to me that a tax is a debt of any higher obligation than any other honest debt; and I can see no reason why the requirements of the statute should not be as rigorously fulfilled in appropriating a man's property to the payment of a tax as in appropriating it to the payment of a debt. There is no principle which I can find in morals or justice, by which the State is bound to any more rigorous observance of its laws in enforcing the payment of other honest debts than in enforcing the payment of its own claims." After exhaustive argument upon a motion for a rehearing, Stanley, J., says (p. 597): "When the statute requires notice to be given in a particular way, before a man's estate can be declared forfeited, unless that notice is given, his property is not taken under process warranted by law. It matters not whether the notice which the law requires can be given or not; the law of the land is not complied with unless it is given, and if it cannot be complied with, the property cannot be taken. The maxim *lex non cogit ad impossibilia* * * * may be applicable to this case; but, as suggested by my brother Cushing in the matter of the collection of the taxes, the impossible thing, to which the law compelled no one, was the collection of the tax where the provisions of the statute cannot be complied with."

The right of every citizen that his property shall not be taken by the State under the name of a tax, except in strict pursuance of authorizing statutes, is not only affirmed by the common law, but is secured to him by the express terms of our Constitution. The Bill of Rights, art. 28, declares that "no subsidy, charge, tax, impost, or duty shall be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the Legislature, or authority derived from that body." Without the authority of the Legislature a tax can no more be levied than it can be laid. The levy of a tax is its assessment and collection. No tax laid upon property according to its value can be levied without a valuation and assessment. A tax is established and laid upon railroads by

Gen. Laws, chap. 62, § 1, which provides that "every railroad corporation in this State not exempted from taxation shall pay to the State an annual tax upon the actual value of the road," etc.; but if the Legislature had made no provision, express or implied, for its assessment and collection it could not be levied. If, under the Constitution, the duty of assessing taxes can be imposed upon the court, and if, in case a tax were laid with no express provision for its assessment, it could be presumed that the Legislature intended that it should be assessed by the court, there is no room for the presumption where the Legislature has particularly prescribed by what officers and in what manner it shall be assessed. In fact, the Legislature has never laid or authorized a tax for the levy of which it has not made full and explicit provision. The provisions of statutes laying taxes (Gen. Laws, chap. 62, §§ 1, 14; chap. 66, § 1; Laws 1885, chap. 64), or authorizing them to be laid (Gen. Laws, chap. 23, §§ 2, 3; chap. 37, § 4), and specifying the property liable to taxation (Gen. Laws, chap. 53), are no more imperative than those of chaps. 54-57, declaring when, how, and by whom they shall be assessed. The whole matter of taxation rests in the control of the Legislature, subject to the restraints of the Constitution. It is as supreme within its province as the Parliament of England. It can impose taxes, and require them to be assessed and collected, under whatever limitations and conditions it may deem proper. It is competent for it to declare that they shall be assessed by certain officers, and by no others, within a time limited and not afterwards, in a prescribed manner and not otherwise. Whenever it has proclaimed the legislative will in these particulars, the taking of a man's property under the guise of a tax assessed by any other officers, at any other time, or in any other manner, is not taxation, but robbery, and none the less so, if it be done under the sanction of the court. It is no justification that the money taken is paid into the public treasury, and applied to governmental purposes; that no more is taken than his just share of the public expense; and that, if not taken, his neighbors would be compelled to pay more than their due share of the common burden. All general laws may sometimes work injustice. If they do, it affords the Legislature a good reason for amending them, but none to anybody for violating or ignoring them. In a government by law, the administration of abstract justice contrary to law is the most mischievous of all wrong.

The Legislature has declared that the selectmen, being first sworn to the faithful and impartial discharge of their duties (Gen. Laws, chap. 41, §§ 1, 2), shall annually in April take an invoice of all the polls and estate liable to be taxed on the first day of that month (Gen. Laws, chap. 55, § 1); shall appraise all taxable property at its full and true value in money (Gen. Laws, chap. 56, § 1); and, upon the invoice so made, assess the taxes for that year (Gen. Laws, chap. 57, §§ 1, 3). Except in cases not here material, it has not authorized an assessment of taxes by any other persons, or in any other manner. If the adoption, by the selectmen, of an appraisal made by others under their direction, or a participation of oth-

ers with them in making the appraisal, vitiates their assessment, it cannot be any the less void if both it and the appraisal are wholly made by strangers to the office. By the statute and the Constitution, the right of every taxpayer that his property shall be subjected to no tax which is not assessed by the selectmen upon an appraisal made by them while in office, and under the sanction of their official oath, is as firmly secured to him as his right that no more than his proportional part of the public expense shall in any case be required of him. If for any reason his property cannot be so appraised, it cannot be taxed. The body charged by law with the power and duty of appraising the Pillsburys' shoe factory, and assessing upon it the tax of 1884, ceased to exist on the 31st day of March, 1885. No tribunal authorized to make the assessment is in existence. If justice requires that it should now be made, the remedy is with the Legislature. *Heine v. Leves Comrs.* 19 Wall. 661 [86 U. S. bk. 22, L. ed. 226]; *Barkley v. Leves Comrs.* 98 U. S. 258 [Bk. 23, L. ed. 893]; *Thompson v. Allen County*, 115 U. S. 555, 560 [Bk. 29, L. ed. 474, 475]; *Overing v. Foote*, 65 N. Y. 264.

It is the legal right of the Pillsbury Bros. that their property in Northwood be appraised and assessed for the taxes of any year by the selectmen of Northwood who hold the office during that tax year, and while they hold it. The lapse of time which has rendered such an appraisal and assessment for the tax of 1884 impossible has not destroyed their right, but their liability and the plaintiffs' right to the assessment which resulted from that liability. An assessment in 1886 of their tax for 1884, by the defendants, either voluntarily or under the direction of the court, would be as much a violation of their rights as would be an assessment, by the selectmen of 1886, of double their just proportion of the taxes for that year. It is no answer that, by the unlawful assessment, they are required to pay only what, upon principles of equity, they ought to pay, and would have been compelled to pay if the tax of 1884 had been seasonably assessed. *Joyner v. School Dist. No. 3*, 3 Cush. 567, 572; *Clark v. Norton*, 49 N. Y. 243, 248; *Cavis v. Robertson*, 9 N. H. 524, 531; *Grafton Bank v. Kimball*, 20 N. H. 107, 118.

The taxpayer's right that his neighbors shall contribute their just proportion to defray the public expense is no more sacred than that of a creditor to have his debtor's property applied in satisfaction of the debt. In neither case is the right absolute. It is qualified by the condition that it can be enforced in conformity with the provisions of the statutes. If it cannot be so enforced, the right does not exist.

Metcalf v. Gilmore, 59 N. H. 417; *Peaslee v. Dudley*, 63 N. H. 220; *Walker v. Walker*, 63 N. H. 321, 1 New Eng. Rep. 250; and *Owen v. Weston*, 63 N. H. 599, 2 New Eng. Rep. 717,

are not relevant. The questions in those cases related merely to a remedy and procedure, and it was comparatively unimportant how they were decided. Here the question is one of right.

These considerations dispose of the question before the court. The petition—no amendment being asked for—should be dismissed on both grounds: (1) because the defendants have no power to assess the tax; and (2) because the plaintiffs have no right to the assessment. They show also that the result would be the same if the petition were amended by making the present selectmen of Northwood or the Pillsbury defendants, although as against them no judgment can now be pronounced.

Mandamus is a discretionary writ. It is not awarded in every case where it is the appropriate remedy, and the applicant's right undoubted. High, Ex. Leg. Rem. § 9. Here the plaintiffs' pecuniary injury is trifling,—so small that the maxim *de minimis non curat lex* may well be applied. *Manchester Mills v. Manchester*, 58 N. H. 39. The selectmen's conceded want of power voluntarily to correct assessment errors after the lapse of the tax year has existed for more than one hundred years. The evil, if it be one, is easily curable by the Legislature, and is especially fit for its consideration. It cannot be denied that the authority of the court to correct it is at least doubtful. For these reasons, if there were no other, a wise judicial discretion requires that the petition should be dismissed.

It is essential to a free government that its executive, legislative, and judicial powers be kept as separate from and independent of each other as the nature of government will admit. Bill of Rights, art. 37. The judiciary has never hesitated to exert its authority to keep the legislative department within its province. It controls both that and the executive branch so far as to keep them from exceeding their constitutional powers. The court is the final arbiter of all controverted legal questions. Neither the Legislature nor the Executive can revise its action or reverse its judgments. It is supreme. If it condemns without notice, adjudges without hearing, denies justice, or what is equivalent—administers that which it is pleased to call justice in defiance of the legislative will, the people have no remedy except by impeachment and removal, or by revolution. It ought therefore, while it is vigilant to restrain usurpations of the law making and law-executing branches of government, to be especially watchful that it does not itself trespass upon the domain of either. It is wiser to refer the correction of the occasional mischiefs incidental to all general laws to the Legislature, which is always at hand, than to assume the exercise of a questionable jurisdiction.

Bingham, J., concurred in this opinion.

NOTE.—Statutory system.

A power to "assess and collect taxes" implies the power to enforce the collection by means of the statutory remedies. *State v. Columbia*, 6 Rich. N. S. 1; *Raynsford v. Phelps*, 43 Mich. 347; *Crapo v. Stetson*, 8 Met. 363; *Shaw v. Peckett*, 26 Vt. 432; *Camden v. Allen*, 20 N. J. L. 399; *Packard v. Tisdale*, 50 Me. 376; *Carondelet v. Picot*, 38 Mo. 125.

Government cannot wait on slow and tedious processes for the collection of its revenue; and hence the adoption of rules, statutory and otherwise, which have established a separate and peculiar system for the assessment and collection of taxes and for testing the legality of the assessment. *Jones v. Randle*, 68 Ala. 290; *Alabama G. L. Ins. Co. v. Lott*, 54 Ala. 499; *Mayor v. Baldwin*, 57 Ala. 61; *Elyton Land*

Co. v. Ayres, 62 Ala. 413; National C. Bank. v. Mobile, Id. 284; Underhill v. Calhoun, 63 Ala. 216.

Town taxes.

In New Hampshire selectmen alone may assess taxes if no assessors are elected. Scammon v. Scammon, 28 N. H. 429. For good cause shown they may abate any tax assessed by them or their predecessors. Edes v. Boardman, 68 N. H. 560. Neither the collector of taxes nor the town can maintain suit to enforce the payment of taxes; and if a town is summoned as trustee of an individual, it cannot set off the taxes assessed against such individual against the amount due from the town to him. Hibbard v. Clark, 56 N. H. 155. The court has no jurisdiction to restrain a town or the collector from the collection of a tax illegally assessed, as the party has a plain remedy at law. Brown v. Concord, 56 N. H. 575; Rockingham Sav. Bank v. Portsmouth, 52 N. H. 17.

Mandatory provisions in statute.

Those provisions in tax laws, a departure from which would be prejudicial to the owner of property taxed, cannot be held to be merely directory. Wiley v. Flournoy, 30 Ark. 612; Mayhew v. Davis, 4 M'Lean, 213; Clark v. Crane, 5 Mich. 151; Hoyt v. East Saginaw, 19 Mich. 39; Houghton Co. v. Auditor-General, 41 Mich. 31; People v. Schermerhorn, 19 Barb. 558. As a general rule statutory provisions regulating the assessment and levy of taxes are mandatory when their object is the protection of the taxpayer against spoliation or excessive taxation; and only regulations intended to promote dispatch, method, system, and uniformity in modes of proceeding are directory. French v. Edwards, 13 Wall. 506 (30 U. S. bk. 20, L. ed. 702); Clark v. Crane, 5 Mich. 151; Sibley v. Smith, 2 Mich. 486. Equality in burden is the principle of the Constitution; and there can be no rule which exempts some property, and casts the burden of the government support upon the rest. Fields v. Highland Co. 38 Ohio St. 481; Exch. Bank of Columbus v. Hines, 3 Ohio St. 43. Provisions must be regarded as mandatory where there are no circumstances which go to excuse their nonobservance, or to render them impeachable; and where the statute requires the performance of an act for the sake of justice or the public good, "may" is the same as "shall," and imposes a positive and absolute duty. People v. Buffalo Co. 4 Neb. 150. See Morrill v. Taylor, 6 Neb. 243; Supervisors v. People, 7 Hill, 511.

The right conferred on subordinate bodies must be strictly construed and closely pursued; and there must be a rigid adherence to the directions and forms of the statute, especially when these are intended for the protection and benefit of the owner of the property. Kniper v. Louisville, 7 Bush (Ky.), 599; Lyon v. Hunt, 11 Ala. 296; Scales v. Alvis, 12 Ala. 617; Parker v. Burgen, 20 Ala. 251; Elliot v. Eddins, 24 Ala. 508; Milner v. Clarke, 61 Ala. 258. The Constitution requires taxation to be equal and uniform and all property to be taxed; and an order of the board in conflict with these provisions is null and void. Wilson v. Sutter Co. 47 Cal. 91.

Mandamus.

Mandamus is the proper remedy to compel a levy 360

by municipal corporations for the payment of their debts and obligations, or for the payment of their bonds or coupons. Commonwealth v. Comrs. of Allegheny Co. 37 Pa. 290; United States v. Labette Co. 2 McCrary, 25; S. C. 7 Fed. Rep. 318; Rice v. Walker, 44 Iowa, 458; People v. Hayt, 66 N. Y. 603. See Supervisors v. Klein, 51 Miss. 807.

Its appropriate functions are the enforcement of duties to the public, by officers and others who neglect or refuse to perform such duties. Commonwealth v. Comrs. of Allegheny Co. 37 Pa. 290; Dunham v. Chicago, 55 Ill. 337; Merritt v. Farris, 22 Ill. 303. It is not necessary that there be a prior refusal to perform the duty, as unreasonable delay and manifest intent to neglect to perform is sufficient. Cleveland v. Board of Finance, 38 N. J. L. 236; Beecher v. Clay Co. 52 Iowa, 142; Bartholemew v. Leech, 7 Watts, 472; Krutz v. Fisher, 8 Kan. 90; McMahon v. McGraw, 26 Wis. 614; Prescott v. Gonser, 34 Iowa, 175.

Mandamus confers no new or additional authority, but simply requires the officer to discharge a legal duty; and is the more appropriate and efficient remedy to compel the collectors of the public revenue to proceed to perform their duties. State v. Fyler, 48 Conn. 145; Oceana Co. v. Hart Tp. 48 Mich. 319; State v. Schenoko, 11 Mo. App. 163; State v. Gracey, 11 Nev. 223; People v. Mayor, 19 Wend. 386; State v. Whitworth, 8 Lea. 594.

Where a duty is imperatively required by law to be performed by ministerial officers,—as the levying of a specific tax,—no demand is necessary to lay the foundation of an application for the writ. Columbia Co. v. King, 13 Fla. 451.

Where it is the clear duty of the authorities to levy a tax for general purposes, or for the payment of some demand, on refusal to do so it lies to compel performance. Robinson v. Butte Co. 43 Cal. 383; Manor v. McCall, 5 Ga. 523; Allegheny Sch. Comrs. v. Allegheny Co. Comrs. 20 Md. 449; People v. Lansing, 27 Mich. 131; Beaman v. Board of Police, 2 Miss. 237; Morgan v. Commonwealth, 55 Pa. 456; People v. Columbia Co. 10 Wend. 363.

The law provides for amending assessment rolls so as to embrace omitted property; and if the tax officers fail to do their duty in this respect, they may be compelled to discharge such duty by *mandamus*. Puget Sound Agric. Co. v. Pierce Co. 1 Wash. Terr. 159.

Assessors may be compelled by *mandamus* to insert in the roll, on application of the proper officer of the State, property which is taxable, but which had been omitted from the roll by them. People v. Shearer, 30 Cal. 645. See People v. Halsey, 37 N. Y. 344. A judicial body may be compelled to undo a wrongful act by means of this writ. People v. Otsego Co. 51 N. Y. 407.

It may by *mandamus* be compelled to proceed and determine the matter, but its discretion as to the manner in which it is to be determined is not subject to control. Howland v. Eldredge, 43 N. Y. 461.

Where it is apparent that to make a demand would be a mere idle act, a demand is not necessary; the law never requires the performance of an idle or vain act.

United States v. Board of Town Auditors, 8 Fed. Rep. 473.

CONNECTICUT.

SUPREME COURT OF ERRORS.

Mary E. LOCKWOOD'S APPEAL from Probate.

A will provided as follows: "After the decease of my said wife, I give * * * all my estate * * * to the children of my nephew J, who shall be living at the decease of my said wife, if she survive me; and if she do not survive me, then to such children of said J as shall be living at my own decease; and to the children of my niece M, who shall be living at the decease of my said wife, if my said wife shall survive me; and if my said wife do not survive me, then to such children of said M as shall be living at my own decease, to be equally divided between said children, to wit, of said J and M, and to belong to them and their heirs forever; and by the term 'children' I mean and intend all such children as said J or said M now have, or may hereafter have, either during my own life or during the life of my said wife. And I further will and direct that if either of said children of said J or of said M shall die before my own decease, or before the decease of my said wife, and leave lawful issue, that such issue shall stand in place of their deceased parent, and take the same share of my estate which their deceased parent, if living as aforesaid, will be entitled to by virtue hereof." *Held*, that the legatees (children and grandchildren of J and M), took per stirpes, and not per capita.

(Fairfield—Filed June, 1887.)

APPPEAL to the Superior Court from a decree of distribution made by the Court of Probate for the District of Westport, Fairfield County, and reserved in the Superior Court for the consideration of the Supreme Court of Errors, by consent of parties. *Reversal advised.*

The decree appealed from divided the property belonging to the estate of Joseph R. Andrews, deceased, into three parts, to wit: One part to A. B. Coley, son of Mary E. Coley; one part to James and Ida L. Coley, minor grandchildren of Mary E. Coley, representatives of James L. Coley, deceased; and the other part to Mary E. Lockwood, daughter of James S. Andrews,—the appellant, Mary E. Lockwood, claiming one half of said estate should be divided and set out to her.

The facts and questions presented are stated in the opinion.

Messrs. John Hooker and H. S. Barbour, for appellant:

We claim, first, that the fair construction of the language of the fourth clause of the will is such as to show that the testator intended to give one half the residue of his estate to the children of his nephew, and the other half to the children of his niece, who should be living at his wife's decease, and the issue of any deceased child; and that, under the circum-

stances, Mary E. Lockwood is entitled to half of such residue. There are two classes of persons to share the property equally,—“the children of James S. Andrews and the children of Mary E. Coley.” The will does not say, to be divided among the children of both, as one class; but equally between the children of the one and the children of the other; and, as if to prevent any possible misunderstanding of his intention, the testator adds, “And by the term ‘children,’ I mean and intend all such children as said James S. Andrews or said Mary E. Coley now have, or may hereafter have, either during my own life or during the life of my said wife.” His intention is precisely as if he had said, “To be divided equally between James’s children and Mary’s children,” using the possessive case, which the word “of” expresses.

Talcott v. Talcott, 39 Conn. 186; *Balcom v. Haynes*, 14 Allen, 204; *Holbrook v. Harrington*, 18 Gray, 102; *Bassett v. Granger*, 100 Mass. 348; *Haskell v. Sargent*, 118 Mass. 340; *Ferrer v. Pyne*, 81 N. Y. 281; *Vincent v. Newhouse*, 83 N. Y. 505; *Gerrish v. Hinman*, 8 Oreg. 348; *Alder v. Beall*, 11 Gill & J. 128; *Risk’s App.* 52 Pa. 269; *Fissel’s App.* 27 Pa. 55; *Lachland v. Downing*, 11 B. Mon. 82; *Lyon v. Acker*, 38 Conn. 222; *Hoatson v. Griffith*, 18 Gratt. 574.

The word “between” is used in this will, and not “among.” If a division is to be made to more than two, the word “between” is not used properly, but “among” should be used. Webster, ed. 1886, and Worcester, make this distinction. Webster says: “‘Between’ and ‘betwixt’ are used in reference to two things, parties, or persons; ‘among’ and ‘amidst’ in reference to a greater number.” Worcester says: “‘Between’ is used in reference to two things; ‘among’ in reference to a greater number.”

It is true this distinction is not always observed, and the words are often used inappropriately; but in a will carefully drawn, as this is, we look to the words used for the intent. In *Webster v. Welton*, 58 Conn. 185, the court says: “The will is drawn with technical nicety, indicating both care and capacity to express the precise intent of the testator in apt terms; language thus used should have its natural and legal meaning.”

If the testator had said that the property should be divided equally among all the children of the nephew and niece, it could with more plausibility be claimed that he intended a division *per capita*. But the case of *Raymond v. Hillhouse*, 45 Conn. 467, shows that such a claim would be untenable.

In *Heath v. Bancroft*, 49 Conn. 222, the court says: “The direction of an equal division has been held to be as applicable to a *per stirpes* as to a *per capita* division,” citing *Raymond v. Hillhouse*, 45 Conn. 473, in which the court says: “Neither do the words, ‘to be equally divided among them,’ necessarily import a division of the property among individuals; for they apply just as readily and appropriately to a division among classes.”

There is “nothing in this will inconsistent with the distribution of the residuum *per stirpes*” (using the language of *Judge Loomis* on page 478 in the case last named); and in the

language of *Judge Carpenter*, in the case of *Lyon v. Acker*, 33 Conn. 224, we certainly can say that no "contrary intention appears."

But if the language of the will is such as to leave the testator's intention in doubt as to the mode of distribution, the court will apply the *per stirpes* rule, which is the rule of our Statute of Distributions.

Rev. Prob. Laws, 1885, § 200, p. 515.

The language is, "Equally to the brothers and sisters of the intestate, of the whole blood, and those who legally represent them,"—the same as in Rev. 1875, p. 373, § 8.

As to the construction of this clause, see 1 Swift, Dig. top page 121, and *Raymond v. Hillhouse*, 45 Conn. 474.

A long line of decisions by our supreme court has established that, in cases of testamentary gifts to heirs or their representatives, if there is doubt as to the intention of the testator in respect to the division of the property, whether it is to be *per capita* or *per stirpes*, the Statute of Distributions is to govern; or, in other words, "courts will apply the general principles governing the descent of estates, unless a contrary intention appears." *Cook v. Catlin*, 25 Conn. 388; *Bond's App. from Probate*, 31 Conn. 183; *Lyon v. Acker*, 33 Conn. 222; *Talcott v. Talcott*, 39 Conn. 186; *Raymond v. Hillhouse*, 45 Conn. 467; *Heath v. Bancroft*, 49 Conn. 222; *Fissell's App.* 27 Pa. 55; *Minter's App.* 40 Pa. 111; *Harris's Est.* 74 Pa. 452; *Loose v. Carter*, 3 Jones (N. C.), Eq. 877; *Lockhart v. Lockhart*, 3 Jones (N. C.), Eq. 205; *Roper v. Roper*, 5 Jones (N. C.), Eq. 16; *Hamletts v. Hamletts*, 12 Leigh (Va.), 350; *Gilliam v. Underwood*, 3 Jones (N. C.), Eq. 100.

Messrs. **John H. Perry**, and **Samuel Fessenden**, for appellees:

For the purpose of determining the object of the testator's bounty, or quantity of interest given by his will, a court may inquire into every material fact relating to the persons who claim to be interested under the will, and to the circumstances of the testator, and of his family, and affairs, for the purpose of enabling the court to determine the persons intended by the testator, and the quantity of interest given by his will.

Wig. Wills, 79, 142, 154, and cases cited, 155, 161, note 2; O'Hara, Wills, 28, 29; *White v. White*, 52 Conn. 519.

There is no class of cases where precedents have so little weight as in the construction of wills.

Redf. Wills, 423; *Lyon v. Acker*, 33 Conn. 225.

It was so evidently the intention of the testator to apply his bounty from the starting point of his grand nephews and nieces, and to divide it *per capita* between them, that, unless some inflexible rule of law prevents, we are confident that his wishes will be carried out. As we proceed, then, to consider the decisions applicable to our case, it should be borne in mind that none of the cases applying the *per stirpes* rule were precisely similar to this, and therefore furnish at the best but arguments which are simply more or less irrelevant.

One of the earliest cases is *Gold v. Judson*, 21 Conn. 615. Testator gives the residue of his estate to the heirs of my brother R, the heirs of my sister N, the heirs of my brother A, "to

be equally divided between said heirs, each individual alluded to having an equal portion of the same." It was divided *per capita*.

In *Cook v. Catlin*, 25 Conn. 387, testator concludes his will with, "The remainder I give to my heirs." The heirs were nephews and nieces and grand nephews and nieces. The property was divided *per stirpes*, following the rule of descents; for the will specified no rule of division; and under the common law, his heirs, the property being given to them *ex nomine*, took by descent, and not by purchase.

In *Bond's App.* 31 Conn. 183, testator gives the remainder "to my children and their heirs respectively, to be divided in equal shares between them." There were living four children, and the issue of four deceased children. The legatees were in unequal degrees of relationship, being children and grandchildren, and no living ancestors were passed over by the will. The property was divided *per stirpes*, it being clear that the testator, by giving shares to the "heirs" of his deceased children, intended them to take the share which, as heirs, the law would give them.

The Connecticut law of distribution divides the property among nephews and nieces and their issue *per stirpes*, and when, in a will, the word "heirs" is used to designate legatees, it is natural to suppose that the testator has this rule of inheritance in mind,—that being a word of inheritance,—and to accordingly apply it; but the word "children," as used in the case at bar, is a word of purchase, and does not presuppose the same intention.

Carr v. Estill, 63 Am. Dec. 548; *Roome v. Counter*, 10 Am. Dec. 390, and note.

In *Lyon v. Acker*, 33 Conn. 222, the salutary rule is stated that precedents are entitled to but little weight in the construction of wills, where the cases are not precisely analogous. Testator gives "to my three daughters, Mary, Susan, and Josephine, and the children of my son Samuel, my homestead, to them and their assigns forever, share and share alike." The devisees were the issue of the testator, and not in equal degrees of relationship. The property was divided *per stirpes*, the court remarking, "That the testatrix intended to discriminate against her daughters, and in favor of her son's children, will certainly not be presumed." Had the court adjudged the will void for uncertainty, it would have been divided *per stirpes* among the identical devisees, except the son would have taken it instead of his children.

In *Talcott v. Talcott*, 39 Conn. 186, testator gives a legacy to a daughter and her children, another daughter and her children, and to the children of a stepdaughter, "to be equally divided among the above-mentioned heirs." The word of inheritance,—“heirs,”—in the sentence, defining the rule of division, will be noticed. The legacy was divided *per stirpes*, on the ground that the intention of the testator was not clear, except it could not be that he wished strangers in blood to take more than his own issue. The devisees—children and grandchildren—were his heirs at law; and it was determined that he did not intend to disinherit any of his heirs at law, but rather to declare how they should enjoy his bounty. This case seems to hold that the *per stirpes* rule

has nothing to recommend it, except as furnishing a convenient door of escape, when it was impossible to ascertain the testator's wishes from his words; with which we agree.

In *Raymond v. Hillhouse*, 45 Conn. 467, testator gives "the residue of my estate, real and personal, to the following-named persons, to be divided equally among them, viz.: R and S, the grandchildren of my deceased brother W, and the grandchildren of my deceased sisters, D & M." It does not appear whether any children of W, D, or M were living, to take as the legal representatives of his deceased brothers and sisters, had he made no will. The court held that the brothers and nieces were named as the heads of classes, and the grandchildren took *per stirpes*, on the ground that such construction "is at least as natural and reasonable as the other." This case differs essentially from the one at bar, as the sisters, R and S, were the direct heirs of the testator, and it was more natural to suppose that he intended to give to them at least as large a share of his estate as to the representatives of his deceased brothers and sisters.

The "paramount rule" of construction, in such cases, is stated to be "to ascertain, if possible, the intention of the testator from the language of the will and all the circumstances;" and it is further stated that a distribution *per stirpes* is to be ordered where the language of the will is consistent with such a distribution, and the real intention of the testator is in doubt.

In *Heath v. Bancroft*, 49 Conn. 220, the language of the will left the intention of the testator again in "serious doubt;" and it was finally decided that he probably intended a *per stirpes* distribution, among other reasons, because any other method would cause great trouble, inconvenience, and delay. The reasoning in this case is not applicable to ours.

These decisions disclose an expressed purpose on the part of this court to apply the *per stirpes* rule only when the testator seems to intend none other; while it must be conceded that in other States no shadow of a doubt would rest upon the validity of the distribution made in the case at bar.

O'Hara, Wills, 824 et seq.; 2 Jarm. Wills, 1st Am. ed. 111; *Roome v. Counter*, 10 Am. Dec. 390, and note; *Ward v. Stow*, 27 Am. Dec. 288; *Bryant v. Scott*, 28 Am. Dec. 590; *Collins v. Hoxie*, 9 Paige, Ch. 81; *Bender's App.* 8 Grant (Pa.), 210; *McKelvey v. McKelvey*, 1 West. Rep. 68; *Weston v. Foster*, 7 Met. 297; *Kelley v. Vigos*, 112 Ill. 242; 64 Am. Rep. 285; *Hall v. Hall*, 140 Mass. 267, 1 New Eng. Rep. 233.

Carpenter, J., delivered the opinion of the court:

The testator, after making provision for his wife, disposed of his property as follows: "After the decease of my said wife, I give, devise, and bequeath all my estate, whereof the use is hereinabove given to my said wife as aforesaid, to the children of my nephew, James S. Andrews, who shall be living at the decease of my said wife, if she survive me; and if she do not survive me, then to such children of said James S. Andrews as shall be living at my own decease; and to the children of my niece, Mary E. Coley, who shall be liv-

ing at the decease of my said wife, if my said wife shall survive me; and if my said wife do not survive me, then to such children of said Mary E. Coley as shall be living at my own decease, to be equally divided between said children, to wit, of said James S. and Mary E., and to belong to them and their heirs forever; and by the term 'children' I mean and intend all such children as said James S. Andrews or Mary E. Coley now have, or may hereafter have, either during my own life or during the life of my said wife. And I further will and direct that if either of said children of said James S. or of said Mary E. shall die before my own decease, or before the decease of my said wife, and leave lawful issue, that such issue shall stand in place of their deceased parent, and take the same share of my estate which their deceased parent, if living as aforesaid, will be entitled to by virtue hereof."

The will was made in 1869. At that time James S. Andrews and Mary E. Coley, the children of a deceased brother, were the next of kin and sole heirs at law of the testator. The testator survived them, so that their children, when the will took effect, were his heirs at law. James S. Andrews left one child, the appellant, who is now living. Mary E. Coley left two children, one of whom died during the lifetime of the testator, having children, and the other survived him.

The question is whether the legatees take *per stirpes* or *per capita*. We think it is reasonably clear that the testator intended that they should take *per stirpes*.

He manifestly regarded his nephew and niece as original stock, being the parents of his legatees. When he made his will they were his next of kin, and naturally enough he would desire to treat them impartially. The reason for passing by them, and bestowing his bounty upon their children, does not appear. It is not to be inferred, however, that it was because of any personal dislike, or of superior affection for the children; other reasons may, and probably did, exist. While the children were the direct objects of his bounty, yet it may have been for the parents', etc., sakes. That is probable from the fact that possible unborn children were placed upon the same footing with those then living.

He also provided for the issue of deceased children. That portion of the will operates in behalf of two minor children, one of whom was born about the time the will was made, and the other was born afterwards. It cannot be supposed that that was because of any special affection for them. We may safely assume, therefore, that a personal regard for the nephew and niece prompted the will. Providing for their children was hardly less gratifying to them than a direct provision for their own benefit; for it is for children that most of us strive and spend our energies. It is neither strange nor unnatural, therefore, that in the mind of the testator equality should be established between his nephew and niece, rather than among their children; indeed, that is what we should expect. Coming, then, to the terms of the will, we find that they are more in harmony with that idea than with a contrary one. Instead of grouping his grandnephews and grandnieces in one class, he divides them into

two classes, by describing separately and fully the children of James S. Andrews, and then, with equal distinctness and fullness, the children of Mary E. Coley, to whom the property is given, "to be equally divided between said children, to wit, of said James S. and Mary E."

The word "between," rhetorically considered, is more applicable to two classes than to a greater number of individuals. While this is not necessarily controlling, yet it is not without weight in a case where other considerations are equally poised; and will have the greater weight if the circumstances aside from that are such as to induce the belief that the word is used in its accurate sense.

The fact that the testator provided for the issue of deceased legatees is of no special significance. He is there making contingent provision for another generation, in order to prevent a lapse. It is not in contrast with the previous provision, but rather in harmony with it. Regarding the children of his brother as the starting point of new lines of descent makes the will symmetrical, and prevents any implication of an intention that the legatees should take *per capita*.

The view we have taken of this case is sustained by the following cases: *Gold v. Judson*, 21 Conn. 616; *Cook v. Catlin*, 25 Conn. 387; *Bond's App. from Probate*, 31 Conn. 183; *Lyon v. Acker*, 38 Conn. 222; *Talcott v. Talcott*, 39 Conn. 186; *Raymond v. Hillhouse*, 45 Conn. 467.

We are asked to distinguish this case from some of the cases cited, on the ground that the word "children" is used instead of the word "heirs;" and some cases are cited from other jurisdictions in support of the claim. There is doubtless a technical difference in the meaning of the two words; and yet, in common speech, they are often used as synonymous. The rule, therefore,—if it is a rule,—should be cautiously applied. No such rule as yet seems to have been adopted in this State, and so far as it prevails elsewhere, we apprehend that it is applied only in nicely-balanced cases. This we do not regard as such a case.

Another distinction is suggested,—that in most of the cases cited the testators were providing for heirs at law. How important this distinction may be in other cases we will not attempt to say. It is sufficient for our present purpose to call attention to the fact that at the date from which this will speaks,—the death of the testator,—these legatees were his heirs at law.

Moreover, in this case the intention of the testator appears with reasonable certainty from the language used, so that it is unnecessary to resort to any artificial rule of construction in order to ascertain it.

The Superior Court is advised to reverse the decree of the Court of Probate.

In this opinion the other Judges concurred.

SOPHRONIA M. SIMONS

v.

CLARA H. SIMONS and ALBERT D. SIMONS.

Re EARL SIMONS'S WILL.

A testator gave the use and income of all his property to his wife during

life, "subject only to the following conditions, limitations, and restrictions." He directed that his wife, during widowhood or during life, "retain the direction and possession of all property." "Said property is placed in her possession for the family, and for the education and support of my daughter Clara, and in trust for my son Albert." The wife was given "power and authority to exchange or dispose of the real estate, if it is found for her comfort and convenience." The will also constituted the widow a trustee for the son during her life or widowhood, with a provision that after her death or marriage the trusteeship might be continued by the court of probate, and the property divided. *Held:*

(a) That the widow took all the estate during life, or so long as she remained a widow, in trust to apply the income, and, so far as might be necessary, a portion of the principal, to the support of the family, by which term the testator intended the present beneficiaries only,—that is, the widow and daughter, not including the son,—and to the education of the daughter; and that as such trustee she might be required to give bonds.

(b) That the reasonable expenses incurred in recovering a portion of the estate, and in the prosecution of an amicable suit for construction of the will, should be paid from the estate.

(Hartford—Filed July, 1887.)

A MICABLE suit for the construction of the will of Earl Simons, deceased, entered in the Superior Court for Hartford County pursuant to the statute, and reserved for the advice of the Supreme Court of Errors.

The questions presented are stated in the opinion.

Messrs. Briscoe & Andrews, for Sophronia M. Simons:

The law of this case, as in every case where the construction of a will is concerned, is the intent of the testator as gathered from the entire instrument and from the surrounding circumstances. This intent is not to be derived from any one clause or provision of the will, but from the whole, so that effect may be given to the entire instrument.

Security Co. v. Hardenburgh, 53 Conn. 170.

A single reading discloses three objects: (1) to provide comfortably for his wife during her life or widowhood; (2) to support and educate his daughter Clara; (3) to postpone the possession and use of any portion of his property by Albert until the death or remarriage of his wife.

There is no interest of any kind given in the property to Albert or Clara during Mrs. Simons's lifetime or widowhood, except the right on the part of Clara to compel the estate to support her. The property is to "be given" on the death or remarriage of Mrs. Simons. If this is said to relate to the time of enjoyment only, then we ask, By what other clause in the will is any present interest given? There is

none; the interest and enjoyment are both postponed to a future time.

Schouler on Wills, ed. 1887, at § 467, says: "Infant children, most of all, deserve a court's solicitude; for those of tender years, at least, can hardly be thought to have incurred the parent's just resentment, or to deservedly forfeit what naturally belongs to them; and, being themselves unable to protect their own inheritance, the tribunal of justice should secure those rights for them when the rules of interpretation permit it. Granting that the legal obligation of a father to support his young children is not continued upon his estate after his death, yet every true parent recognizes the moral obligation; and so natural is this feeling that courts may presume that the parent made his will under its influence."

The fact that the daughter Clara has now attained majority cannot affect the provision made for her education and support.

In the case of *Bouditch v. Andrews*, 8 Allen, 341, 342, the will provided "for the maintenance of my family, and the support and education of my children." The court, in its opinion, says: "The word 'family' may undoubtedly sometimes be so used as to include a wife as well as children. Indeed, it would usually be so understood if there were nothing to show that the contrary were intended. And we think the whole language of the will shows that it was meant to include the wife and children while they should live together and thus constitute a family. The will made no other provision for the children during the life of their mother than that which was contained in this clause. A very considerable amount of property was given to the widow for her sole and exclusive use and benefit. But the testator seems to have contemplated that, during the whole life of his widow, there would be a household to be maintained. His children were young, and for a considerable period, at least, would be likely to live with their mother and be dependent upon her. And we think it was in reference to this probability that he used the phrase 'maintenance of my family' in addition to the 'support and education of my children.' The first had reference to the expenditures necessary for the joint maintenance of those who should live together collectively; and the second was intended rather to provide for the children separately, as they should cease to continue members of the family on their marriage, or leaving home for purposes of education or settlement in life."

See also *Bates v. Dawson*, 128 Mass. 384.

In this case the term "family" undoubtedly was intended to include the wife and daughter, who were living together, and are likely so to continue.

If we are correct in the view we have taken, it follows that no such bond as that claimed by Albert should be required of Mrs. Simons. If she has the right to draw upon the principal of the estate for the necessary support of herself and daughter, and the education of the latter, of course no bond can be required of her that the principal shall remain intact.

The law only prescribes that a bond shall be given by the life legatee where a life estate in

personal property is given by will to one, and the remainder to another, and no trustee is named during the continuance of the life estate.

Gen. Stat. Rev. 1875, p. 371, § 18.

This statute has no application to the case at bar, because the great bulk of the property was not personal but real estate; and, further, because Mrs. Simons is especially named as a trustee to hold and expend the estate for certain purposes.

And, further, no bond is required of a life legatee of personal estate if the will provides that the possession as well as the use shall rest in the life legatee. In this case Mr. Simons has himself directed who should hold his estate, and, such direction being valid, the law does not require more.

Sanford v. Gilman, 44 Conn. 464.

It is possible that Mrs. Simons may be required to give a bond to perform her duties under the will, to wit, to expend the estate in so far as may be reasonable and proper for her own support, and the education and support of her daughter Clara. The demand for such a bond, however, would naturally come from the person immediately entitled to the benefit of the property; that is, the daughter Clara. If she does not require it, certainly Albert cannot. Should Mrs. Simons squander or misapply the property given her, undoubtedly Albert could obtain protection from a court of equity; but until there is some reason to apprehend such misapplication, no bond should be required of Mrs. Simons.

Smith v. Wildman, 37 Conn. 384.

In respect to the allowance of the expenses incurred before the probate court, and in effecting a settlement between Hayden and the estate, there ought to be but little question. If Mrs. Simons occupied, in any sense, the position of a trustee, her reasonable expenses in protecting the property so given her should be allowed from the estate.

The mere fact that the administration account had not been rendered, and therefore that the estate was not technically settled, is no reason for refusing Mrs. Simons her necessary expenses.

Mr. W. B. Stoddard, for Clara H. Simons:

The testator evidently thought that he had provided for his wife by devising to her, absolutely, all the income; and now places the property itself in her hands, in trust to provide for his family and to educate and support Clara.

The testator does not say the property is placed in his wife's name in trust for the above purposes, but the word "trust" is not necessary.

2 Jarm. Wills, p. 154; *Hess v. Singler*, 114 Mass. 56.

This will clearly defines for what purposes the property is placed in her hands, to wit: to educate and support Clara, and for the family.

The expression that said property is placed in her possession "for the family" is void for uncertainty. The will gives no intimation that the property can be expended or used for the family, or what is meant by the expression, "family." Does it include the testator's wife and both children, or does it simply refer to

his wife and daughter; or, in case the daughter does not live with her mother, does it then refer to the testator's wife alone?

We claim that the expression is so indefinite, both as to what disposition is to be made of the property, and who the family are, that it is void.

2 Jarm. Wills, 622; *Harper v. Phelps*, 21 Conn. 270.

The fifth paragraph of the will is as follows: "After the death or marriage of my said wife, I direct my property to be given to my son, Albert, or his trustee, and my daughter Clara, to each one share, share and share alike."

Upon this point Albert and Clara make conflicting claims: Albert claims that the entire estate must be kept intact, and, upon the death or marriage of the testator's wife, he is entitled to one half of the estate as it existed at the time of the death of the testator. While Clara claims that the expenses of her education and support should be taken from the entire property; and, upon the death or marriage of her mother, the remainder should be equally divided between Albert and herself.

This clause of the will does not give either Albert or Clara a vested interest in the property at the testator's death, with the time of taking effect in possession postponed until the death or marriage of Mrs. Simons.

2 Jarm. Wills, p. 409; *Taylor v. Gould*, 10 Barb. 888; *Nash v. Nash*, 12 Allen, 845; *Austin v. Bristol*, 40 Conn. 183.

It is clear that when the property is divided each shall have an equal share. It is clear that the property is not to be divided until the death or marriage of the testator's wife. It is also equally clear that the property is put in the possession of Mrs. Simons for the education and support of Clara. The only process by which these provisions of the will can be carried out is for the trustee to educate and support Clara from the entire property; and, in the event of the death or marriage of Mrs. Simons, the remainder is to be equally divided between Albert and Clara.

Messrs. Lewis Sperry and John A. Stoughton, for Albert D. Simons:

The widow claims a fee in the entire estate. This is not the precise language of her claim, but it is the precise effect of it. For instance, she claims the right to the immediate and exclusive possession, without bonds or other security, with power to consume and dispose of the same, principal and interest, to whatever extent might seem proper "in her judgment." Rights of property so extensive as that are wholly inconsistent with any other title than a fee absolute.

McKenzie's App. 41 Conn. 607.

The words, "to have and to hold during her life," grant a life estate only, and an accompanying right, "to do with as she sees proper before her death," will be limited to such right of conveyance as a life tenant might properly make.

Brant v. Virginia Coal & I. Co. 98 U. S. 836 (Bk. 28, L. ed. 927).

A testator may give a contingent fee in connection with a life estate or by way of subsequent devise.

Security Co. v. Hardenburgh, 58 Conn. 169.

But that is not this case. The fee here is

vested in the children. There is no contingency, near or remote, under which the widow can claim a fee.

When the language is sufficient to carry a fee, it will be limited to a life estate only when coupled with a condition which vests the remainder over in some other person.

Hollister v. Shaw, 46 Conn. 256.

When the original grant is of a life estate only, nothing short of an express grant will enlarge that estate. It will not be enlarged by any sort of implication, although the remainder may be intestate, and the other heirs of the testator aliens who cannot inherit.

Evans's App. 61 Conn. 485.

If these broad claims of the widow are tenable, so as to enable her to take a fee under *McKenzie's App. supra*, then the heirs are disinherited.

If, without taking a fee, she has the power to consume and convey at pleasure, then she might convey all the property during life, and thus disinherit the heirs.

State v. Smith, 52 Conn. 557.

In either event the intent of the testator is defeated, and the rule of law in the premises violated. "Heirs at law are not to be disinherited without a clear intention to do so, and that intention must be carried out by actually vesting the estate elsewhere. * * * If there is any doubt as to the real intention of the testator, the heir is to have the benefit of the doubt."

Hughes v. Knowlton, 87 Conn. 432.

That a widow's interest in her husband's estate may be limited by will to her widowhood, was early decided in this State (*Griggs v. Dodge*, 2 Day, 51), and recently affirmed (*Sheldon v. Rose*, 41 Conn. 871).

Evidently Mrs. Simons takes nothing but use and income; and evidently she takes that only for the purposes specified.

She is nominated trustee; the property she is to take—use and income—is specified; the purpose for which she takes it is specified; the duration of the trust is limited to her death or marriage. The testator has given us a clear declaration of trust, and the widow is given no discretion in the premises.

No particular form of words is necessary to create a trust. Whenever any person having a right to command gives property, and points out the object, the property, and the way in which it shall go,—this creates a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it.

Strong v. Strong, 8 Conn. 413. See also *Bristol v. Austin*, 40 Conn. 438; *Tolland County Mut. F. Ins. Co. v. Underwood*, 50 Conn. 493.

The widow ought to give bond before she takes possession of the estate, whether she take as life tenant or trustee.

Security Co. v. Hardenburgh, 58 Conn. 171.

Carpenter, J., delivered the opinion of the court:

This will is loosely drawn, and fails to express clearly the testator's intention. Nevertheless we can gather that intention, not alone from the language used, but partly from the circumstances and condition of his family and

estate. He left a widow, one son about thirty years old, and a daughter about fourteen years old. His estate, consisting of real and personal property, inventoried at about \$15,000; now, after the settlement of the estate, it is less than \$12,000.

Counsel for the daughter states in his brief that the son, when the will was made, was away from home and in business for himself. The case itself does not show this; but we may assume that he was then capable of supporting and caring for himself, as the will evidently proceeds upon that assumption, there being no present provision for him.

The will, in substance, is as follows:

1. The testator gives the use and income of all his property to his wife during life, "subject only to the following conditions, limitations, and restrictions."

2. He directs that his wife during widowhood, or during life, "retain the direction and possession" of all property.

3. "Said property is placed in her possession for the family, and for the education and support of my daughter, Clara H. Simons, and in trust for my son, Albert D. Simons."

4. The wife has "power and authority to exchange or dispose of the real estate, if it is found for her comfort and convenience; the court of probate will authorize any sale of the same, and the investment in other security."

5. The widow is constituted a trustee for the son, during life or widowhood; with a provision that after her death or marriage the trusteeship may be continued by the court of probate, and the property divided.

The property is left with Mrs. Simons for the family, for the education and support of Clara, and in trust for Albert. To what extent and for what purpose she is trustee for Albert is not very clear. He is excluded from any enjoyment of the property during the widowhood or life of the mother. The testator considered it necessary that Albert's interest should be held by a trustee for a time; and the draftsman seems to have thought that there should be a trustee before he came into the enjoyment of the property; and so, in stating the purposes for which the widow is to have the possession, the trusteeship for Albert is mentioned. We are inclined to think that this is the meaning of this part of the will.

The daughter is expressly named as a beneficiary—she is to receive her education and support. To what extent she was to be educated, and what would be the probable cost of her education, do not appear. She was therefore entitled to such an education as her circumstances and condition in life would reasonably afford.

The word "family" is a collective noun, necessarily including two or more persons. As used here, we think the testator intended by it present beneficiaries. That includes the wife and daughter, but excludes the son. The provision for the daughter's support is express; that for the support of the wife is clearly implied. Of the three members of his family, they are left dependent, the other is not.

We are satisfied, therefore, that the testator intended that his wife and daughter should be supported by his estate, and that his daughter should be educated. How long the support

of the daughter shall continue is an open question which may depend upon circumstances. After she becomes of age, having received her education, it may be reasonable to require her to support herself.

A more difficult question remains to be considered: Is the widow bound to support herself, and support and educate her daughter, from the income of the estate, or may she, if necessary, use some part of the principal for that purpose?

In behalf of the son it is contended that the widow simply takes a life estate, and that her possession is only such as is incidental to any life estate; and consequently that she can expend only the income in discharging the duties imposed upon her by the will.

If that had been the intention, it would have been an easy matter to have said so in plain terms. If with so small means she was expected to accomplish so much, the will should have been explicit, and not have left so important a matter to be inferred.

Besides, that construction gives no force to the provision that she should retain the direction and possession of the property. An ordinary gift of a life estate would have carried with it the possession. In addition to a gift of the income without the intervention of a trustee, the possession is expressly given, and reiterated in connection with a statement of the purpose for which it was given; and we can see that the purpose specified will, in all probability, require more than the income. The testator must have been aware of this; and consequently must have intended that more might be used, and gave her the possession that she might have the means of using more. Said "property"—not the income merely—"is placed in her possession for the family, and for the education and support" of the daughter. From this it may be fairly inferred that he expected and intended that some portion of the principal might be used, if need be, for that purpose. Putting the property in her hands for a given purpose carries with it an implication that all may be used which is necessary to accomplish that purpose.

Nor can we agree with counsel for the daughter, that the widow is entitled to all the income for herself, and may support the family and educate the daughter from the principal. The income is given to her, "subject only to the following conditions, limitations, and restrictions;" and those conditions, etc., are found in the obligations subsequently imposed.

We think the testator intended no such division of rights and obligations, but that the mother and daughter would be supported as one family, and that the income would be used for that purpose.

But her power over the principal is not unrestricted. She is a trustee, not only for the son, but for herself and daughter. As such, she must render an annual account to the court of probate, and is subject to its supervision. Said court will restrain any extravagance or unnecessary expense, and see that the annual expenditures are reasonable and proper.

From this view of the case it follows that the widow, as trustee, may be required to give bonds for a faithful discharge of her duties.

and that any portion of the principal of the estate unexpended at her marriage or decease shall be forthcoming for distribution between the son and daughter.

The case shows that the administrator neglected to render a satisfactory account to the court of probate; that he had in his hands money belonging to Mrs. Simons, and also to Clara, which he failed to account for; that legal proceedings were instituted for the purpose of compelling a proper accounting in respect to all these matters; that in those proceedings all of the parties to this suit employed counsel; and that the proceedings resulted in the payment of the money due to Mrs. Simons and Clara, and also some \$2,000 due to the estate. It is now claimed that the fees of counsel so employed should be allowed as a proper charge against the estate.

Whatever expense was reasonably incurred in recovering a portion of the estate should be allowed; expense incurred in respect to the personal demands of Mrs. Simons and Clara should not be allowed. A reasonable sum may also be allowed for the expenses of this suit.

The Superior Court is advised that the widow takes all the estate during life, or so long as she remains a widow, in trust to apply the income, and, so far as may be necessary, a portion of the principal, to the support of the family, including herself, and to the education of the daughter; and that as such trustee she may be required to give bonds; also that the reasonable expenses incurred in recovering a portion of the estate, and in the prosecution of this suit, be allowed to be paid from the estate.

In this opinion the other Judges concurred.

George HURLBURT

vs.
George W. THOMAS.

Where it appeared affirmatively from the record of a justice's court that both plaintiff and defendant in an action by attachment against an absent and absconding debtor, in such court were inhabitants of this State when the writ was served; that service was made by leaving a true and attested copy of the writ at the usual place of abode of defendant; that defendant was then absent from the State; that on the return day the defendant did not appear, and the justice adjourned the case for three months, at the expiration of which time he rendered judgment against defendant by default,—*Held*, that the judgment was conclusive upon the defendant in an action against him thereon.

(Hartford—Filed June, 1887.)

ACTION on a judgment recovered in a Justice's Court. Case reserved in the Court of Common Pleas for Litchfield County. *Judgment for plaintiff advised.*

The writ and return in the original action, and the justice's record therein, were as follows:

To the sheriff of the county of Litchfield or his deputy, or either of the constables of

the town of Roxbury, within said county, greeting:

By authority of the State of Connecticut, you are hereby commanded to attach, to the value of \$100, the goods or estate of George W. Thomas of said town of Roxbury, an absent and absconding debtor; and him summon to appear before Herman B. Eastman, Esq., Justice of the Peace for Litchfield County, at his office in the town of Roxbury, in said Litchfield County, on the 29th day of August, 1873, at 10 o'clock in the forenoon, then and there to answer unto George Hurlburt, of said town of Roxbury, in a plea of the case, whereupon the plaintiff declares and says that the defendant, on the 1st day of August, 1873, was indebted to the plaintiff in the sum of \$100, for so much money before that time had and received of the plaintiff by the defendant, to and for the use of the plaintiff, and for so much money before that time paid, laid out, and expended by the plaintiff for the defendant, at the special instance and request of the defendant, and for so much money before that time lent and advanced to the defendant by the plaintiff at the special instance and request of the defendant, and for goods, wares, and merchandise before that time sold and delivered to the defendant by the plaintiff, at the special instance and request of the defendant, and for work and labor done and performed by the plaintiff for the defendant, at the special instance and request of the defendant, and for money found to be due and owing from the defendant to the plaintiff on an account then and there stated between them; and, being so indebted, the defendant afterwards, to wit, on the day and year last aforesaid, in consideration thereof, undertook and faithfully promised the plaintiff to pay to him said sum of money, when he should be thereto afterwards requested. Yet the plaintiff says the defendant, his said several promises aforesaid not regarding, has never performed the same, though often requested and demanded, which is to the damage of the plaintiff the sum of \$100; and for the recovery thereof, with just costs, the plaintiff brings this suit.

And you are hereby further commanded to leave a true and attested copy of this writ and process, at least twelve days before the session of the court to which the same is made returnable, with, or at the usual place of abode of, Hosea Carpenter, of said town of Roxbury; as he is the attorney, agent, trustee, and debtor of said defendant, and has concealed in his hands the goods, effects, and estate of said defendant, and is indebted to him.

And you are further commanded to summon said Hosea Carpenter to appear before said court, at the time and place first mentioned, then and there to answer unto and disclose under oath, whether he has concealed in his hands the goods, effects, or estate of said defendant, or is indebted to him.

George Hurlburt is recognized in \$20, to prosecute, etc.

Hereof fail not; but of this writ, with your doings thereon, make due return according to law.

Dated at Woodbury, the 16th day of August, 1873.

James Huntington,
Commissioner of the Superior Court,
for Litchfield County."

Litchfield County, ss. }
 Roxbury, August 16, 1873. }

Then, by virtue hereof, and by direction of the plaintiff, I attached as the property of George W. Thomas, as the within-named defendant, four certain stacks of hay, described as follows: the east one in the barn meadow, so called; one in the peach orchard; one in the oat lot; one in the lot east and adjoining Ira Booth's corn, and all the hay in the barn. I also attached all of the goods, wares, and chattels now in the house of Hosea Carpenter; as he is the attorney, agent, factor, trustee, and debtor of the defendant. And on the same day I left at the last usual place of abode of the defendant, a true and attested copy of this writ and process, with my doings thereon. I also at the same time left a like copy at the usual place of abode of Hosea Carpenter; and within twenty-four hours I left a like copy in the town clerk's office, in said town of Roxbury, with my endorsement thereon. Attest:

George E. Harris, Deputy Sheriff.

George Hurlburt

George W. Thomas,
 Justice Court, Roxbury, Aug. 29, 1873,
 Before Herman B. Eastman,
 Justice of the Peace.

Be it remembered, that in the above-entitled action, in favor of George Hurlburt of said Roxbury, against George W. Thomas, of said Roxbury, described in the plaintiff's writ as an absent and absconding debtor from said Roxbury, as per writ dated Aug. 16, 1873, on file, will fully appear at large, returnable before me, the said justice of the peace, at my office, in said Roxbury, on the 29th day of August, A. D. 1873, at 10 o'clock in the forenoon; being an action of assumpsit.

The plaintiff appeared on said return day and hour, and the defendant made no appearance; and it appearing to this court that the defendant was and is a resident of said town of Roxbury, and an absconding debtor, and absent from the State, and that personal service had not been made in said cause upon the defendant, but service had been made by the officer serving said writ, by leaving a true and attested copy thereof at his usual place of abode, in said Roxbury, the further hearing in said cause was adjourned by me three months, in pursuance of the statute in such cases made and provided, to wit, to the 29th day of Nov. A. D. 1873, at my office, at 9 o'clock in the forenoon; and on said 29th day of Nov. 1873, the plaintiff again appeared to prosecute his said suit. But the defendant made default of appearance; and therefore it was adjudged that the plaintiff recover of the defendant the sum of \$52.77 debt, and cost of suit, taxed and allowed by me at the sum of \$7.86, and that execution issue for said debt and cost, amounting to \$61.15, and 25 cents more for cost of said execution.

Execution granted and issued Dec. 18, 1873.

Herman B. Eastman,
 Justice of the Peace when said execution was issued.

Mr. Henry B. Graves, for plaintiff:

The only question in the case is whether the
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judgment rendered by Justice Eastman, November 29, 1873, was personal or merely *in rem*. We insist it was a personal judgment.

The justice had jurisdiction of the parties, the subject-matter, and the process. The process was legally served upon the defendant by leaving a copy at his usual place of abode, and in strict conformity to the statute regarding service of civil process.

Stat. Rev. 1875, p. 401, § 3; *Grant v. Dalliber*, 11 Conn. 284; *Coit v. Haven*, 80 Conn. 190.

The defendant was an inhabitant of this State, resident in Roxbury, when the process issued, and when the judgment was rendered; and legal notice of the pendency of the proceedings was given the defendant by the service of copy left at his usual abode.

"The most prominent purpose of the law in prescribing the mode of serving civil process, was to ensure actual notice to defendants; and, when the prescribed modes have been complied with, the law will presume that actual notice has been given and received."

Opinion of the court in *Grant v. Dalliber*, *supra*, 287, 288.

"The court of a justice of the peace in this State is one whose proceedings and judgments import verity; and in this respect it is not distinguishable from our county or superior courts."

Fox v. Hoyt, 12 Conn. 491.

Under the service as here made, the justice's court could have rendered a legal judgment on the return day of the writ. If defendant afterwards claimed that judgment was unjust and wrong, the statute provides a remedy.

Stat. 1875, p. 448, § 4.

At the time of the rendition of the judgment there was no law making it necessary for the plaintiff to file a bill of particulars before taking judgment. The judgment was in proper form.

Fox v. Hoyt, *supra*.

Mr. William Oothren, for defendant:

On taking the default no bill of particulars was filed in said suit, though the defendant was absent and had no notice to appear. He would be entitled to it, all the same, if he had appeared.

London v. Sage, 11 Conn. 805; *Dean v. Mann*, 28 Conn. 856; *Vila v. Weston*, 33 Conn. 47.

Such bill should have been filed, so that the defendant might know, when he returned, whether he wished to contest the case or not.

Practice Act, Rule 2, p. 12.

The rule and practice has been the same always.

The plaintiff sues on a pretended judgment whose existence and validity are denied. May not the existence of this judgment be denied? May not its validity be denied, especially where the want of validity appears on the face of the record? May not fraud be proved in its procurement, to defeat it?

Bulkley v. Andrews, 39 Conn. 524.

We claim, as matter of law, that said record of judgment was not admissible in evidence, and could not be made the basis of an action of debt; because it appears on its face that it was improperly and illegally obtained for any purpose except as a judgment *in rem*. The

record shows that the defendant was absent out of the State, and had no personal or actual notice of the suit. Surely judgment can never be made available for any purpose except to hold any property that may have been attached on the original suit.

As we claim, a pretended attachment was made, and a factorizing process served, fraudulently. This is proved by the finding that, though an execution was taken out against a man out of the State without entering bond, it was never served; and the plaintiff finally did not claim that his process held any property or credit.

Strong v. Meacham, 1 Root, 371.

A judgment rendered in an action in which the property of the defendant has been attached, but in which no service was made on him personally, is not a judgment *in personam*, and cannot be made the basis of an action of debt. The effect of the proceeding is limited to an appropriation under the process of the court of the property attached, to the payment of the debt.

Easterly v. Goodwin, 35 Conn. 273. See also *Davidson v. Murphy*, 13 Conn. 218; *Litchfield's App.* 28 Conn. 135; *Strong v. Meacham*, 1 Root, 391.

It is a principle of natural justice, of universal obligation, that, before the rights of an individual are bound by a judicial sentence, he shall have notice, actual or implied, of the proceedings.

Parsons v. Lyman, 32 Conn. 567.

The judgment of even a court of general jurisdiction cannot affect a person who had no notice to appear. As to him the proceedings are *coram non judice*.

Id. 577; *Starr v. Scott*, 8 Conn. 484; *Case v. Humphrey*, 6 Conn. 189; *Hungerford's App.* 41 Conn. 322, 327.

To make a former judgment or decree operate as an estoppel, as to any fact found, or, in general, to make it evidence at all, the fact must have been necessary to uphold the judgment or decree; and to create an estoppel, such point or fact must have been directly put in issue, and it must so appear on the record.

Fairman v. Bacon, 8 Conn. 425; *Cowles v. Harts*, 3 Conn. 522; *Abbe v. Goodwin*, 7 Conn. 388; *Crandall v. Gallup*, 12 Conn. 373; *Dickinson v. Hayes*, 31 Conn. 423; *Kennedy v. Scovil*, 14 Conn. 69.

Admitting, as I do most fully, that a judgment rendered in a sister State, by a court that has jurisdiction of the subject-matter and parties, is conclusive and unimpeachable, I am equally clear that, where the defendant neither appeared nor had legal notice to appear, a judgment against him is invalid, and ought not to be enforced. So far as my knowledge extends, no decision has been had giving validity to a judgment under the circumstances mentioned.

Aldrich v. Kinney, 4 Conn. 383; *Wood v. Watkinson*, 17 Conn. 504.

Beardsley, J., delivered the opinion of the court:

In the year 1873 a justice's court in the town of Roxbury rendered judgment against the defendant in a suit brought by the plaintiff; and the present suit was brought to enforce

the payment of that judgment. The defendant claims that the judgment is invalid, for the reason that personal service of the writ was not made upon the defendant, and that he had no notice of the pendency of the suit until after the rendition of the judgment.

The record of the justice's court shows affirmatively that both the plaintiff and defendant were inhabitants of this State when the writ was served, and that service was made by leaving a true and attested copy of it at the usual place of abode of the defendant; that the defendant was then absent from the State; that on the return day of the writ, the defendant did not appear, and the justice adjourned the case for three months, at the expiration of which time he rendered judgment against the defendant by default.

The writ was served in the manner prescribed by the statute; the adjournment of the case for three months, though unnecessary, was within the discretion of the justice; and the judgment, while in force, is conclusive upon the parties. Stat. Rev. 1875, p. 101, § 3; *Grant v. Dalliber*, 11 Conn. 236; *Cott v. Haven*, 80 Conn. 190.

The defendant also asks, by way of equitable relief, that the plaintiff shall be restrained from enforcing the judgment. But the court below finds that no injustice was done to the defendant by the judgment.

For the particular grievance of which the defendant complains, namely, that judgment was rendered against him without his having received actual notice of the pendency of the suit, the law furnished him ample remedy if he had chosen to avail himself of it. By statute (Gen. Stat. p. 447, § 1) he could have brought a petition for a new trial, or at common law a writ of error, *coram nobis*; or, after the three years within which these proceedings must be brought, he could have brought a suit in equity for relief against the judgment. *Jeffery v. Fitch*, 46 Conn. 601. He not only did not avail himself of either of the legal remedies within the time limited, but apparently has slept too long on his rights to be now heard in a court of equity. However that may be, he clearly cannot find a remedy by setting up in an action upon the judgment the mere fact that he failed to receive actual notice. The judgment, having been rendered in full accordance with the requirements of law, must stand as a valid judgment until set aside by some direct proceeding for the purpose.

The Court of Common Pleas is advised to render judgment for the plaintiff.

In this opinion the other Judges concurred.

Hubert SCOVILLE *et al.*

v.

Henry J. MATTOON and Center School District.

1. The school society of a town voted "that Captain John Foot, and whosoever doth at this time, or shall at any future time, occupy his house, they with their respective list shall be set to the first district." *Held*, that the intention

and effect of this vote was to annex to the first district the farm of John Foot, and not merely the house then occupied by him and the ground upon which it stood.

2. The present owner of the John Foot farm occupied a house on another part thereof than that occupied by John Foot at the time of said vote, but had, with all others concerned, acquiesced in and acted upon the construction of said vote, to the effect that it annexed them to the said district, for more than fifty years. *Held*, that in the absence of record evidence, the acts of the parties would raise a conclusive presumption that the present owner had been legally annexed to said district.
3. Under the statute in force in 1808 (Rev. 1808, p. 582, § 2), school societies had the power to annex to the district disconnected territory.

(Hartford—Filed June, 1887.)

APPEAL by defendants from a judgment of the Court of Common Pleas of Litchfield County in favor of plaintiffs in an action to recover a school-district tax. *Reversed*.

The facts are stated in the opinion.

Messrs. Huntington & Warner, for defendants, appellants:

It was within the power and scope of said school society to pass said vote by virtue of the statute, passed October Session, 1766.

See Rev. 1808, p. 582, § 2; *Pierce v. Whitman*, 28 Vt. 626; *Orvitt v. Chase*, 37 Vt. 196-201.

If there were any irregularities or informalities in said vote, they were healed by the Acts of 1852, chap. 38, p. 45, and 1860, chap. 84, p. 92, § 5.

The vote was not void by reason of the said Captain John Foot house not being contiguous to the Center District. There was nothing in the statutes in force at the time of the passage of said vote that required it to be contiguous territory. But, on the other hand, "the school societies had full power to alter and regulate the school districts from time to time as there might be occasion."

Rev. 1808, p. 582, § 2.

The decisions confirm this view of the vote.

Rowe v. Blakeslee, 11 Conn. 479; *State v. Bradley*, 54 Conn. 74-80, 2 New Eng. Rep. 711; *Alden v. Rounsaville*, 7 Met. 218.

The vote of 1808 was not the conferring of a merely personal privilege.

Rowe v. Blakeslee, *supra*; *Nye v. Marion*, 7 Gray, 244.

The vote of 1808 is valid and binding, because the finding shows that all parties interested therein and affected thereby—to wit, the town school society, the three districts mentioned in the finding, the plaintiffs and those under whom they hold since 1808—have acquiesced in and been governed by it since its passage.

Pierce v. Whitman, 28 Vt. 626-631; *Bowen v. King*, 84 Vt. 163-165; *Jones v. Camp*, 84 Vt. 384-386.

The finding discloses that nothing appears upon the records of said school society or town relative to the boundaries of the said CONN.

school districts, except the original lay-out in 1798, and said vote of 1808, and also discloses that the house of Captain John Foot was the first house on the highway north of the then north line of the Center District. Therefore the presumption of law is that, at the time of the passage of the said vote, the lines of the districts were so changed and extended, and all other legal acts executed, so as to include the house of said Captain John Foot and his list.

State v. Bradley, 54 Conn. 74, 2 New Eng. Rep. 711, and cases cited.

The plaintiffs are estopped from denying the validity of the tax in question. They should be held to have waived all right to a remedy by their course of conduct which renders it unjust and inequitable to the Center School District that they should be allowed to complain of the illegality of the tax in question.

Cooley, Tax, 578, and cases cited; *Bigelow, Estop.* 8d ed. p. 578, and cases cited.

The record shows that, by virtue of the vote of 1808, and since that date, the plaintiffs and those under whom they hold have enjoyed all the rights and privileges and received all the benefits to be derived from a residence in said Center School District. They should bear their proportion of its burdens, of which the tax in question is one.

Hewett v. Miller, 21 Vt. 402, 407.

Mr. Henry B. Graves, for plaintiffs, appellees:

A school district cannot, under the statutes, be made up of isolated and distinct tracts of land. It must exist as an entirety, not only by the statute, but by the very term and name "district." Webster gives the following as his first definition of district; "A limited extent of country; a circuit within which power, might, or authority may be exercised, and to which it is restrained; a word applicable to any portion of land or country, or to any part of a city or town, which is defined by law or agreement," etc. This definition of a district has received the sanction of this court.

Rowe v. Blakeslee, 11 Conn. 479; *State v. Bradley*, 54 Conn. 74, 2 New Eng. Rep. 711.

The judgment of the common pleas court, as against Mattoon, was correct. Though an action of trespass will not lie against a collector of taxes who has a legal warrant directed to him for levying the same on property, yet an action of assumpsit will lie against a collector for moneys paid him on an illegal tax.

Rowe v. Blakeslee, *supra*; *Toll Bridge Co. v. Osborn*, 35 Conn. 7; *Hubbard v. Brainard*, Id. 563; *Phelps v. Thurston*, 47 Conn. 477, 485.

In *Prince v. Thomas*, 11 Conn. 473, an action of trespass against a tax collector, the law is fully stated on this subject; and in that case the collector was held liable because he had proceeded illegally under his warrant, and on that ground alone, the court holding that but for his illegal conduct his warrant would have been his protection. The next case is *Rowe v. Blakeslee*, *supra*, an action of assumpsit to recover money paid a collector for an illegal tax; and the plaintiff recovered in the county court, and this court confirmed the decision.

Beardsley, J., delivered the opinion of the court:

The plaintiffs in this action seek to recover

from the defendant Mattoon the amount paid by them to him as collector of taxes for the Center School District of Watertown, for taxes assessed against them by said district; and the single question in the case is whether the plaintiffs were, on the 2d day of May, 1884, when the tax was laid, subject to taxation as members of said school district.

It is found that on the 10th day of October, 1808, the school society of the town of Watertown voted "that Captain John Foot, and whosoever doth at this time, or that shall at any future time, occupy his house, they with their respective list shall be set to the first district." The first district is now known as the Center District.

When the vote was passed, John Foot's house stood upon his farm, which did not adjoin the Center District, but was separated from it by an intervening strip of land, the house being about a quarter of a mile from the line of the district. Hubert Scoville, one of the plaintiffs, was his grandson, and lived with him. Foot died in 1810, and the father of Hubert then entered into possession of the house and farm, and continued in the same until 1829, when he took down the house and built another upon the farm, and near the site of the former one, which he occupied until his death in 1847. Hubert then became the owner of the house and farm, and he and his son, the other plaintiff, have continued to occupy them since.

The first question is as to the proper construction of the vote of 1808. If that operated to annex to the Center District the land upon which the plaintiffs' house stands, it is clear that the plaintiffs are subject to the tax in question.

The plaintiffs claim that the vote does not apply to the ground upon which the house occupied by them stands, but that at most it annexed to the district only the house of John Foot, and the ground upon which it stood.

Such a construction seems irrational and inconsistent with the language of the vote.

While the language is informal and redundant, and somewhat confused, we think it expresses the intention of the society to annex by force of it the farm of John Foot to the Center District.

In 1860 the Legislature enacted that the records of school societies, "whether informal or otherwise, provided the same can be clearly understood, are hereby validated and confirmed." Rev. 1875, p. 180, § 2.

The vote provides that the persons designated by it shall be set to the district with their respective lists, that is, their taxable property; and no exemption is made of any part of their taxable property. The case would then have been distinctly within the authority of *Alden v. Rounseville*, 7 Met. 218, where the court says: "The formation of a school district by the addition of individuals, with their polls and estate, to the territorial limits of a district is in effect permanently adding to the district the real estate of such individuals, and embracing it within the limits of such district."

Connected with the provision as to John Foot and his list, is that relating to the future occupants of his house, that they with their respective lists shall be set to the district,—and

this provision has probably served to create uncertainty as to the meaning of the vote. Upon either construction of the vote it is superfluous, as, whether the farm was annexed, or the house only, its occupants would become members of the district. We do not think that it was intended to qualify the provision as to John Foot. So far as it goes it is in harmony with it, and was probably designed to supplement it, and make it plain that the annexation was to be a permanent one. However this may be, it does not overrule the clear expression in the vote setting John Foot and his list to the Center District.

It is apparent that all the parties affected by the vote—the school district, the owners of the Foot farm, and the society itself—have acted upon the understanding that the house built in 1829 was in the Center District. It is true that in 1868 the Guernsey District, in which before 1808 that part of the farm upon which the present house stands was situated, taxed Hubert and his property, and that he paid the tax, but he did so protesting that he belonged to the Center District; and with this exception it does not appear that since 1808 taxes have been paid by the occupants of the farm to any other than the Center District.

The finding is silent as to taxes before 1829 but since then the taxes upon the house have been paid to the Center District. Since 1829, the children living in the house have attended school in the Center District, and have been enumerated as belonging to it. Hubert has attended the meetings of the district, and has acted as one of its officers, especially in 1837 and 1838, when he was appointed by the school society one of the district committee,—and uniformly claimed to be a member of the district down to about the time when this tax was imposed.

In the year 1883, Hubert and his son, the other plaintiff, alleging that they were members of the district, applied to the clerk to register as voters of the district.

The clerk omitted the names of the plaintiffs from the registry; at a subsequent district meeting the plaintiffs offered to vote, but the meeting declined to receive their votes because their names were not on the registry list. It is too late to call in question a construction of the vote, which the parties themselves have adopted and acted upon for more than fifty years.

Indeed, if there were no record evidence in the case, the facts to which we have referred would, in our opinion, raise a conclusive presumption that the plaintiffs had been legally annexed to, and were members of, the Center District long before the omission by the clerk of the names from the registry list.

In the recent case of *State v. Bradley*, 54 Conn. 74, 2 New Eng. Rep. 711, this court held that upon evidence of user, of certainly not more significant character, and for a shorter period than in the present case, it might properly be found that the lines of a school district had been extended so as to include territory in an adjoining town.

In the case of *Bowen v. King*, 84 Vt. 156, where it appeared that towns were first empowered to unite in forming a school district in 1808, and a district had in fact existed com-

posed of the inhabitants of the adjoining towns for twenty-five years before that of the organization, of which there was no record evidence, the court says: "In favor of long-continued user and possession, courts have said they will presume everything. Acts of Parliament, grants from the Crown, surrender of charters, and many other things, have been presumed. This district appears to have been in continuous existence for more than twenty-five years before 1808, and we may well presume that it was formed by an Act of the Legislature; and the continued acquiescence, not only by the inhabitants of the district, but by all the towns, cannot be otherwise rationally accounted for."

We do not think that the claim of the plaintiffs that the society had not power to annex to the district territory not contiguous to it is well founded. The statute in force when the vote was passed (Rev. 1808, p. 582, § 2) gave societies full power to alter and regulate school districts; and we see no reason why, in the exercise of this plenary authority, they might not annex to the district disconnected territory. In the case of *Alden v. Rounseville*, 7 Met. 218, before cited, a similar claim was made, and the court says; "In the formation of school districts, it is not necessary that all the persons within them should be within continuous geographical lines.

There is error in the judgment.

In this opinion the other Judges concurred.

Andrew J. COE *et al.*, Exrs.,

Charles P. JAMES *et al.*

Where a testator gave certain portions of his estate to his son, a grandson, and two grand-daughters, and provided that, in the event of the death of either of them without issue, his or her share should go to others,—*Held*, that the term "dying without issue" meant so dying before the death of the testator, and that, as the legatees survived the testator, they each took an absolute estate.

(New Haven—Filed February, 1887.)

CASE reserved.

Suit for the construction of a will, re-

NOTE.—The term "dying without issue." Where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of testator, followed by a devise over in case of his death without issue, the words refer to death without issue in the lifetime of the testator; and the primary devisee, surviving the testator, takes an absolute estate in fee simple. *Vanderzee v. Haswell* (N. Y.), 4 Cent. Rep. 176.

Where there is a devise to one person in fee, and in case of his death, or death "without issue" or "without children," etc., to another, the contingency referred to is the death of the first-named devisee during the lifetime of the testator; and if such devisee survives the testator, he takes an absolute fee. But this rule applies only when the context of the will is silent and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without issue; and the tendency is to lay hold of slight circumstances in the will to vary the construction, and give effect to the language according to its natural import. *Re New York, L. & W. R. Co.* (N. Y.), 7 Cent. Rep. 259. See also *Engel v. State* (Md.), 8 Cent. Rep. 845.

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served by the Superior Court for the advice of this court.

The case is stated in the opinion.

Mr. A. J. Coe, for plaintiffs.

Mr. S. E. Baldwin, for defendants.

Granger, J., delivered the opinion of the court:

This is a suit brought by the executors of a will to obtain a construction of the will.

By the will the testator gives to his grand-daughters, Harriet T. James and Edith James, each \$5,000. Of the residue he gives one third to his son, Charles U. Shepard, Jr., and of the residue after the payment of these three legacies, he gives two thirds to his daughter, Fanny B. James, for life, with the remainder to his two grand-daughters before named; and the remaining one third to his grandson, Louis S. De Forest, and, in case of his death without issue, then to the father of said Louis, John W. De Forest, for life, with the remainder to the grand-daughters named.

Then follow the provisions of the will as to which the present question arises, which are as follows: "In the event of the death of my said son without issue, his portion to go to my other legatees herein named, to be shared in the same manner as the residue of my estate hereinbefore last named. In case my said son, grandson, or grand-daughters shall leave descendants, their respective shares under this will shall go to said descendants severally. In the event of the death of either of my said grand-daughters without issue, everything given her hereby shall go to her mother for life, remainder to her father for life, remainder to my surviving grand-daughters and my grandson, share and share alike; and in the event of the death of both without issue, then the shares of both shall go in like manner to said parents and to my said grandson."

The question made in the case is whether the provision with regard to the death of the son, grandson, and grand-daughters without issue was intended to limit the estates given them to life estates, or only to provide for the contingency of their dying before the death of the testator.

This question is to be determined, not by the application of any technical rule to the construction of the will, but by ascertaining from the will, if possible, the real intent of the testator.

There is nothing in the will, beyond the expression quoted, to indicate an intention to limit the estates given to estates for the lives of the persons to whom they are given, while the frequent designation of an estate as one for life, when it was clearly intended to be such, shows that the testator was perfectly familiar with the language ordinarily used in describing an estate for life. It is also to be considered that the legatees and devisees in question were the natural objects of the testator's bounty, being his son, grandson, and grand-daughters; and no reason is apparent why he should limit their estates when evidently desirous to keep the property in the family. By construing the term "dying without issue" as meaning dying before the death of the testator without issue, every apparent intent of the testator, and every intent that

we can regard as probable upon the facts of the case, seem to be satisfied.

We conclude, therefore, that the only contingency affecting the bequest to the son, grandson, and grand-daughters, was their dying in the lifetime of the testator; and as they all survived the testator, we think each took an absolute estate in the property given.

The construction which we thus give to the will is sustained, not only by a rule of very general application (1 Jarm. Wills, 782), but by recent decisions of this court. *Phelps v. Robbins*, 40 Conn. 250; *White v. White*, 52 Conn. 518.

The Superior Court is advised to give a construction to the will in accordance with these views.

In this opinion the other Judges concurred.

William W. COMSTOCK'S APPEAL from Probate.

1. It is not error to permit the administrator of a deceased wife to amend his first presentation of claim against the estate of her deceased husband, so as to present a claim for money received by the husband under an express trust, instead of a loan as first presented.
2. Where money belonging to the separate estate of the wife had gone into the hands of her husband, her administrator may recover it from her husband's estate.
3. Money received by the husband from his wife's separate estate was, under the Act of 1849, received by him as statutory trustee, against which the Statute of Limitations would not run, and if received by him for care and investment for her benefit, the law created a trust on his part which prevented him from taking advantage of the Statute of Limitations.
4. Money so delivered to the husband from time to time by the wife, out of her separate estate, was neither a gift, nor a loan in the ordinary way of a loan between strangers, against which the statute would run.
5. Although the statute of 1849 provides that all the personal property of the wife shall vest in her husband, in trust, yet the wife may have personal property to which the statute does not apply, as, where money is left to her as her separate estate to be under her sole control, free from the control of her husband. Such estate, whether in the form of principal or interest, she may dispose of as she pleases; and whether she puts it in his hands to manage for her as her agent, or loans it to him, or makes an absolute gift of it, is a question of fact, not of power; and is for the jury to determine.
6. It was not error for the judge to express to the jury the inclination of his judgment upon the evidence, against the claim that the transaction was a gift, or a loan as between strangers,

where he did not make his opinion binding upon their consciences, but left them to decide the matter for themselves.

(Fairfield—Filed July, 1887.)

APPEAL from a judgment of the Superior Court of Fairfield County on a verdict in favor of a claimant against a decedent's estate. *Affirmed.*

The case is stated in the opinion.

Messrs. Perry & Perry, for Silas B. Tuttle, defendant, appellant:

Prior to June 1, 1883, claims presented against the estates of deceased persons were required to be so presented that the administrator might know the "exact claim presented" and be "fully apprised of its character."

Pike v. Thorp, 44 Conn. 450.

The presentation must contain "a clear, intelligent statement of the claim."

Mead's App. 46 Conn. 429.

It must make "the extent of the plaintiff's demand upon the estate" and its "character" clear.

Hammell v. Starkweather, 47 Conn. 440.

By Laws 1883, chap. 49, liberty is given to the claimant "to amend any defect, mistake, or informality in the statement of the claim not changing the ground of action."

The original demand was for the repayment of a simple and ordinary "loan" of \$2,135, made by a married woman to her husband out of her sole and separate estate. A bill of particulars of this could manifestly only consist of an itemized statement of dates and amounts going to make up the gross sum claimed.

The "fuller and more particular statement," however, abandoning entirely this original claim for money loaned, sets up first an indebtedness of \$2,035, upon what is apparently intended to be an account stated, and then proceeds to describe the nature and ground of the amended claim to be that Mr. Day received the said sum from Mrs. Day out of her sole and separate estate, and "as trustee thereof," "under the expressed and acknowledged trust" that he would invest and keep the same invested for her, and account for it on demand.

An action for money loaned cannot, under the statute of 1883, be thus changed, upon an order for a bill of particulars, into an action for money received by a person as trustee upon an express and acknowledged trust to invest and keep the same invested, and account for it on demand.

As to the question whether the Statute of Limitations has any office when applied to transactions between husband and wife, it should be borne in mind that the only state of facts which could be proved by the plaintiff in support of his case, or could be considered by the jury in his behalf, was the loaning by Mrs. Day of money agreed to be, and to have been received by her as, her sole and separate estate, to her husband, as an ordinary debt.

The Statute of Limitations, "though in terms applicable to actions only, applies to all claims which may be the subject of actions, however presented."

Hart's App. 32 Conn. 520, headnote.

In the matter of the Statute of Limitations, equity follows the law.

Phalen v. Clark, 19 Conn. 434; *Wagner v.*

Baird, 7 How. 258 (48 U. S. bk. 12, L. ed. 681); *Frame v. Kenny*, 12 Am. Dec. 368; Story, Eq. § 1520.

As to her sole and separate estate, a married woman is in equity a *feme sole*.

Inlay v. Huntington, 20 Conn. *175; 1 Cord, Mar. Women, §§ 253 and note, 254 a, 265, 275, 283 b, 778.

A married woman may sue for her separate estate in equity, and may sue her husband.

West v. Howard, 20 Conn. 587, *589; 1 Bish. Mar. Women, § 793; 1 Cord, Mar. Women, §§ 265, 269, 270, 275, 386 a.

The statute will run against a married woman when she may sue and act as a *feme sole*.

Ball v. Bullard, 52 Barb. 141; *Castner v. Walrod*, 25 Am. Rep. 373-375; *Goodspeed v. East Haddam Bank*, 22 Conn. 580; *Hanford v. Fitch*, 41 Conn. 501, 502.

The existence of a trust will prevent the running of the statute only in those cases in which it is (1) a direct trust; (2) of the kind cognizable only in equity; (3) where the question arises between trustee and *cestui que trust*.

Ang. Lim. 6th ed. §§ 166, 167 and note.

Where a fiduciary relation has existed or might exist, but is abandoned or not recognized, the statute will always apply.

Ang. Lim. 6th ed. §§ 174 and note, 175; *Frame v. Kenny*, 12 Am. Dec. 373, note; *Wilmerding v. Russ*, 33 Conn. 76, 77.

Mr. John S. Seymour, for William W. Comstock, plaintiff, appellee:

The alleged differences in the two statements of the claim are not material, nor is one statement inconsistent with the other. By the first statement it appears that the claim is grounded in a transaction between Mr. and Mrs. Day respecting her sole and separate estate, originally derived from a source stated, which estate, between specified dates, passed by agreement between them into Mr. Day's hands, with an obligation on his part to pay it back to her on demand. Such is the legal effect of the allegations. The second statement, professing to be more particular, and to relate to the same transaction as the first, describes Mr. Day as the trustee of this sole and separate estate, and as receiving it in that capacity upon trust to invest it in his own business for her. Now, if on the trial it is proper to prove, or if elsewhere in the pleadings it appears, that the Mr. Day referred to was the husband of the Mrs. Day referred to, then the allegations of the first statement become substantially the same as those of the second.

Bacon v. Bacon, 51 Conn. 19, 21; *West v. Howard*, 20 Conn. 58.

For want of a third person trustee, the husband becomes, by force of the marriage, and by force of his executed agreement that the fund should be sole and separate estate, the trustee of that estate. His transactions thereafter with her become transactions between trustee and *cestui que trust*, open to the scrutiny which equity gives them; and, no matter how he comes by the fund, in his hands it is trust money—if not forever, then until he fully accounts and pays over the fund, divests himself of the character of trustee with respect of it, and, by some fair transaction, dealing with her as at arm's length, he acquires the fund again.

The allegations of the second statement, that

he acquired the fund on an express trust, are not different from the allegations in the first, that he, the husband, acquired the sole and separate estate of the wife by way of loan, there being no other trustee, and afterward indistinguishably mingled them.

Mead's App. 46 Conn. 429.

The technical rules applicable to pleadings in cases in the courts of law are not to be insisted on before commissioners on insolvent estates.

Mills v. Wildman, 18 Conn. 124.

A clear, intelligent statement of the claim,—one that commissioners can understand and act upon intelligently,—is enough.

American Bd. Comrs. For. Missions App. 27 Conn. 353; *Mead's App. supra*; *Hammitt v. Starkweather*, 47 Conn. 439, 443.

If the law relating to sole and separate estate determines the status of Mr. Day and Mrs. Day as to the fund, then her interest was purely an equitable one, extending to her full beneficial interest, and his purely a legal one, extending to her full legal ownership,—but without beneficial interest.

If the statute controlled, her interest was cut down to the bare principal of the fund, though in character the same kind of an interest, an equitable interest,—that of a *cestui que trust*,—and his enlarged to include the equitable interest of the entire income for his life, subject to the agreement that he should support her during her life. But in either case he was a trustee, bound by the obligation of a trustee, bound to manage the fund for her, bound not to contract it into his own pocket, bound not to minimize her beneficial interest, and rendered by the fact of his trust incapable of denying or disputing her right.

Williams v. King, 43 Conn. 574; *Riley v. Riley*, 25 Conn. 161 164; *Baldwin v. Carter*, 17 Conn. 201; *Deming v. Williams*, 26 Conn. 234.

There is no pretense that this trust—if it ever was a trust—ever came to an end, or was ever executed in compliance with the obligation of a trustee, unless mere lapse of time in the face of continual recognitions of the trust would of itself end it, or exercise its due execution. The charge of the judge in the particular criticized does not relate to a claimed termination of the trust by an accounting and payment, but merely to the amount or value of the wife's interest, which, if the statute applies, is less in value, by all the income of this fund or the interest on it, than it would be if the pleadings control, and it must be treated as sole and separate estate. That is to say, this part of the charge tended merely to reduce the amount of the verdict after it should be determined that the plaintiff was entitled to one on other grounds, and so does the defendant no injury, whatever the plaintiff might complain and say on this point had he chosen to appeal.

Bacon v. Rives, 106 U. S. 105 (Bk. 27, L. ed. 69); *Walker v. Beal*, 9 Wall. 743 (76 U. S. bk. 19, L. ed. 814).

A similar answer may be made to objection 7 of the appeal.

The eighth error is stated to be that the court charged the jury that if Mr. Day received the sole and separate estate of his wife on an agreement to return it to her, if he needed it in his business, and she let him have it from time to

time as he requested, the Statute of Limitations would not apply.

Bacon v. Rives, supra.

This part of the charge is to be interpreted with reference to the evidence and claims. The fund was conceded to be sole and separate estate so long as it remained in the wife's hands. If, in changing merely the possession of it from her to him whom equity treats as a naked trustee of it whenever necessary to protect her interest in it, nothing further was intended than that it should be invested by him for her, it seems clear that, without a proved intention to change the nature of the estate from her sole and separate estate to something else, no such intention will be imputed to them, and no such change presumed. It is equally clear that, until the character of the property is changed, his possession of it is that of a trustee, and that so long as he holds as trustee no Statute of Limitations has any application.

Walker v. Beal, 9 Wall. 747 (76 U. S. bk. 19, L. ed. 814); *Rich v. Cockell*, 9 Ves. 869, 874; *Nichols v. McCarthy*, 53 Conn. 299, 3 New Eng. Rep. 55; 1 Perry, Tr. § 194; 2 Pom. Eq. Jur. § 955; *Spencer's App.* 80 Pa. 332; 11 Paige, Ch. 314; 4 Johns. Ch. 136; 1 Mylne & K. Ch. 195; *Bacon v. Rives*, 106 U. S. 99, 104-106 (Bk. 27, L. ed. 69).

The court properly sustained the demurrer to the fifth defense.

Drost v. Coorle, 4 Cent. Rep. 862; *Kline v. Vogel*, 6 West. Rep. 650; *Bacon v. Bacon*, 51 Conn. 19; *Bacon v. Rives*, 106 U. S. 99 (Bk. 27, L. ed. 69); *Vance v. Nogle*, 70 Pa. 176; *Wilmerding v. Russ*, 33 Conn. 67, 76.

This fifth defense interposes the fact of the marriage of Mr. Day and Mrs. Day as a reason why whatever obligation he would otherwise be under to account to her, or his administrator to her administrator, was destroyed. It is not perceived how marriage alone could affect the property of the wife to a greater extent than is provided by the statutes in such case provided.

A married woman, *cestui que trust*, has no power to consent to a loan to her husband of the trust moneys.

2 Story, Eq. § 1273 (d); *Fletcher v. Green*, 83 Beav. 426.

Much less has he, when himself the trustee, a right to contract for that consent.

Nichols v. McCarthy, 53 Conn. 299, 3 New Eng. Rep. 55.

In New York a married woman may sue her husband at law, in certain cases,—for example, to recover possession of her sole and separate estate in land when ousted by him; but this is because, by their Married Woman's Act, she is given the power to sue and be sued.

Wood v. Wood, 83 N. Y. 575, 580.

Loomis, J., delivered the opinion of the court:

Between 1867 and 1879 Amelia F. Day, wife of and living with George W. Day, acquired about \$2,000 by her personal services, under an agreement between herself, her husband, and her brother, by whom the money was paid to her, that it should be of her sole and separate estate, which money she, from time to time, delivered to her husband. She died in 1879; he died in 1883. W. W. Comstock, the ad-

ministrator upon her estate, whom we shall call the plaintiff, presented a claim for the repayment of this money to the commissioners appointed to receive, examine, and decide upon the claims against his estate. They allowed \$805.73; disallowed the balance, \$1,912. Whereupon he appealed to the superior court, and there, by verdict of a jury, recovered \$2,000. S. P. Tuttle, the administrator upon his estate, whom we shall call defendant, then appealed to this court, for reasons as follows, viz.: The plaintiff first presented his claim against the husband's estate to the defendant in 1884, in the following form, viz.:

Estate of Geo. W. Day, Dr.

To William W. Comstock, administrator of the estate of Amelia F. Day, deceased. To cash loaned by the said Amelia F. Day in her lifetime to the said George W. Day in his lifetime, out of her sole and separate estate, between January 1st, 1868, and January 1st, 1881, \$3,185.

The same being the amount of all money received by the said Amelia F. Day from William W. Comstock for the care and board of Georgiana Comstock, for the period embraced between said last-mentioned dates. The said William W. Comstock, administrator, further claims the interest on said sums loaned, from the dates when the same were loaned to the date when interest is allowed on other claims against said George W. Day's estate.

In 1885, in the superior court, upon the suggestion of that court that he should present his claim with more particularity, the plaintiff made this additional presentation, viz.:

"On or about the 18th day of April, 1879, there was found to be due from the said George W. Day, then in full life, to the estate of Amelia F. Day, deceased, the sum of \$2,035, by the admissions of the said Day to the said W. W. Comstock; and on April 29, 1890, the said Day received from the said W. W. Comstock, on the account referred to in said claim, \$50 more, amounting in all to the sum of \$2,085, the same, except said \$50, having been received by said George W. Day in his lifetime from the said Amelia F. Day in her lifetime, from and out of her sole and separate estate, and as trustee thereof, and under the express and acknowledged trust that he would keep the same invested for her in his business or elsewhere, and would account to her for the same, with interest, on demand. Said moneys were received by said George W. Day in payments of from \$20 to \$50 each, at intervals of about two months, beginning about April, 1869, and continuing to about October 1, 1879."

The defendant moved the court to strike out all except the last clause of this additional statement, because the other portions of it change the ground of action from that embodied in the first presentation. The court denied the motion.

The parties were at issue to the court on the demurrer of the plaintiff to the fifth defense in the substituted answer of the defendant. The fifth defense was in these words, viz.: "The said George W. Day and Amelia F. Day were husband and wife, and living together as such on the 1st day of January, 1868, and so con-

tinued until her death, which took place October 18, 1879."

The plaintiff's demurrer was in these words, viz.:

"I. Because the appellant's claim is alleged to be upon an express and acknowledged trust.

"II. The transactions upon which the said claim is based are described as being between husband and wife, relative to her sole and separate estate, which came into the husband's hands for investment merely, and as trustee thereof for the benefit of the wife, and not upon any other agreement whatever.

"III. Because, if not in the law the sole and separate estate of the wife, then it appears that the moneys which are the subject-matter of this suit were the statutory estate of the wife, acquired since the 22d day of June, 1849, in the hands of the husband as her statutory trustee, which estate in this case, at the husband's death, is to be transferred to the administrator of the deceased wife.

"IV. Because the facts therein stated would not in equity excuse the said George W. Day from accounting to the said Amelia F. Day for so much of her sole and separate estate, or for so much of her statutory estate, as should come into his hands in the manner stated in the reasons of appeal; and because the right of the appellant and the obligations of the appellee are the same in this proceeding as those of the wife and husband respectively in a court of equity, in their lifetime.

"V. Because it does not appear that the written assent of said Amelia F. Day was ever obtained by the said George W. Day to apply any part of the principal of the wife's estate either for her support or otherwise."

The court held the fifth defense to be insufficient. The parties were then at issue to the jury; the plaintiff had a verdict; the defendant appeals.

The first five reasons are based upon the reception by the court of the additional statement as to his claim by the plaintiff. The remaining reasons are as follows, viz.:

"6. That the court charged the jury that the property in question in this case came within the terms of, and was controlled by, Rev. Stat. p. 186, § 3.

"7. That the court charged the jury that the pleadings in the case did not fix the character of the property in question for the purposes of this case.

"8. That the court charged the jury that if Mr. Day received the sole and separate estate of his wife on an agreement to return it to her, —if he needed it in his business, and she let him have it from time to time as he requested, —the Statute of Limitations would not apply.

"9. That the court charged that if Mrs. Day did not give the property in question to her husband, then he received it as trustee, so that the Statute of Limitations would not apply to the transaction.

"10. That the court charged the jury, in substance and effect, that the relation of debtor and creditor did not and could not have arisen between Mr. and Mrs. Day, and that he did not believe that any such relation existed between them; but that if the jury found some other agreement to have existed between them, contemplating a return of the money in ques-

tion, their verdict should be for the appellant.

"11. That the court did not charge the jury as requested by the appellee in his first request.

"12. That the court did not charge the jury as requested by the appellee in his third request.

"13. That the court did not charge the jury as requested by the appellee in his fifth request.

"14. That the court sustained the demurrer to the fifth defense in the appellee's answer.

"15. That the court overruled the claims of the appellee relating to the reply to the third and fourth defenses of the answer."

By our rules of practice, great latitude is allowed to the discretion of the court in permitting amendments of and additions to the first statement by a plaintiff of his claim. This, because it is deemed better for both parties that an error should be corrected in this manner rather than by compelling the plaintiff to go out of court and return again; it is in the interest of an early and economical adjustment of controversies. In the exercise of this discretion the court is always careful of the interests of the defendant. He is not to be surprised by any change. If he makes it appear to the court that time is necessary for preparation to meet the new presentation, it will be given to him. We assume for the present purpose that the first presentation was for a loan against which the Statute of Limitations would run; the second, for money received by the husband under an express and acknowledged trust, against which the statute would not run. The administrator upon the husband's estate did not ask for time. He simply denied the power of the court to allow the amendment at any time or upon any condition. There was no error in allowing it.

Another reason of appeal is that the court charged the jury that the property in question in this case came within the terms of, and was controlled by, Rev. Stat. 1875, p. 186, § 3. That section is as follows:

"All the personal property of any woman married since the 22d day of June, 1849, and all the personal property thereafter acquired by a married woman, and the avails of any such property, if sold, shall rest in the husband in trust for the following uses: To receive and enjoy the income thereof during his life, subject to the duty of expending from such income so much as may be necessary for the support of his wife during her life, and of her children during their minority; and to apply any part of the principal thereof which may be necessary for the support of the wife, or otherwise, with her written assent; and, upon his decease, the remainder of such trust property shall be transferred to the wife, if living; otherwise, as the wife may by will have directed, or, in default of such will, to those entitled by law to succeed to her intestate estate."

We understand this to be the effect of the charge, viz.: If the jury should find no more to be proven than that the wife acquired the money by her personal services, the husband, by force of the statute, in the absence of an agreement between himself and wife, would become trustee thereof for the uses and upon the conditions therein specified; also, as a matter of law, notwithstanding the fact that in the pleadings the plaintiff claimed, and the defendant admitted, the money

to be the sole and separate property of the wife in the strict, technical sense, such claim and admission are not of sufficient force to destroy the effect of proof of a tripartite agreement between Mr. Comstock, who paid the money to the wife, the wife, and the husband, which provided that the control and beneficial use of the money should be in the wife in the fullest manner, without declaring in technical words and form that it should be her sole and separate estate. Also, even if the husband could have enforced, as against the wife, his right to a statutory trusteeship of the money in question, he could make a binding contract with her that it should become, and ever thereafter continue to be, her sole and separate estate, with all legal consequences; and if it should be found as a fact that he did make such contract, and subsequently received the money from her as her sole and separate property, with no further understanding or agreement than that he should return it, as a matter of law he took it burdened with such trust as would be beyond the reach of the Statute of Limitations. Also, in the opinion of the court upon the evidence, the stamp of sole and separate property was impressed upon the money by an agreement between husband and wife.

The defendant complains of these instructions. They are largely speculative, and, if in any respect erroneous, the error does not become a ground for granting a new trial unless the defendant was injured by them.

It was admitted that money belonging to the wife, of considerable amount, had gone into the hands of the husband; it was also agreed that this money belonged to the wife as her sole and separate estate; and the sole question was whether the administrator of the wife's estate could recover it from the estate of the husband. The administrator, whom we call the plaintiff, claimed that under the Act of 1849 the husband received this as statutory trustee, and that consequently he could not avail himself of the Statute of Limitations as a bar to the recovery. The plaintiff also claimed that, if it was not received by the husband as statutory trustee, yet it was so placed in his hands for care and investment and an ultimate account, that the law created a trust on his part which prevented his taking the advantage of the Statute of Limitations. The defendant claimed that the money was given to the husband, and that he was not bound to account for it; and that, if not a gift, it was a loan to him in the ordinary way of a loan between strangers, against which the Statute of Limitations would run. It is obvious that the only question of importance for the defendant was whether the Statute of Limitations would run against the claim, unless indeed the jury should find it to be a gift. The jury having found that it was not a gift, it leaves the question of the running of the statute as the only one of importance. On this point the court was

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clearly right in instructing the jury that the statute would not run against a statutory trust on the part of the husband, nor against the trust growing out of her delivering the money to him to manage, invest, and account for: while the instructions given with regard to the running of the statute against the loan, if they should regard it as a mere ordinary loan, were wholly in the defendant's favor. Whether the court was right in instructing the jury that the statute would run against the claim if they should regard the transaction as an ordinary loan, it is not necessary for us to decide, and we leave the question entirely open for future consideration.

We might leave the matter here, but we are not willing, by our silence, to leave room for the inference that under the statute of 1849 personal property of the wife, which is her separate estate, can come under the control of her husband. The statute, it is true, is comprehensive in its language, "All the personal property of any woman married since the 22d day of June, 1849, * * * shall vest in the husband in trust." But it is very clear that the wife may have personal property to which the statute does not apply. A father often leaves money to a daughter, not only as her sole and separate estate, but with an express provision that it shall be free from all interest in, or control over, the same on the part of any husband she may marry. Such property, of course, could not be taken possession of by the husband, and its income used for his own support; and the same rule must apply to all her separate estate. That separate estate, whether in the form of principal or of income derived from it, she can dispose of as she pleases. She may put it into his hands to manage for her as her agent; she may loan it to him, and she may make an absolute gift of it to him. Whether she has done either is always a question of fact, not one of power; but the court below was right in instructing the jury that common experience suggests the necessity of looking carefully at a transaction in which a husband claims that his wife has voluntarily made a gift to him of her property, and that there should be "entirely clear and satisfactory evidence that the wife intended the transaction to be a gift from herself to her husband."

The requests to charge the jury concerning the weight and application of the testimony were sufficiently complied with. And we think the judge committed no error in expressing to the jury the inclination of his judgment, upon the evidence, against the claim that the transaction was a gift or a loan as between strangers. He did not make his opinion binding upon their consciences. He left them to decide the matter for themselves.

There is no error, and there should be no new trial.

In this opinion the other Judges concurred.

RHODE ISLAND,

SUPREME COURT.

Jonathan MAXON *et al.*

v.

Nancy C. GRAY *et al.*

1. A bill charging that the debt for which complainants recovered judgment was contracted by defendant under an assurance on her part that she would pay it out of her dower right, and that she fraudulently refrains from having her dower assigned so that complainants shall not levy their execution upon it, **does not charge such fraud as gives jurisdiction in equity.**
2. A debtor who has property in such form that it is not attachable is **under no legal duty to his creditors to convert it into a form in which it will be attachable.**
3. **Mere inaction**, where there is no legal duty to act, is **not cognizable as fraud in equity**, whatever motives may influence the non-acting party.

(Decided February 19, 1887.)

BILL in equity to satisfy a judgment debt out of a right of dower. On demurrer to the bill. *Demurrer sustained.*

After the opinion given in this case (*Maxon v. Gray*, 1 New Eng. Rep. 27, 14 R. I. 641), the complainants, June 11, 1885, amended their bill. To the amended bill the respondents demurred.

Messrs. Crafts & Tillinghast, for respondents:

This court has already decided that this bill of complaint cannot be maintained simply to reach a chose in action, such as dower; at least without allegations of fraud, leaving the latter question undecided.

Maxon v. Gray, 1 New Eng. Rep. 27, 14 R. I. 641.

The expectation of the firm that the debt would be paid out of the rents and profits, or out of the dower right by defendant Nancy C. Gray, is altogether inadequate, and the court has already decided that her neglect and refusal to have dower assigned is not fraud; and if the neglect is not a sufficient fraud to give jurisdiction, then of course the allegation that she has fraudulently, collusively, etc., neglected to have dower assigned adds nothing.

There is no allegation that she promised to have dower assigned, or to sell her right and pay out of the proceeds, or that the rents and profits had been sufficient to pay. There should be allegations of what representations and promises were made by Nancy C. Gray; that they were made with fraudulent intent; that she had failed to fulfill the definite promises made; and that she had been able to do so.

Messrs. Thomas H. Peabody and Charles Perrin, for complainants:

Actual or positive fraud includes cases of the intentional and successful employment of any cunning, deception or artifice used to circumvent, cheat, or deceive another.

1 Story, Eq. Jurispr. § 186.

R. I.

The equity doctrine of fraud extends, for certain purposes, to the violation of that class of so-called imperfect obligations which are binding on conscience, but which human laws do not and cannot ordinarily undertake to enforce.

2 Kent, Com. 39; 1 Johns. Ch. 630; 1 Ball & B. Ch. 250, 251.

What constitutes a case of fraud in the view of courts of equity, it would be difficult to specify. It includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and which are injurious to another, or by which an undue and unconscientious advantage is taken of another.

1 Bouv. 613.

The ground of demurrer that a dower right unassigned cannot be reached in a court of equity where there has been fraud is effectually disposed of by the former decision of this court in this case (*Maxon v. Gray*, 1 New Eng. Rep. 27, 14 R. I. 641), and in *Greene v. Keene*, Id. 888.

Per Curiam:

Since our former decision in this case the bill has been amended by alleging that the debt for which the complainants recovered judgment was contracted by the defendant Nancy C. Gray, under an assurance on her part that she would pay it out of her dower right or estate, or out of the income and profits thereof, and in the expectation, on the part of the complainants, that she would do so; and by further alleging, in substance, that the said Nancy, acting fraudulently and in collusion with the heirs, occupies and enjoys the entire estate in which she is entitled to dower, with the consent of the heirs, and refrains from having her dower assigned, purposely, so that the complainants shall not be able to levy their execution upon it. The complainants contend that these amendments introduce the element of fraud required to give the court jurisdiction.

The first amendment simply alleges an assurance which may have been given, for anything that appears, in entire good faith, and we do not think that a failure to fulfill it amounts, in law, to a fraud. Indeed we do not see how it puts the widow under any stronger duty, in point of law, than she would have been under without it, by reason of her general obligation to pay her debts, unless it was of such a nature as to bind her estate; and the complainants do not claim relief on that ground. We do not see that the second amendment materially alters the bill. Merely to characterize an act or omission as fraudulent or collusive is not enough, but the allegation must be such that the court can see, without the epithets, that the act or omission is fraudulent. The allegation here is, not that said Nancy has done anything to put her property beyond, but only that she refrains from doing anything to bring it within the reach of legal process. We do not think this is such fraud as gives jurisdiction in equity. A debtor who has property in such form that it is not attachable is under no legal duty to his creditors to convert it into a form in which it will be attachable; and, in our opinion, mere inaction where there is no legal duty to act is not cognizable as fraud in equity, whatever motives may influence the non-acting party.

It may be thought that this view does not accord with the view taken in *Re Keene, Petitioner*, 2 New Eng. Rep. 504, Index Y, 1. The question in that case was whether a debtor, owning a patent-right which, being intangible, was incapable of seizure on execution, was liable to commitment under Pub. Stat. chap. 222, § 14, for fraud in the detention of his property, if, still retaining the patent-right, he refused to pay his debt. The court was of opinion that the debtor was guilty of "fraud in the detention," within the meaning of the statute; the provision for arrest on execution being designed for the case of debtors who have property not exempt, which they refuse to use if necessary for the payment of their debts. We think, however, that the statute was only intended to determine in what cases execution was issuable against the body, and that it was no part of its purpose to enlarge the jurisdiction in equity. If a creditor desires the benefit of the statute, he should proceed under it.

Demurrer sustained.

Henry REYNOLDS, Admr. of James Reynolds,

v.

John B. HENNESSY.

1. The **act of the donee of a power is**, in contemplation of law, the **act of the donor** himself, if he simply executes it in a proper manner; and **if damages ensue** from such execution, it is the **donor**, and not the donee, who is to be **regarded as the author of them.**
2. It is only when the **donee of a power of sale in a mortgage** is guilty of some fraud or fault detrimental to the interests of the owner of the equity of redemption, in his manner of executing the power, that he can actually execute it, and, at the same time, violate his duty.
3. The averment that such donee acted secretly, and without the knowledge of the donor of the power, in executing it, does not show any violation of duty; for the **donee was under no obligation**, so long as he acted within the terms of the power, **to give any notice**, other than the general notice prescribed in the power, **of what he intended to do.**
4. Assuming that the **donee of such power** could not convey the mortgaged premises absolutely, without receiving the amount bid for them, or so much thereof as the owner of the equity of redemption was entitled to, such **conveyance by him** would be void, or **effectual only to transfer the mortgage or the mortgagee's interest in the lands, the mortgagor still remaining the owner of the equity of redemption**; and the latter would not suffer the loss of so much of the amount bid as was not required to pay the amount due on the mortgage.
5. An **action will not lie for fraudulently**

preventing one from bringing a suit upon a cause of action, by concealing its existence by false representations until after it was **barred by the Statute of Limitations**, unless the cause of action alleged to have been concealed was in fact a good cause of action.

(Providence—Decided March 19, 1887.)

TRESPASS on the case. On demurrer to the declaration. *Demurrer sustained.*

This action was brought March 2, 1886, after the equity suit, *Reynolds v. Hennessy*, Index, X, 49, 1 New Eng. Rep. 863, had been dismissed, and was founded on the same transactions as that suit.

Mr. William H. Greene, for defendant.
Messrs. George B. Barrows, Charles Bradley, and Albert R. Greene, for plaintiff.

Durfee, Ch. J., delivered the opinion of the court:

This is an action of trespass on the case *ex delicto*. The declaration contains three counts, each of which is demurred to.

The first count sets forth that, on February 24, 1870, one Bartlet Reynolds, being then the owner of a lot of land described, mortgaged it, with power of sale, to the defendant, to secure a negotiable promissory note of \$1,600, payable to the order of the defendant five years from date, with interest semi-annually at the rate of 8 per cent; that Bartlet died February 4, 1872, and his estate in the lot descended to James Reynolds, the plaintiff's intestate, he being Bartlet's sole heir; that in May, 1872, the defendant, for breach of the mortgage, sold the lot, under the power, to one Patrick Reynolds, the highest bidder, for \$4,950; said sum being greatly in excess of the amount due and the expenses of sale; that thereupon it became the duty of the defendant to give a deed of the lot to Patrick Reynolds for the full sum bid and no less, and to account to James Reynolds, and to pay over to him such excess; but that the defendant afterwards, in 1872, not regarding his duty, and "wrongfully, subtly, and maliciously contriving to injure said James Reynolds and to defraud him of such excess, did secretly and fraudulently, without notice to said James Reynolds, and without his knowledge, under color of his right and authority as attorney and mortgagee as aforesaid, make, execute, and deliver to the said Patrick Reynolds a deed of said premises, vesting in him, said Patrick, a full and absolute estate in fee simple; and in fact secretly, covinously, and fraudulently sold and conveyed said premises to said Patrick, notwithstanding said Patrick's bid of \$4,950, for the sum of about the amount due on said note and the expenses of sale, to wit for the sum of only \$——; by reason whereof the balance of the amount bid for said premises at said sale by said Patrick, as aforesaid, to wit, the sum of \$——, was wholly lost to said James Reynolds in his lifetime."

The power of sale, which is set forth in full in the count, is in the usual form. It authorizes the mortgagee to sell at auction for default, after notice as prescribed, and to make convey-

ance vesting in the purchaser "a full and absolute estate in fee simple," to receive the amount which the lot sold for, and, after paying expenses, to apply the residue to the payment of the note, principal and interest, accounting to the mortgagor, his heirs and assigns, for all sums over and above the amount thereof.

The question which has been argued for the plaintiff is whether the count sets forth a cause of action which survives to the administrator, it being assumed that a cause of action is alleged. The primary question, however, is whether any cause of action is alleged. The gist of the count is that the defendant, as donee of the power, sold the lot to Patrick Reynolds for \$4,950 bid, and then conveyed it to him by deed passing the estate absolutely, without requiring any more than was sufficient to pay the mortgage note and expenses, whereby the residue was lost to James Reynolds, the plaintiff's intestate. The count assumes that the defendant, as donee of the power, could convey the lot absolutely, without requiring the intestate's portion of the price, and yet that it was a violation of his duty for him to do so. We think this assumption involves a judicial inconsistency. The donee of such a power may commit a violation of his duty in executing it, but not by simply executing it; for the power is given to be executed when due occasion occurs. The act of the donee of the power is, in contemplation of law, the act of the donor himself, if he simply executes it in a proper manner; and if damages ensue from such execution, it is the donor, not the donee, who is to be regarded as the author of them. It is only when the donee of the power is guilty of some fraud or fault detrimental to the interests of the owner of the equity of redemption, in his manner of executing the power, that he can actually execute it, and, at the same time, violate his duty; and no such fraud or fault on the part of the defendant is duly alleged; for, though it is alleged that he acted "secretly, covinously, and fraudulently," etc., such denunciatory characterizations are, according to the rules of pleading, to be treated merely as expressions of the animosity of the party or pleader, not as substantive allegations of the fraud or misconduct. Nor does the averment that the defendant acted secretly and without the knowledge of James Reynolds show any violation of duty; for it does not appear that he was under any obligation, so long as he acted within the terms of the power, to give any notice, other than the general notice prescribed in the power, of what he intended to do. In this view, therefore,—that is, on the assumption that the defendant acted within the terms of the power, so that his deed actually conveyed an absolute estate in fee simple to the purchaser,—we do not think that any cause of action is duly set forth.

But perhaps it may be claimed that the defendant did not act within the terms of his power, and therefore that he violated his duty by exceeding them. This is to claim that he had no power to convey the lot absolutely without receiving the amount bid for it, or at least so much of it for James Reynolds as he was entitled to as owner of the equity of re-

demption. Assuming that this is so, it follows that the conveyance to Patrick Reynolds was void, or, at the most, was effectual only to transfer the mortgage or the mortgagee's interest to him, James Reynolds still remaining the owner of the equity of redemption, and consequently that James Reynolds, whatever other injury he may have sustained, cannot have suffered the injury which is alleged, namely, the loss of so much of the amount bid as was not required to pay the mortgage note and expenses, since it is only as the price of the equity of redemption, when sold and conveyed, that he could be entitled thereto. In this view, if James Reynolds suffered any injury, it does not appear what the injury was. Indeed, the view is utterly inconsistent with the theory on which the count is framed, and we do not think it can be resorted to, to sustain it.

The second count alleges the same cause of action on the part of the defendant, and the same injury resulting therefrom, as are alleged in the first count, and, in addition thereto, sets forth that the defendant, intending and contriving to hinder and prevent James Reynolds from knowing and discovering that he had executed and delivered to Patrick a deed of the lot on receiving only enough to pay the note and expenses, till a period of six years should have elapsed therefrom, did wrongfully, etc., conceal the fact from James Reynolds, and, further, did falsely, etc., give out, represent, and pretend that he had received the amount bid, and continued to do so until James Reynolds died, September 8, 1882; by means whereof the remedy of said James Reynolds in his lifetime, by action against the defendant for wrongfully making and delivering said deed for only enough of the price bid to pay the note and expenses, became barred by the Statute of Limitations, and said James was prevented from maintaining any action in that behalf, in his lifetime, against the defendant.

The cause of action against the defendant which is intended to be set forth in the second count is that the defendant, fraudulently contriving and intending so to do, prevented James Reynolds from bringing suit upon the cause of action supposed to be set forth in the first count, by concealing its existence by false representations, until after it was barred by the Statute of Limitations, and until the death of said James.

We need not decide whether an action will lie for such concealment, if a good cause of action be concealed; for it is very evident that it will not lie unless it is made to appear that the cause of action which is alleged to have been concealed was in fact a good cause of action, and here, if our view be correct, this has not yet been made to appear. We may remark, however, that the case of *Imperial Gas Light & Coke Co. v. London Gas Light Co.* 10 Exch. Rep. 39, which is cited in support of the second count, is not a very clear authority for the proposition that the concealment of a cause of action until the remedy is barred by the Statute of Limitations is itself a cause of action; for two of the judges remarked in that case that what was done to effect the concealment, being a trespass, was a good cause of action, whether the concealment was or not; and thereupon the court, without giving further

explanation, sustained the action because the defendants were alleged to have done certain wrongful acts, in consequence of which the plaintiff sustained damage.

The counsel for the plaintiff makes no argument in support of the third count, and we therefore assume that it is abandoned.

Demurrers sustained.

STATE of Rhode Island

v.

Joseph DOYLE.

1. In an indictment for a nuisance in keeping a place for the habitual resort of intemperate, idle, dissolute, noisy, and disorderly persons, it is not necessary to give the names of the persons of that character who are in the habit of resorting to it.
2. Such indictment is not bad because it charges the same offense in two different counts; nor because of the omission of the words "then and there," as indicated in the motion in arrest.

(Providence—Decided April 23, 1887.)

ON exceptions to the Court of Common Pleas.

Overruled.

Indictment for keeping a common nuisance. The case is stated in the opinion.

Messrs. Charles H. Page and Franklin P. Owen, for defendant.

Mr. Walter F. Angell, Asst. Atty-Gen., for plaintiff.

Per Curiam:

The defendant was indicted at the December Term, A. D. 1886, of the Court of Common Pleas for this county, for keeping and maintaining a common nuisance, under Pub. Stat. chap. 80, §§ 1, 2, and, on trial before a jury, was convicted.

After verdict and before sentence, he moved in arrest of judgment, on the ground that the indictment is insufficient, in that (1) it does not set forth the names of the persons who are described in it as intemperate, idle, dissolute, noisy, and disorderly persons, and who are alleged to be in the habit of resorting to the defendant's place; (2) the first and second counts of the indictment contain the same charge, and charge the defendant with the same offense; (3) said indictment does not charge that defendant kept a place, etc., where idle, intemperate, etc., persons were then and there in the habit of resorting. The motion was overruled, and the defendant excepted.

We do not think it was necessary to set forth in the indictment the names of the persons there described. It would be difficult, and in many cases impossible, so to do. The offense consists in keeping a place for the habitual resort of persons of the character indicated, whoever they may be. The authorities cited for the State show that it has been held that, in a common-law indictment for keeping a disorderly house, it is unnecessary to give the names of the persons resorting to it. The indictment is in the form in which indictments for the of-

fense have been drawn for thirty years. Moreover, the entire clause alleging that the place was kept for the habitual resort of intemperate, idle, dissolute, noisy, and disorderly persons might be struck out, and the indictment would still be good; the allegation being simply an allegation of one among several of the modes in which the offense charged can be committed.

We do not think the indictment is bad because it charged the same offense in two different counts. It is common practice to charge an offense in several counts in different ways, for the purpose of meeting the evidence as it may come out on the trial; and though it is usual to charge the offense as if the offense in each count was a distinct offense, yet that is matter of form, and does not make the indictment bad under our statute. R. I. Pub. Stat. chap. 248, § 4.

The omission of the words "then and there," as indicated in the motion in arrest, was immaterial. *Commonwealth v. Langley*, 14 Gray, 21.

Exceptions overruled.

STATE of Rhode Island

v.

Frank A. KANE.*

1. An indictment charging an offense in the language of the statute is generally sufficient.
2. In an indictment for keeping an unlicensed victualing house, it is not necessary to allege that it was kept open for business. To keep open a victualing house is necessarily to keep open a place where victuals are sold, or where the business of victualing is carried on.
3. An allegation that defendant was the keeper or proprietor is not necessary.

(Providence—Decided May 27, 1887.)

ON exceptions to the Court of Common Pleas.

Overruled.

Indictment for keeping an unlicensed victualing house.

The case is stated in the opinion.

Mr. Joseph Osfield, Jr., for defendant.

Mr. Walter F. Angell, Asst. Atty-Gen., for plaintiff.

Per Curiam:

The defendant was indicted at the December Term A. D. 1886, of the Court of Common Pleas for this county, for keeping an unlicensed victualing house, under R. I. Pub. Stat. chap. 86, § 3, as follows: "§ 3. Every person in any town, who shall open or keep open any tavern, victualing house, cook-shop, oyster-house, or oyster cellar, without license first had and obtained from the town council of such town, or in any place other than that specified in such license, shall be fined \$50 for each offense; one half thereof to the use of the town in which the offense shall have been committed, and one half thereof to the use of the State." The indictment alleges that the defendant, on the 11th day of December, 1886, with force and

*See *St. Johnsbury v. Thompson*, ante, p. 589.

arms, at Pawtucket, in the county of Providence, "unlawfully did open and keep open a victualing house in the city of Pawtucket, in said State, without a license then and there first had and obtained from the board of aldermen of said city of Pawtucket."

At the trial the defendant moved to quash the indictment because (1) it does not allege that the defendant did open and keep open said victualing house for business, and therefore does not charge any offense; (2) it does not allege that the defendant was the keeper or proprietor of said victualing house. After a verdict of guilty, the defendant moved in arrest of judgment on the same grounds. All these motions were overruled, and the defendant excepted.

The indictment follows the language of the statute; and though an indictment charging an offense in the language of the statute is not always, it is generally, sufficient. To open and keep open a victualing house is necessarily to open and keep open a place where victuals are sold or furnished, or where the business of victualing is carried on. Therefore it adds nothing to say that the place was open or kept open for business.

We do not think that any allegation that the defendant was the keeper or proprietor was necessary.

Exceptions overruled.

STATE of Rhode Island

v.

James MARCHANT.

1. Under Pub. Stat. R. I. chap. 246, § 5, an indictment which charges that defendant, on the 4th of July, did keep a room, and suffered it to be kept, to be used for gambling, means that he kept and suffered it to be kept on the day alleged, and the words "then and there" are unnecessary.
2. A motion in arrest of judgment cannot be sustained if either count of the indictment is good.
3. If defendant was in charge and control of the room for the purpose, on his part, of its being used as a gambling room, it was enough to make him guilty of the offense, even though the room was not actually so used while he was in charge of it.

(Providence—Decided May 26, 1887.)

ON exceptions to the Court of Common Pleas. *Overruled.*

Indictment for keeping a room for gambling, etc.

The case is stated in the opinion.

Messrs. Charles H. Page and Franklin P. Owen, for defendant.

Mr. Walter F. Angell, Asst. Atty-Gen. for plaintiff.

Per Curiam:

The defendant was indicted in the court of common pleas, under Pub. Stat. R. I. chap. 246, § 5, as follows: "§ 5. Every person who

shall keep or suffer to be kept any building, room, booth, shed, tent, arbor, or any other place in any city or town in this State, or in any vessel, boat, or raft upon any waters of Narragansett Bay, to be used or occupied for the purpose of gambling or playing at any game or games of chance of any kind whatsoever, for money or other valuable consideration, or shall keep, exhibit, or suffer to be kept or exhibited, upon his premises, or under his control, any cards, dice, table, bowls, wheel of fortune, shuffleboard, or billiard table, or any device, implement, or apparatus whatsoever, to be used in gambling or playing at any game or games of chance, for money or other valuable consideration; or who shall be guilty of dealing faro, or banking for others to deal faro, or acting as lookout, game-keeper, or assistant for the game of faro, or any other banking game where money or property is dependent upon the result, shall be taken and held to be a common gambler, and shall be imprisoned not exceeding two years, or be fined, not exceeding \$5,000, nor less than \$500."

The case comes before us on exceptions, for alleged errors committed by said court in refusing to instruct the jury on the trial as requested by the defendant, and also for overruling the defendant's motion in arrest of judgment. We will consider the latter exception first.

The indictment contained two counts. The first count charges that the defendant, on July 4, 1886, with force and arms, at Pawtucket, unlawfully "did keep and suffer to be kept a certain room to be used and occupied for the purpose of gambling and playing at games of chance, for money and other valuable consideration, whereby," etc. The second count charges that the defendant, at the same time and place, "unlawfully did keep and exhibit, and suffer to be kept and exhibited, upon his premises and under his control, tables, cards, dice, etc., to be used in gambling and playing at games of chance, whereby," etc. The defendant directs his argument especially against the second count, as being the more clearly insufficient. The motion, however, cannot be sustained if either count is good. We think the first count is good. It is substantially in the language of the statute. The objection of the defendant is that the charge is that he kept the room to be used for gambling, without alleging that he kept it to be then and there used for gambling. We think, however, that the charge that the defendant, "on the 4th of July, did keep a room, and suffer it to be kept, to be used for gambling," means that he kept it, and suffered it to be kept, to be used for gambling, on the day alleged, and that the words "then and there" were unnecessary. *Commonwealth v. Bugbee*, 4 Gray, 206; *Commonwealth v. Langley*, 14 Gray, 21; *Whiting v. State*, 14 Conn. 487.

The evidence submitted on the trial of the indictment went to show that one Frank E. Sulloway was the lessee and keeper of the room mentioned in the indictment, and that the defendant was there with others, and that, on the day mentioned in the indictment, the defendant and others being present, Sulloway went out and left the room temporarily in charge of the defendant. The instruction requested was

that, if the jury found that the defendant was not an employee of Sulloway, but was left temporarily in control and charge of the room, it was necessary for the jury also to find that, during some part of the time when the defendant was in control and charge, the room was used in gambling and playing at a game or games of chance, for money or other valuable consideration, in order to find the defendant guilty as charged. We do not think the refusal of the instruction was error; for we are of the opinion that if the defendant was in charge and control of the room for the purpose, on his part, of its being used as a gambling room, it was enough to make him guilty of the offense, even though the room was not actually so used while he was in charge of it. *State v. Miller*, 5 Blackf. (Ind.) 502.

The counsel for the defendant, in his brief, argues that "the jury must be satisfied that the premises were kept by the defendant for the purpose of being used in gambling." This is undoubtedly true, but, in order to prove this, it is not necessary to prove that they were actually so used.

Exceptions overruled, and case remanded to Court of Common Pleas for sentence.

Henry H. SAGER

Michael MOY *et al.*

Payment of a joint judgment by one of the judgment defendants extinguishes it; and an appeal therefrom cannot thereafter be taken by another defendant.

(Providence—Decided May 4, 1887.)

ON plaintiff's exceptions to the Court of Common Pleas, in an action of trespass *de bonis asportatis*, appealed by one of the defendants from a justice court. *Sustained.*

The facts are stated in the opinion.

Mr. Nathan W. Littlefield, for plaintiff:

The appeal should have been dismissed. The judgment was entire, and could not be appealed from by one defendant.

Curry v. Richards, 12 R. I. 152.

The effect of an appeal is to entirely vacate a judgment; and as the obligation is joint, so nothing less than the consent of all bound by it can vacate it.

Dunns v. Jones, 4 D. & B. 154; *Wilkinson v. Gilchrist*, 5 Ired. L. 228.

To enable one person bound by a joint judgment to take an appeal, he must proceed to have a summons and severance of the judgment before the appeal is taken, and take his appeal alone; otherwise there might be two or more appeals pending at the same time.

Williams v. Bank of U. S. 11 Wheat. 415 (34 U. S. bk. 6, L. ed. 508); *Owings v. Kincannon*, 7 Pet. 402 (32 U. S. bk. 8, L. ed. 728); *Mussina v. Canazas*, 20 How. 280 (61 U. S. bk. 15, L. ed. 878); *Kirby v. Holmes*, 6 Ind. 33; *Cumberland C. & I. Co. v. Jeffries*, 21 Md. 375; *Vasor v. Fox*, 1 Wils. 88; 2 Bac. Abr. 461.

But the payment by Sherman did not work a severance; it extinguished the judgment, so that there was nothing left to base an appeal upon.

Klippel v. Shields, 90 Ind. 81; *Freem. Judg.* §§ 466, 477.

Where separate judgments against co-tortfeasors in different suits are obtained, the payment of one judgment is held to extinguish the other.

Kasson v. People, 44 Barb. 347; *Lathrop v. Briggs*, 8 Cow. 171.

The judgment did not exist, after payment, for contribution, or for any purpose whatever. *Cooley, Torts*, p. 144.

It is well settled that the voluntary payment of a judgment waives the right of appeal.

Borgalhouse v. Ins. Co. 36 Iowa, 250; *Alkous v. Delaware*, 44 Iowa, 201.

Mr. George J. West, for defendant Moy.

Per Curiam:

This is an action of trespass *de bonis asportatis*, originally brought against Michael Moy and Arthur Sherman in the Justice Court of Pawtucket, wherein judgment was rendered against both defendants for \$3.94 damages, and costs taxed at \$8.75. Judgment was rendered January 5, 1886, and on January 9, 1886, was satisfied by payment of the debt and costs by the defendant Sherman. After the payment an appeal was taken to the court of common pleas by the defendant Moy. At the trial in the court of common pleas the plaintiff requested the court to dismiss the appeal, claiming that it was improperly taken. The court denied the request. The jury returned a verdict for the defendant, and judgment was rendered thereon for the defendant for his costs. The case comes before us on exceptions taken by the plaintiff, on the ground that the court erred in refusing to dismiss the appeal.

We think the refusal to dismiss the appeal was error, for it is well settled that payment by one primarily liable as a judgment debtor extinguishes the judgment. *Klippel v. Shields*, 90 Ind. 81, and cases therein cited; *Freem. Judg.* §§ 466, 467. It follows that, upon payment by Sherman, the judgment was discharged and extinguished, and ceased to be a judgment against either defendant, and could therefore no longer be appealed from. It was not, after such satisfaction, a judgment by which the defendant Moy was aggrieved.

Exceptions sustained, and proceeding dismissed without costs, there being no appeal.

VERMONT.

SUPREME COURT.

Andrew J. WILLARD

v.

Avery D. PIKE.

1. A party is not entitled to an exception, when he allows grand list books to be admitted as evidence, "subject to all legal objections," without specifying the defects. Such a general objection only saves the right to specific rulings on the defects that are called to the attention of the court before the case is submitted to the jury. Nor was it fatal error to exclude voluminous inventories offered as bearing upon the good faith of the listers, without stating in what respect they bore upon it, although one of them on examination was found admissible.
2. What purported to be a certificate of the president of the county equalizing board, required by Rev. Laws, § 303, and in proper form, was admissible and *prima facie* sufficient, under the rule that it is presumed that a man acting in a public capacity was properly appointed, etc.
3. An alteration of the list by the listers, after the time provided for its completion, unauthorized by law, does not render the whole grand list void.
4. The check-list used at the annual town meeting, with proper alterations, may be used at a special meeting, to elect listers to fill a vacancy, and need not be posted, longer than the notice of the meeting. Rev. Laws, chap. 6, § 2656.
5. When the reasons specified as an objection to the admission of the grand list as evidence are not sufficient, the exception will not be sustained, although the list for other reasons is void.
6. Statutory regulations which relate to the rights of the taxpayer are conditions precedent to the legality of the tax; but those for the information of the lister, to promote method, are directory. Thus, the list in contention was very defective in form, tested by Rev. Laws, § 948, but contained the necessary elements of a grand list; what was wanting could be readily supplied by computation; and it was held valid in this respect.
7. School-district officers must be elected at the annual meeting on the last Tuesday of March, as provided by Rev. Laws, § 519; and a collector cannot justify as a *de facto* officer, even if elected at any other time. Thus, three districts were formed into one by a vote of the town, under Rev. Laws, § 545, instead of § 573, requiring a two-thirds vote of each district, and, assuming to be a union district, elected the defendant its collector at a time re-

quired by § 575 for union districts. *Held*, that it was not a union district, and therefore that the defendant was not a legal officer and could not justify; but that a district could vote taxes at any meeting properly warned. Rev. Laws, § 559.

8. The St. Johnsbury Academy, incorporated and operated for the purposes of general education, owned certain buildings obtained for its use in carrying on the school, a part of which was occupied by its students for a clubhouse and a boarding-house, a part by one of the professors, and the remainder rented; and tuition was charged only for the maintenance of the institution. *Held*, that the buildings are exempt from taxation, under statute (Rev. Laws, § 270), which affords exemption to property "used for public, pious, or charitable uses."
9. Property actually devoted to pious or charitable uses is exempt, although the deed or record title does not show the use.
10. The property of an aqueduct company, consisting of ponds, springs, a reservoir, and iron pipes by which water was brought into a village, was properly set in the list as real estate.
11. The stock of a corporation cannot be assessed to the stockholders when it does not exceed in value the value of the property which it represents, and which is assessed to the corporation. Rev. Laws, § 288.

(Decided June 29, 1887.)

TRESPASS and trover for the conversion of four shares of bank stock. Plea, general issue and notice. Trial by jury. June Term, 1885, Caledonia County, Ross, J., presiding. Verdict and judgment for defendant. *Reversed and remanded*.

The case is stated in the opinion.

Messrs. Bates & May, for plaintiff:

The statute pointed out the manner in which the real-estate appraisal should be made; and if the listers, the county or State equalizing board, failed in the performance of any essential requisite, or if proof itself failed to show their compliance with the law, then the lists of 1883 and 1884 were never the legal basis of taxation.

Houghton v. Hall, 47 Vt. 383.

The law required quadrennial appraisal to be made and filed before July 1; and the county board must meet the first Tuesday in August. This board must be sworn.

Rev. Laws, § 300.

The vote to make school districts Nos. 2 and 3 a part of school district No. 1 closed the existence of school districts Nos. 2 and 3.

43 Vt. 212.

The corporation is purely a private one; it may accept or reject any pupil, and may hold property until its income reaches \$30,000 per year. The academy and south hall were not exempt under the law as it now stands; for the school was not, and does not pretend to have

been, built and managed either for public, pious, or charitable uses.

De Soto Bank v. Memphis, 6 Bax. 415; *S. C.* 32 Am. Rep. 580; *Church v. Assessors*, 12 R. I. 19; *S. C.* 34 Am. Rep. 597; *Phillips Exeter Academy v. Exeter*, 58 N. H. 306; *S. C.* 42 Am. Rep. 589; *People v. Graceland Cemetery Co.* 86 Ill. 336; *S. C.* 29 Am. Rep. 82; *Northwestern University v. People*, 80 Ill. 333; *S. C.* 22 Am. Rep. 187; *Pierce v. Cambridge*, 2 Cush. 611; *State v. Ross*, 24 N. J. L. 497; *State v. Leicester*, 28 N. J. L. 108; *State v. Axtell*, 41 N. J. L. 117; *Cooley, Tax*, pp. 146, 540 *et seq.*; *N. H. Gen. Stat.* 1867, chap. 49, § 2; 8 Kan. 344.

The law prescribing the duties of the listers requires them (1) to lodge an abstract of the list on or before April 25; and (2) to deposit the completed list on or before the 15th day of May.

Laws 1882, No. 2, § 25.

This law contemplates the making and depositing of two distinct and separate books.

It has been said by this court: "The time is limited within which an appeal is demandable, and there must be a completed copy of the appraisal from which the appeal is to be taken."

Ayers v. Moulton, 51 Vt. 115.

The filing of the completed list, therefore, before the time for appealing expires, or on April 25, virtually takes away the right of appeal, and makes the law unconstitutional. The marking on the document to indicate when it is filed has nothing to do with the filing. That is complete when the instrument is deposited.

Gorham v. Summers, 25 Minn. 81; *State v. Briggs*, 27 N. W. Rep. 358.

The grand list is void because there was no compliance with the law requiring an abstract of the list to be lodged in the office of the town clerk on April 25. The failure to lodge and keep the abstract in the town clerk's office is just as fatal to the list as would be a failure to lodge it there at all.

Any papers actually used at a trial can be incorporated in a bill of exceptions. By that use they become a part of the evidence. The law allows the production of them in court in a case of this kind.

Messrs. Ide & Stafford, for defendant:

The certificate of the president of the equalizing board is required by Rev. Laws, § 303, to be indorsed on the list of the town signed by him. Presumptions of the character of the one in question are constantly made in the trial of tax cases in this state.

Bull v. Dow, 56 Vt. 562; *Briggs v. Whipple*, 7 Vt. 15; *Wilson v. Seavey*, 88 Vt. 221; *Macomber v. Center*, 44 Vt. 235; *State v. Potter*, 52 Vt. 88.

The directions of the statute in regard to the details of the making, posting, and manner of using the check-list are directory, not mandatory; and an irregularity in these respects, which has worked no harm and impaired no right, would not impair an election.

Barnes v. Board of Supervisors, 51 Miss. 305; *Wheelock's Case*, 82 Pa. 297; *Dale v. Irwin*, 78 Ill. 170; *State v. Ferguson*, 81 N. J. L. 107; *McKinney v. O'Connor*, 26 Tex. 5; *Sprague v. Norway*, 31 Cal. 178; *Hulseman v. Rems*, 41 Pa. 396; *Piatt v. People*, 29 Ill. 54; *Whippley v. Mc-*

Kune, 12 Cal. 352; *Cleland v. Porter*, 74 Ill. 76; *People v. Police Commissioners*, 57 How. Pr. 445; *Rounds v. Smart*, 71 Me. 380; *Colins v. Huff*, 63 Ga. 207; *People v. McManus*, 34 Barb. 620; *State v. Elwood*, 13 Wis. 553; *Day v. Kent*, 1 Oreg. 123; *State v. Stumpf*, 21 Wis. 579; *Re Census Superintendent*, 1 New Eng. Rep. 156.

The regularity of the election of the listers cannot be assailed in this collateral manner, but only by some proceeding, directly instituted for that purpose, to which the listers are parties.

Sudbury v. Heard, 103 Mass. 548.

The ruling of the court as to taxing the stock of the corporations was correct.

Cooley, Tax, p. 165; *Salem Iron F. Co. v. Dancors*, 10 Mass. 514; *Amesbury, W. & C. Mfg. Co. v. Amesbury*, 17 Mass. 461; *Boston Water Power Co. v. Boston*, 9 Met. 202; *London Bank v. New London*, 20 Conn. 117; *Toll Bridge Co. v. Osborn*, 35 Conn. 7; *Rockingham Ten Cent Sav. Bank v. Portsmouth*, 53 N. H. 17; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389.

The property belonging to the academy was exempt from taxation.

State v. Gaffney, 34 N. J. L. 133.

Veazey, J., delivered the opinion of the court:

The action is trespass with a count in trover for the conversion of four shares of bank stock. The defense was a justification under tax warrants. The trial was by jury, and the verdict was for the defendant. The defendant, to show the validity of the taxes, put in evidence the grand-list books of his town, St. Johnsbury, and the field books for 1882, 1883, and 1884; and they were received subject to all legal objections. No general exception was taken or allowed, and ought not to have been, to this general ruling and admission of evidence. It was the duty of the plaintiff's counsel to specify wherein these books were defective if he wanted an exception to their admission. It was not the duty of the court to search the books for defects. The general objection was sufficient to save the plaintiff's right to specific rulings on defects that were called to the attention of the court before the case was finally submitted to the jury, but it went no farther. *Hills v. Marlboro*, 40 Vt. 648.

The plaintiff's points are so numerous, we follow the order of the brief lest some may be omitted:

1. The defendant offered in evidence a certificate, or what purported to be that, of the president of the county equalizing board, in book B. No proof was offered as to identity of handwriting, or who, in fact, was the president of that board.

The court held that the certificate being in the form required by law, and signed by a person professing to act as president of the board, the defendant need not prove more, and that this proof was *prima facie* sufficient; to which the plaintiff excepted. That certificate is required by Rev. Laws, § 303, to be indorsed on the list of the town, and signed by the president of the board, who was a public official, all in the form precisely as this certificate showed.

It does not appear, and no claim is made,

that the list thus certified was not found in the hands of the proper depository. We hold that the ruling was correct. As to town and county clerks, magistrates, and other officers having prescribed statutory duties which they have to authenticate by attestation or certificate, proof of the officer's handwriting, and that the person is the officer he purports to be, is not required in the first instance. *Lemington v. Blodgett*, 37 Vt. 210; *Hubbard v. Dewey*, 2 Aik. 312; *State v. Potter*, 52 Vt. 83; *Benedict v. Heineberg*, 43 Vt. 231.

It is a general presumption of law that a man, acting in a public capacity, was properly appointed and is duly authorized to perform the duties prescribed by law for such official. This is so under the maxim, *Omnia presumuntur rite et solemniter esse acta donec probetur in contrarium*. Broom, p. 849; *Rez v. Verelst*, 3 Camp. 432; *Bank of U. S. v. Dandridge*, 12 Wheat. 69 [25 U. S. bk. 6, L. ed. 554].

2. It appeared that the listers of 1883 and 1884 made some alterations in the lists after the time specified by law for them to be completed and filed, but not in the manner provided by law. The plaintiff claimed that any such material additions or alterations of the lists were illegal, and would render the whole grand list void. The court held that while the listers could legally make additions only in the manner specified in the statute, after May 15, yet if they made them not in that manner, such alterations or additions, while they might render the listers liable, would not render the grand list void; to which the plaintiff excepted.

In *Bellows v. Weeks*, 41 Vt. 590, Pierpoint, Ch. J., speaking for the court, says: "When they had discharged their duties as listers, and had deposited the list with the town clerk, they had no further control over it, or authority in respect to it. Therefore their relation to it was precisely the same as that of any other inhabitant of the town. This principle was expressly decided in *Downing v. Roberts*, 21 Vt. 441. In the same case it was held that alterations made by persons other than the listers were of no effect, and did not invalidate the list as made and deposited by the listers; that it was like the alteration of a written instrument by a stranger." The logic of these two propositions leads to the conclusion that a list tampered with, even by listers, out of time and unauthorized, is not thereby void, but stands good as made and deposited by the listers in time; for, as the late chief justice further said in the same cases, "after the list is returned to the town clerk's office, the listers would seem to be as much strangers to the instrument as any other persons," except in supplying omissions as provided in Rev. Laws, § 852.

In this case there was no alteration of the plaintiff's list. We think there is no ground for sustaining this exception.

3. The listers elected at the annual town meeting, held March 6, 1883, having resigned, the selectmen called a special town meeting for March 27, 1883, at which a new board was elected, being the board whose action is here attacked. A check-list to be used at the special meeting was posted either March 14 or 15, 1883. The check-list thus posted, as amended by the selectmen, was used at the special meet-

ing, without questions then made. The plaintiff asked the court to rule that the election of listers at the special meeting was illegal for the reason that the town had no legal check-list. The court ruled otherwise, to which the plaintiff excepted.

The objection to the check-list, as urged, is that it was not posted thirty days before the special meeting. The proper inference, from what is stated in the bill of exceptions, is that the check-list posted and used at the special meeting was the same, with amendments or corrections, that was posted thirty days before, and used at the annual meeting previously held. Rev. Laws, § 2856, provides that a check-list shall be "made and used in town meetings in the manner provided for check-lists of voters in freemen's meetings."

The statute (Rev. Laws, chap. 6) provides for the making of the check-list and the posting thereof thirty days before a freemen's meeting, but further provides, in § 70, that at certain special elections "the check-list used at the preceding freemen's meeting shall be used with such alterations as the board of civil authority, having given six days' notice of a meeting for that purpose, may make prior to the day of such election." Special elections at freemen's meetings, under Rev. Laws, §§ 70, 72, can be held on six days' notice. Special town meetings require twelve days' notice.

It is plain, first, that the same check-list, with proper alterations, may be used at a special town meeting as was used at the annual meeting. We also think that, owing to the great embarrassment that might be occasioned by requiring a check-list for a special meeting to be posted thirty days before, and in the absence of any express provision to that effect, it was not the intention to require a posting longer than the notice of the meeting. The occasion for special town meetings often arises suddenly and demands immediate action, as in this case where the listers were required to enter upon their duties by the 1st of April, and had a limited time to complete them.

Neither is there any necessity for so long a posting of the list. It is completed at the start, subject only to alterations. To require thirty days' posting would, in effect, require thirty days' notice of special meetings. The statute by implication, though not so expressed, we think, requires a posting of the list for special meetings as well as for the annual meeting, but not for a greater period than for the notice of the meeting. This view renders it unnecessary to decide what would be the effect of a failure to post the list for the time as specified, and whether the directions as to the details of the making, posting, and manner of using the check-list are directory or mandatory. The authorities on this point are cited at length in the brief of defendant.

4. The plaintiff asks the court to rule that book "H" was not the grand list which the law required. The court ruled that this book contained the necessary elements of a grand list, if the jury should find that the listers made it up and completed it as the grand list, and filed it in the completed condition at the time required by law; to which the plaintiff excepted. This was the only exception taken in respect to

this book. The defendant's evidence tended to show that it was filed first on April 25, 1884, as the abstract of personal lists required by Rev. Laws, § 881, and again, after being corrected and completed, on May 15, 1884, in its present shape, as the grand list of the town. No question was made below that this book was not properly authenticated or duly filed as the abstract of personal lists. One objection urged to it as a grand list is that it is not a compliance with Rev. Laws, § 348. That section provides that "the list when completed shall contain the following particulars," which are therein specified in eight paragraphs. The substantial question is whether this section, so far as it pertains to the form of the list in its subdivisions, its additions, and deductions, is directory or mandatory.

On this point *Torrey v. Millbury*, 21 Pick. 64, is instructive. Chief Justice Shaw there says: "Some of the regulations relating to the assessment of taxes are conditions precedent to the legality of the tax, and others are directory merely; that those measures which are intended for the security of the citizen or insuring an equality of taxation, and to enable anyone to know with reasonable certainty for what polls, and for what real and personal estate, he is taxed, and for what all those who are liable with him are taxed, are conditions precedent. * * * But many regulations are made by statute designed for the information of assessors and officers, and intended to promote method, system, and uniformity in the modes of proceeding, the compliance or noncompliance with which does in no way affect the rights of taxpaying citizens. These may be considered directory." In that case there was a failure to carry out in distinct columns the values of the real and personal estate and their reduced values, as the statute provided; but there was sufficient stated so that, by computation, all the results required could be ascertained; and the tax was held valid. In the same line are *Blackburn v. Walpole*, 9 Pick. 97; *Westhampton v. Searle*, 127 Mass. 502; *Bellows Falls Canal Co. v. Rockingham*, 37 Vt. 622; *Wilson v. Wheeler*, 55 Vt. 446.

Book H did not comply in form with the provisions of § 348, but we fail to see wherein it did not contain the "necessary elements of a grand list." It contained the name of each taxable person and against it the amount of his poll, if any, and the quantity and value of his real estate, with such description of it as would indicate into what class it belonged, and the village and district in which it was situated, as indicated by letters and figures, and the value of personal estate taxable in town after deduction made for debts owing, nothing being carried out if there was nothing left after such deduction. It lacked only those features which computation, from what was given, would readily and surely supply. There was no omission in formal compliance that could possibly operate to the prejudice of any taxpayer. In form as a grand list, as provided in § 348, the book was very defective; but we think those provisions, so far as they pertain to form only, come within the class that Shaw, *Ch. J.*, described as directory, and are not conditions precedent to the validity of a tax assessed upon such list.

Further objection is urged because the listers took the book of abstracts of personal lists required to be filed April 25, and made it over, and again filed it as the grand list. It appears that this book, as an abstract of personal lists, though filed seasonably in the town clerk's office, was in no way authenticated as such by the listers, and was taken right out by them after being deposited there, and was kept in their hands, and worked over into the grand list. If objection had been taken on this ground in the county court, it would be fatal so far as now appears; as this court has held in two cases heard at the present term,—*Smith v. Hard*, 4 New Eng. Rep. 118; *Barlett v. Wilson*, Id. 116—that the abstract of personal lists must be authenticated by the listers as such when filed; and we have no doubt but it should remain in the clerk's office for the inspection of taxpayers. But the bill of exceptions fails to show such objection.

The only objection in the county court was that first above stated. The objection was to the incompleteness of the list as it stood in Book H, not to the fact that it was defective as an abstract of personal lists, or that it had been improperly taken from the office and utilized for the grand list. The above exception, therefore, is not sustained.

5. The plaintiff claims that the school-district meeting, when the defendant was elected collector and the tax in question voted, was illegal because not held on the last Tuesday of March. The full statement in the bill of exceptions on this point is as follows: "Record of the annual school-district meeting of No. 1, warning March 17, 1884, and meeting Wednesday, March 26, 1884, put in and referred to. Elected Messrs. Ross, Sandford, and Bradley, and Mrs. Brooks, Smith, and Ide, committee, and defendant Pike, collector. Voted to raise 60 per cent. No other meeting was held in March, 1884, and tax on district in dispute was raised at this meeting, and at no other meeting. The plaintiff objected that, as this district No. 1 was not a union district, the law required a meeting to be held on last Tuesday of March,—that this meeting Wednesday was illegal,—and plaintiff put in record of town at its annual meeting in March, 1884, consolidating Nos. 1, 2, and 3 with district No. 1. The court held that the meeting of March 26, 1884, was legal, and the action of the district binding; to which the plaintiff excepted."

It seems quite plain that the requisite steps for making this a union district had not been taken. Under Rev. Laws, § 573, contiguous school districts may form a union district "if the voters of each district, by a two-thirds vote at a district meeting, agree to form such union." Rev. Laws, § 545, provides that "a town may, by vote in town meeting, divide, unite, or otherwise alter, school districts therein situated." The records of St. Johnsbury, which were put in evidence, show that the alteration in this district was under the latter section; and there is nothing to show any action under § 573. The action of the town was in 1854; and the record shows that the town, under an article in the warning, "to see if the town will vote to unite school districts Nos. 2 and 3, or either of them, with school district

No. 1," voted that the territory now embraced and included within the limits of school districts Nos. 2 and 3 in town, be annexed to and become a part of school district No. 1." It would seem from further statements in the bill of exceptions that, since about 1880, this district has assumed to be a union district, and held its annual meetings on the day provided for such districts, being the first Wednesday after the last Tuesday in March (Rev. Laws, § 575) instead of the last Tuesday, which is the day for the annual meeting of ordinary districts (§ 519). How this came about does not appear.

But it is urged by the defendant that the annual meeting of a school district need not be held on the day prescribed by the statute. Prior to 1858 the statutes did not provide when the annual meeting should be held. The provision was that the officers should be chosen annually at any legal meeting warned for one purpose, and should hold their offices for one year, etc. Under that statute it was held that an annual meeting need not be precisely one year from the day of the preceding meeting, there being no particular day fixed by law for the commencement of the term of office. *Chandler v. Bradish*, 28 Vt. 416. The statute now provides (Rev. Laws, § 519) when the annual meeting shall be held, and that the school-district officers shall be elected at such meeting, and that their term of office shall commence at the time of their election and continue until their successors are chosen. Rev. Laws, § 508. Under these provisions, after a school district is once organized and officers elected, there can be no lack of officers by a nonelection at an annual meeting; therefore nothing serious can befall a district by a failure to have an election. There are also ample provisions for filling vacancies by appointment of selectmen until a "new election" at a "special meeting." § 518. We have therefore a statute, in terms peremptory as to time of holding the annual meeting, and, when adopted, constituting an alteration of the law in this very respect, and, with other sections constituting a Code, so complete as to obviate all necessity for allowing a deviation in time arising from inadvertence. We fail to see any good reason for holding it as simply directory as to time, and no authority is cited or has been found to that effect; and we believe such holding would be contrary to the legislative intention. It could not have been intended that the failure to elect officers at the annual meeting should create vacancies; because that would be inconsistent with the provision that the term of office of the officers elected at the annual meeting should continue until their successors are chosen. There could be no vacancy while they continued in office. Section 518 applies to the filling of vacancies. It says: "When a vacancy occurs, * * * the selectmen * * * shall fill such vacancy until a new election is made by appointment; * * * and the district at a special meeting may make a new election." It would seem to be a distortion of the purport and spirit of that section to construe it as applying other than to the case of vacancy. There is no necessity for such construction, because there is no lapse in the law

without it; and it would be no improvement. In this case the election was not a new election at a special meeting.

It is urged that the right of the prudential committee, though not elected at a legal annual meeting or at a special meeting after vacancies occurred, cannot be questioned in this action to which they are not parties, as they were *de facto* such committee. *Goodwin v. Perkins*, 39 Vt. 598. Unless the rule that there cannot be a *de facto* officer without a *de jure* office applies, this contention of the defendant is sound as to the prudential committee, but not as to the collector of the school district, as he is the party defendant and can justify only by showing he is a *de jure* officer. *Courser v. Powers*, 34 Vt. 517; *Houston v. Russell*, 52 Vt. 110. Upon this point we think this exception must be sustained.

But upon the question of voting a tax the statute is different. It does not restrict the voting of taxes to the annual meeting of a school district. They may be voted at any meeting properly warned for the purpose. Rev. Laws, § 558.

6. The bill of exceptions contains a statement as follows: "It further appeared that the large boarding-house, just below the court-house, worth \$5,000 or \$6,000, was deeded several years ago to St. Johnsbury Academy; that in 1882, 1883, and 1884 this property, or a part of it, was rented for a boarding-house, academy and other boarders,—a part occupied by one of the professors of the academy; that the rent or income from said property was used for general expenses of said academy; that the 'club' house, just back of the academy, and worth several thousand dollars, was in 1882, 1883, and 1884 omitted from the list as exempt. This club-house was partly rented and, a part occupied by a club of scholars who take their meals there, and lodge in the 'south hall' just below; that the rent is used for general expenses of the academy. Lower down Main Street the Warner House stands, also taken out of list in 1884 by listers."

"This property was bought by the St. Johnsbury Academy, in November, 1883, for \$7,000. The property, since the purchase, has brought the academy no rent. The only proof as to this property was that one of the trustees of the academy said they intended to use it as a residence for the principal of the academy. It has not in fact been so used, or used at all, but has been kept as a part of the academy property, bought with the fund of the academy, which fund was a gift for the purposes of education. The court, against the plaintiff's exception, ruled that this Warner place, club-house, and the boarding-house were properly omitted from the list, and were exempt, as a matter of law, upon the facts stated."

The plaintiff contends that this was error because St. Johnsbury Academy is a private and not a public corporation.

Rev. Laws, § 270, is in part this: "The following property shall be exempt from taxation:

"VI. Real or personal estate granted, sequestered, or used for public, pious, or charitable uses, * * * and lands owned or leased by colleges, academies, or other public schools."

Rev. Laws, § 9: "The word 'land,' 'lands,'

and 'real estate,' shall include lands, tenements, and hereditaments, and all rights thereto and interests therein."

There is no claim that the St. Johnsbury Academy is a misnomer, or that the institution by that name is not an academy in the sense in which the term is generally used and understood. It is a chartered institution, and the charter conferred upon it "all the rights, privileges, and powers belonging to similar corporations for the purpose of instructing pupils" in languages specified, the various sciences, and for improvement in general culture and in morals.

We do not think the words "or other public schools" were intended to be restrictive of what precedes. Colleges and academies are, in popular understanding, public institutions, although not public in the sense as applied to our common schools, which are supported by public taxation, and are free to the public without charge to the pupils. The word "public" in this statute, we hold, is not to be construed in the latter sense, but in the sense in which academies are regarded as public institutions. It is not restrictive of what precedes, but is explained thereby; that is, public in the sense in which colleges and academies are public.

No colleges or academies in this State are yet free to the public, like our public schools, neither are they public corporations: therefore, if the Legislature intended by the phrase "lands owned or leased by colleges, academies, or other public schools," only such colleges and academies as were free to the public without charge for tuition, or as were purely and technically public corporations like municipalities, the legislation was simply idle.

Neither do we think the word "public," in the first clause of the statute above quoted, viz.: "Real and personal estate granted, sequestered, or used for public, pious, or charitable uses," was intended in so restricted a sense as to leave a donation to this academy for its use in maintaining it as an institution of learning taxable. When a college or academy is incorporated wholly for the purpose of general education, and is so operated without any capital stock or purpose of profit, and tuition is charged only for its maintenance, then it is devoted to public use. It is private only in technical sense. Every donation not devoted to extension or improvement would naturally enable it to extend its beneficial use to the public with less charge, until in time it may become free. Its operation all the time is for the public weal, without personal advantage or profit to the corporators, except as they share with the whole public in the general advantage, by promotion of education and good morals. It would be hard to say that money thus devoted was not given and used for "charitable uses." The popular misapprehension as to what constitutes a charity is certainly very great, if money given for education is not a charitable use of it.

This is not the case of a purely private school started under the name of a college or academy solely as a business enterprise for profit. Such schools may promote education and so serve a public advantage, but their primary and principal object is personal profit. But this branch

of this case comes under the second clause of the statute as quoted.

Objection is urged that the use of this property, although owned by the academy, was not such as is required to entitle it to exemption; and numerous cases are cited in support of the plaintiff's claim. In those cases the exemption law was very much restricted as compared with our statute. Our statute stands on the ground of ownership alone. There is no mention of use. In the cases cited there is language in the exempting statutes importing, with more or less distinctness, the elements of direct use in carrying on the enterprise; and the decisions turned on that provision. I refer to a few only for illustration. In *Phillips Exeter Academy v. Exeter*, 58 N. H. 306; *S. C. 42 Am. Rep. 589*, the exemption was granted to the plaintiffs as to "all lands, tenements, and personal estate that shall be given to the trustees for the use of the academy." The building in question was used in part by the students as a boarding-house and dormitory, and the remainder by the superintendent as a public house. The court held it was not exempt from taxation as land "for the use of the academy;" and the court said: "The fact that the Legislature ignored ownership, and made use the test, shows unmistakably that they recognized the essential distinction between the two, and fixed the latter, in preference to the former, as the basis of exemption."

In *Mullin v. Erie Co.* 85 Pa. 288; *S. C. 27 Am. Rep. 650*, it was held, under a statute exempting from taxation "churches, meeting-houses, or other regular places of stated worship, * * * in actual use and occupation for the purpose aforesaid," that the land on which a church was in process of erection was not exempt; the court giving force to the words importing actual use for stated worship.

In Ohio the statute exempted "all lots of ground or land set apart for schoolhouses, academies, or colleges, with the buildings thereon occupied for those purposes." It was held in *Kendrick v. Farquhar*, 8 Ohio, 189, that a professor's house, erected on the college grounds and occupied by one of the faculty as a residence, was not exempt. The court says: "It must be shown that the building is occupied for literary purposes."

But for another class of cases, when there is nothing in the statute restricting the exemption to property in special use, see *Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *State v. Ross*, 24 N. J. L. 497; *Griswold College v. State*, 46 Iowa, 275; *S. C. 26 Am. Rep. 138*.

Although, under our statute, ownership is all that is expressly required, it is probable that the Legislature did not intend to exempt property simply because owned by an academy. In construing statutes of exemption from taxation, regard must be had to the settled rule that they are to be construed most strongly against those who claim their benefit. The ownership must undoubtedly be, not for speculative purposes, but for the appropriate use and benefit of the institution as an academy or a college, in carrying out the purposes of its incorporation.

When the corporation transfers a portion of its funds from its personal assets, into a building for use in operating the school, it does not

thereby increase its exemption from taxation. The fund was not taxable before. Its duty is to keep its funds invested. But this case does not present the question whether this academy could have exemption from taxation for a building bought wholly for investment, and to obtain income for its legitimate uses by renting. Although portions of two of the buildings in question were rented, we do not understand they were bought for that purpose,—no such claim is made; but we understand they were obtained for actual use and convenience of the academy in carrying on the school; and the renting of a part was merely temporary and incidental. Nothing appears to the contrary.

In view of the difference between our statute, and those in all the cases cited by the plaintiff, and many others that we have examined, where the claim of exemption was not sustained, we think the ruling of the county court was not in conflict with authority, and we hold it was not error.

7. A further statement was in the bill of exceptions as follows: "In the spring of 1882 Henry Fairbanks purchased two parcels of land on Eastern Avenue,—the 'Harroun' place and the 'Matthews & Pettengill' place. Mr. Fairbanks gave up the Harroun place soon after to the use of the Y. M. C. Association, but rented the place till some time in the spring or summer of 1883 as a grocery and eating-house." It did not appear to what use he put the income or rent. In 1883 he removed both buildings, and laid the foundation for the fine structure now on Eastern Avenue. The Harroun property and the Matthews & Pettengill estate were worth on April 1, 1883, from \$4,000 to \$5,000, and more in 1884, or as much. The title stood in Henry Fairbanks till after the building was completed, in January, 1885, when said Fairbanks deeded the westerly half of the building to the Y. M. C. Association. He retained the easterly half for his own benefit and use. There was no proof of any trust on the record; but there was talk that when the building was completed it was to be given to the Y. M. C. Association. Both parcels were omitted from the list in 1883 and 1884. The court submitted to the jury to determine whether the listers, in good faith, omitted this property from the list in 1883 and 1884, telling them that the grand list would not be invalid if they acted in good faith in omitting, although they made a mistake as to the law. He also told the jury that property used for public, pious, or charitable uses was exempt from taxation, although the deed or record title might not show it was devoted to such use. This instruction was general, and applied to this and other property of same class. To this instruction plaintiff excepted."

The first part of these instructions as to the good faith of the listers follows the recent decision in *Wilson v. Wheeler*, 55 Vt. 445. The objection now made is to the other holding. It is claimed that the word "used" in the clause, "real and personal estate granted, sequestrated, used," applies to personal property alone; that the law is imperative that real estate shall be set in the list to the last owner thereof on the 1st day of April, etc.,—*Rev. Laws, § 276*.

That statute does not aid the plaintiff because its language is "taxable real estate." The question here is whether this was taxable. No authority is cited, and no reason is given why the word "used" should have the limited application stated, and we see none. Neither do we see why the statute does not apply to property actually used for the purposes named, although the deed does not show it was devoted to such use. We think the exemption must turn on the fact of grant, sequestration, or use for "public, pious, or charitable uses," and not on the language of the deed.

The question in the cases cited by the plaintiff was whether the use was such as to warrant exemption; but this bill of exceptions does not show what the instructions were on that point, or that any exception was taken thereto. Error cannot be presumed, but must be shown. The exception was only to the instruction "that property used for public, pious, or charitable uses is exempt from taxation, although the deed or record title might not show it was devoted to such uses." This, we think, was sound as a general proposition as applied to our statute. What the use must be is another question, and is not before us on this point, although briefly considered on another point, *supra*. No question is made but that land devoted to the use of the Y. M. C. Association is a pious use, therefore we have no occasion to pass on that point.

The statement in the exceptions in regard to the Kittredge and Music Hall places presents no different question.

8. One question in the case was as to the good faith of the listers in making the grand list.

The plaintiff offered in evidence the inventories of E. & T. Fairbanks & Co. for 1883 and 1884; the inventories of the managers and principal owners of said company, to wit: Thaddeus, Horace, Franklin, and William P. Fairbanks; also the inventories of several other prominent taxpayers in town,—Col. Frederick Fletcher, Henry Fairbanks, and C. M. Stone. He offered them in evidence generally, and especially upon the claim that they have upon the good faith of the listers in making up the grand list; but he did not point out in what respect they bear upon the good faith of the listers in their action, nor did he point out or claim that the several persons whose inventories were offered were assessed otherwise than as required by said inventories. The inventories were excluded without examination by the court, to which he excepted. Neither the court nor opposing counsel requested the plaintiff to point out the particulars in which he claimed the inventories bore upon the good faith of the listers.

The above is all that the bill of exceptions contains on the point, except the testimony of one of the listers that he had nothing to do about taking the inventories, and knew nothing about them except what they showed. We cannot see how several of the inventories had any tendency to show bad faith on the part of the listers; but we think that one, and perhaps more than one, was admissible as bearing on that issue. The question is whether it was error for the county court to exclude them, in view of the manner in which they were offered.

These were the inventories required by the Act of 1882. They contained twenty-two printed questions to be answered by the taxpayers. That Act is entitled "An Act Revising, Consolidating, and Amending the Laws Relating to the Grand List," and contained thirty-seven sections. It was a comparatively recent statute when this case was tried, and had provoked more or less controversy as to its proper construction in reference to inventories, as this court has frequently had occasion to know. The inventories offered in evidence were offered generally, and especially on the question of good faith of listers; but how they or any one of them bore on that issue was not stated. No claim is now made that they were admissible generally, but only on the issue of good faith. The exceptions are not clear whether they were offered in gross or separately, and counsel disagree on that point. If offered all together, the court was clearly not bound to go through them without the aid of suggestion as to defects. It would be impracticable, in the hurry of a jury trial, for the presiding judge to examine and dissect a bundle of papers to see whether they, or any of them, have a bearing on an issue. *Wright v. Williams*, 47 Vt. 222.

The same reason would apply to a single document if its bearing on the point was not readily apparent, whether from its length or peculiar character. It would seem that such must have been the fact in this case, assuming that these inventories were offered one at a time; otherwise the counsel offering them would have stated the defects or peculiarities which made them admissible. The only excuse they now give is a statement in argument that they did not know because they had been deprived of an opportunity to examine them before. But they had the opportunity then, and presumably, from their knowledge of their case, could much more readily discern the defects than the judge. We have examined these inventories with the aid of the criticisms now put upon them in argument; and while we see in this deliberate review that some of them might have been properly admitted in evidence, we as plainly see that their admissibility would not be readily apparent to the court without suggestion of defects. They were offered for a collateral bearing which they could have only by reason of something wrong about them. They were voluminous, and their correctness was dependent upon compliance with a recent, long, and somewhat complicated statute. Counsel were not deprived of an opportunity to examine them and point out defects, but neglected to do so. Under these circumstances we do not think it was fatal error for the court to exclude them. It was the fault of counsel in not doing their part towards getting a correct ruling on the merits.

9. The county court held that the property of the St. Johnsbury Aqueduct Company was, in its nature, real property, and was properly so treated by the listers; to which the plaintiff excepted.

This company was a corporation and owned ponds and springs in Waterford some four miles from St. Johnsbury, and owned an aqueduct made of large iron pipes, by which the water was brought into its reservoir in St. Johnsbury. This aqueduct was partly in the

highway and partly in fields of various owners. It did not appear what its rights were under its charter, as that was not produced; but the exceptions state that there was evidence tending to show it exercised the right of eminent domain. This exception was but slightly alluded to in the brief or argument of the plaintiff's counsel. They simply say this: "The property in the pipes was personal merely,"—and cited *Commonwealth v. Gaslight Co.* 12 Allen, 75, and *Memphis Gaslight Co. v. State*, 6 Cold. 318. The latter case I have not seen. The former does not support the claim, but so far as it bears on the proposition, its force is the reverse. Following the treatment of the subject given by counsel we hold, without further discussion, that the ruling of the county court was correct.

10. The listers testified they appraised all the real and personal estate of the Ely Fork & Hoe Company, a corporation, and of all the corporations, deducted from the personal property the debts they were owing, and set the balance of personal, and all real, estate in the list of said corporations; and that was the way they understood the law required; and that the balance of the value of the stock above the property thus taxed to the corporation was to be set to the stockholders if there was any balance, but that they found no balance in the case of Ely Hoe & Fork Company; that the property taxed covered the entire property represented by the stock of the company. They also testified that they understood that the property assessed by them to E. & T. Fairbanks & Co., taxed in this State, and its property out of the State taxed, where situated, to the corporation, was the entire property of the corporation which was represented by its stock, and for this reason they did not tax the stock of either corporation to the stockholders, as they found no value in such stock to be taxed to said stockholders. The court told the jury that if they found all the property represented by the stock of said corporations was taxed in this State or elsewhere, this view of the law taken by listers was the correct view, and there would be no balance to tax to the stockholders of the corporation; to which the plaintiff excepted.

We think this instruction was in accordance with the provisions of Rev. Laws, § 288, and was correct.

11. It appeared that, at the time of sale of said bank stock by defendant, all four shares were sold together. Plaintiff's evidence tended to show such sale was without his assent; defendant's evidence the contrary.

Mr. Willard, the plaintiff, testified that Judge Poland was requested by him to bid off and pay for the shares sold, and for no other purpose.

The defendant was asked what occurred between him and Judge Poland after the sale of the stock and after Mr. Willard had gone away, but while Judge Poland was paying for stock. Defendant was asked: "In what capacity did Judge Poland claim he was acting in the business you did with him relating to the sale of stock, the payment for the stock, of the proceeds of sale, and repayment of surplus?" Plaintiff objected, but witness was allowed to state: "He claimed to be acting as agent for

the plaintiff." To this the plaintiff excepted. The plaintiff's four shares of stock were transferred to Judge Poland, who merely gave his check to Mr. Pike for taxes and costs of sale,—some \$192. The stock brought some \$76 per share. The only reason now given why this evidence should have been excluded is that it was with reference to Willard's assent to having the sale of the property separately. The exceptions fail to make this apparent.

We have passed upon all questions that were ruled upon in the trial court, to which our attention has been called, but have omitted to notice other points now argued, but which the bill of exceptions failed to show were passed upon in that court.

The only error found, to which exception was taken, was the ruling as to the legality of the annual meeting of the school district when the defendant was elected collector of the district.

Judgment reversed, and cause remanded.

Alexander McLANE, Admr. of Jesse Johnson's Estate,

v.

Jonathan JOHNSON.

1. A demurrer to a bill for want of equity incorporated into an answer is not available.
2. The subject-matter of set-off is an original head of equity jurisdiction. Thus, the defendant purchased claims allowed against the estate with the money of the estate advanced for that purpose by the orator as administrator,—*Held*, that a bill in equity will lie to compel an offset of the claims to the amount of the dividends to become due thereon; and for any balance due the orator.
3. The orator is entitled to have the status of these claims fixed by a decree in chancery in advance of any order of the probate court for their judgment.
4. At law, there could not be an offset of these claims, even if they were originally payable to the defendant; as the orator's demands accrued to him in his administrative capacity, and it would alter the course of distribution.
5. The defendant and one C were interested as sureties on some of the notes so purchased; but it was agreed that the defendant should account for the money advanced,—*Held*, that C was not a proper party.
6. Parol evidence is admissible to explain an accountable receipt for money, and to prove the basis of the accountability, and when and to whom the accounting is to be had.
7. The Statute of Limitations is not a bar; as by the agreement the time has not arrived for the application of the dividends to money advanced, nor the payment of the balance.
8. An answer as evidence is to be
VT.

weighed like other evidence. No more weight is given to it because it is one of the pleadings.

(Decided June 23, 1887.)

BILL in chancery. Heard on the pleadings and a special master's report, and the exceptions thereto, December Term, 1885, Orange County, Rowell, Chancellor. *Affirmed.*

Decree that the moneys advanced to the defendant and paid out at the request of the defendant, by the orator, from the funds of the estate of which orator is administrator, as specified in the report of the master, to the amount of \$9,585.79, with the interest included therein to January 1, 1886, as is computed by the master, be allowed to the orator as against the defendant. And that there be allowed to the defendant against the orator, as administrator, the following claims as allowed by commissioners, January 2, 1867, viz.: The Andross and Holton notes, the Arnold, Cilley, Frye, and Hunkins notes,—all amounting to \$3,712.16,—and also the claims against the said estate brought by defendant, amounting to \$1,109.61; one half of the claims of J. & R. C. Johnson against the estate, being \$298.50; the Johnson Chamberlin claim of \$450,—making in all the sum of \$5,570.27, and interest from the date of commissioner's report, January 2, 1867, to January 1, 1886, as appears in the report of the master, to the extent of the percentage upon said claims allowed by the probate court of the district of Bradford, whenever a dividend is declared upon the claims against said estate; and that said dividend upon said sum allowed to the defendant, when ascertained, shall be offset against the sum named as allowed to the orator to the extent of said dividend. And should there be a balance due the orator, after allowing said offset, then the defendant shall pay said balance to the orator.

The master found in substance that Jesse Johnson, the intestate, deceased about the 2d day of March, 1866, and that very soon thereafter the orator was appointed administrator of his estate; claims were duly presented before commissioners who, as such, held regular sessions, and on the 2d day of January, 1867, returned their report to the probate court; that, among the claims allowed by the commissioners against said estate, there were a number, on which the defendant appeared as surety for the said Jesse Johnson, deceased, and the defendant's name and that of M. R. Chamberlin were on two notes as surety for deceased, on which was allowed by the commissioners, \$1,421.11 to John W. Andross, and one to Buckley Holton for the sum of \$1,076.78; that in April, 1869, suit was brought upon one or both of these notes against M. R. Chamberlin and the defendant Johnson, to enforce the collection of these notes against them; that the defendant and said Chamberlin conferred together to see what could be done to pay these notes; that it was arranged between them to apply to the orator, as administrator, to see if he could not let them have the money to pay these notes; that the defendant Johnson met the orator, and it was agreed between them that the orator should then advance to them \$1,200 to pay the Buckley Holton note, and

that he would in a few days let them have a further sum sufficient to pay the Andross note; that the orator then had the money in his hands belonging to said estate without any immediate occasion for its use; that in getting this money of the orator, M. R. Chamberlin was equally interested with defendant Johnson; that it was agreed between the orator and the defendant that the orator would let the defendant have the money required to pay the Holton note and the Andross note, and the defendant was to hold said notes against the orator administrator, the same as the original party would have done, and on the settlement of said estate the dividend of these notes was to offset against the money thus advanced by the orator as administrator as aforesaid; that at this time, or within a few days of this time, it was further agreed that the orator should, from time to time, let the defendant have money in like manner to purchase in claims against said estate, and on settlement of said estate the dividend on said claims so purchased in by the defendant was to offset against the money so advanced to the defendant by the orator; that the defendant gave the orator receipts as follows:

Received of Alexander McLane, administrator of the estate of Jesse Johnson, late of Fairlee, deceased, the sum of \$1,200 to account for in the payment of certain claims against said estate, allowed by commissioners, and particularly the claims of Buckley Holton and Johnson Chamberlin, said claims being founded upon notes which the said Jesse gave the said Holton and the said Chamberlin, and which I also signed as surety.

Jonathan Johnson.

Received of Alexander McLane, administrator of the estate of Jesse Johnson, late of Fairlee, deceased, the sum of \$1,700 to be accounted for in the payment of certain claims against said estate, allowed by commissioners, and particularly the claim of J. W. Andross. Said claim being upon a certain note which the said Jesse Johnson gave the said Andross, and which we each of us signed as surety, \$1,700.

Jonathan Johnson.

Moses R. Chamberlin.

Mr. John H. Watson, for defendant:

The orator's exhibits, two and three, are contracts, not mere receipts; hence, parol evidence was not admissible.

Story, Ballm. §§ 187, 159, 171; *Winn v. Chamberlain*, 32 Vt. 818; *Randall v. Kelsey*, 46 Vt. 158; *Brown v. Hitchcock*, 28 Vt. 452; *McGregor v. Bugbee*, 15 Vt. 734; 1 Greenl. Ev. § 305; 8 Wall. 325 (75 U. S. bk. 19, L. ed. 455); *Alldrich's Admr. v. Haggood*, 89 Vt. 621.

Parol evidence was not admissible to vary the terms of exhibit 9.

Brown v. Spofford, 95 U. S. 482 (Bk. 24, L. 510); *Morse v. Low*, 44 Vt. 565; *Bradley v. Bentley*, 8 Vt. 243; *Gillett v. Ballou*, 29 Vt. 296; *Brown v. Wiley*, 20 How. 442 (61 U. S. bk. 15, L. ed. 965).

The rule is the same in equity as at law.

14 Pet. 206 (39 U. S. bk. 10, L. ed. 454); 8 Wall. 573 (75 U. S. bk. 19 L. ed. 501).

It should have been alleged that the estate was settled.

Story, Eq. Pl. § 259; *Brown v. Bank*, 31 Miss. 459; 1 Dan. Ch. 369.

The bill is demurrable.

Downer v. Dana, 17 Vt. 518.

Such facts must be alleged as show a present right in the orator. When a party seeks specific performance he must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms.

8 Pom. Eq. Jur. § 1407.

Messrs. Roswell Farnham and A. M. Dickey, for the orator:

Parol evidence was admissible.

26 Vt. 123; 1 Greenl. Ev. § 305; 3 Stark. Ev. p. 1272; *Winn v. Chamberlain*, 32 Vt. 318; *Reynolds v. Hassam*, 56 Vt. 449; *Proctor v. Wiley*, 55 Vt. 844; 60 Vt. 1; 22 Vt. 507; *Snoles v. Snoles*, 11 Vt. 146; *Stackpole v. Arnold*, 11 Mass. 31.

The bill alleges the insolvency of the defendant, and the master has found the fact that he is insolvent. Courts of equity will allow, in such case, compel offset, regardless of the Statute of Set-Off.

Blake v. Langdon, 19 Vt. 485; *Downer v. Dana*, 17 Vt. 518.

Chamberlin was not a necessary party.

Story, Eq. Pl. §§ 103, 118; *Van Clief v. Sickles*, 5 Paige, 505.

Powers, J., delivered the opinion of the court:

The bill seeks to compel an offset of the claims held by the defendant against the estate of Jesse Johnson, to the amount of the dividends to become due thereon, to the orator's advances of money provisionally made to the defendant, and for the defendant's benefit, to satisfy the original holders of such claims; and for the payment to the orator of any balance that may be due him, above the amount of such dividends.

The defendant, among other things, incorporates into his answer a demurrer to the bill for the want of equity. But this defense comes too late. It is now the well-settled doctrine that a demurrer must be interposed at the outset of the proceedings, and disposed of before the expense of a trial is had; and if the defendant submits to answer the bill on its merits, he waives his demurrer. The authorities are referred to in *Wade v. Pulsifer*, 54 Vt. 45.

But, if seasonably interposed, the demurrer would be unavailing. The subject-matter of set-off is one of the original and well-established heads of equity jurisdiction. Our statutes allowing it have not taken away the jurisdiction of chancery, but have merely provided a remedy at law for the offset of mutual claims between parties which might always have been done in equity. At law, however, set-off cannot be effected unless the demands are, in legal significance, mutual.

Here the orator sues in his representative capacity as administrator upon a demand arising since the death of his intestate, and asks to

have an offset made of claims allowed against the estate he represents in favor of third persons, but now held by the defendant as assignee, or equitable owner thereof.

At law, the claims held by the defendant could be enforced only in the names of the original holders. They were not allowances made to the defendant. They were never, at law, debts owing by the intestate to the defendant. Even if the debts had originally been payable to the defendant, they could not, at law, be offset to a demand accruing to the orator in his representative capacity after the death of his intestate, for this would alter the course of the distribution of the assets, and give one creditor an advantage over the others. *Aiken v. Bridgman*, 37 Vt. 249; *Rees v. Watts*, 11 Exch. 410; *Chitty, Cont.* 956. But in equity, the form of the indebtedness is disregarded, and an offset may be decreed of liquidated demands held by an assignee or equitable owner, especially if he is insolvent. The defendant, in respect to the claims in question, stands in this relation; and his claims have been liquidated by the allowance of the commissioners, and the judgment of the probate court thereon. He is compellable therefore to make the offset, if the orator's case is in other respects made out. *Ferris v. Burton*, 1 Vt. 439; *Downer v. Dana*, 17 Vt. 518; *Blakes v. Langdon*, 19 Vt. 485.

It is urged that the receipts of April 18 and 17, 1869, described in the master's report, are written contracts between the parties, and so within the rule prohibiting the admission of parol proof to enlarge or vary the scope of the terms made use of. But looking at these papers in the light of the circumstances surrounding their execution, and as applied to the subject-matter to which they relate, which is always allowable and generally necessary in the construction of written instruments, we think they are, what their terms fairly import, mere accountable receipts for money, and not contracts within the rule contended for. They purport to acknowledge the receipt of money to be accounted for in the settlement of certain claims allowed by commissioners; but upon what basis of accountability, or what is included in the unnamed and unspecified "certain claims," and when or to whom the accounting is to be had, is left wholly to conjecture so far as the terms of the instrument inform us. It is clear, then, that by giving to these instruments the character of contracts, they are so far ambiguous as to require explanations, even upon the defendant's theory of the manner in which he holds the money specified.

They are like the receipt described in *Hitt v. Moom*, 37 Vt. 524, which was "a receipt for the Osburn note, to apply on account;" and that in *Earle v. Wallingford*, 44 Vt. 367, which in form showed a completed contract; and that in *Bandall v. Kelsey*, 46 Vt. 158, which purported to be in full; and those in many other cases wherein it has been held that a receipt purporting to be in full, thus indicating the consummation of a previous transaction, or one for money or property to be thereafter accounted for, is an instrument that is open to explanation so that its true office, as between the parties, may be fulfilled.

The objection made to the evidence offered

to show the true character of the other exhibits of the orator rests substantially upon the ground above referred to, and need not be further considered.

The defendant claims that the effect of his answer, as evidence, was ignored or disregarded by the master; but there is nothing in the report that warrants this criticism. The answer, as evidence, is to be weighed like other evidence. It gains no factitious weight because it happens also to be one of the pleadings. As evidence, it is subject to the infirmities of evidence. *Veile v. Blodgett*, 49 Vt. 270.

The master having based his findings upon proper evidence, they establish this state of facts: The orator advanced to the defendant at his request, from time to time, large sums of money belonging to the estate he represented, for the purpose of aiding the defendant in getting temporary relief from the pressure of certain creditors of said estate, whose claims were legally collectible of the defendant as surety for the intestate, and to enable him to buy up sundry claims of other creditors, for his own personal advantage, under an agreement that, as to said estate, such claims should be held by the defendant precisely as they otherwise would have been held by the original holders; that is, subject to such dividends as might be declared upon them; and after deducting or offsetting such dividends, the defendant should account to the orator for any balance that might be due him, with interest from the date of such advances. These facts are applicable to all the exhibits of the orator from No. 2 to No. 9, inclusive. They represent a common understanding respecting the accountability of the defendant.

The Statute of Limitations is interposed as a bar to the relief the orator seeks; but this defense is not available; as, by the terms of the agreement, the time has not arrived for the application of the dividends to the advances made, nor the payment of any balance that may appear by such application.

The suit is not premature; for the defendant has repudiated the understanding upon which he received the money, and his agreement to make the application of it upon the claims which he now holds. Under these circumstances, a right accrued to the orator to have the status of these claims fixed by a decree in chancery, in advance of any order of the probate court for the payment of the claims allowed by commissioners, and the distribution of the assets; as the probate court is powerless to make an offset of the dividends upon these claims to the orator's advances, and the orator could, in that court, get no protection for these advances in the settlement of his administration account, and by the insolvency of the defendant would be wholly without remedy. There is little reason, therefore, in asking the orator in advance to hazard the fruitless experiment and incur the needless expense of seeking at the hands of the probate court a decree to the effect that it can give him no relief in the premises.

The remedy at law is wholly inadequate to restore to the orator the assets of this estate, which he has, in kindness, but not in wisdom, entrusted to the defendant. The defendant controls all the claims in question, as well

those upon which Chamberlin was surety as the others.

The master says, respecting the money advanced to pay the Holton and Andross notes, which were signed by the defendant and Chamberlin: "It was agreed between the orator and defendant, that the orator would let the defendant have the money required to pay the Holton note and the Andross note, and the defendant was to hold said notes against the orator administrator, the same as the original party would have done, and on the settlement of the estate the dividend on these notes was to offset against the money thus advanced by the orator administrator as aforesaid." As to these notes, then, although Chamberlin was a joint surety with the defendant, still the advance of the money was made to the defendant alone, and accountability therefor was alone assumed by the defendant. Chamberlin, then, is no proper party to an accounting upon the score of those notes.

As to exhibit No. 4, covering the Rice note, the master says: "The defendant and M. R. Chamberlin requested the orator to pay said note, and the orator did so; and they were to account to the orator as though they held the note, —to account to the orator for any deficiency that might arise by reason of the estate being short of paying in full." This would indicate a joint accountability of the defendant and Chamberlin for the advance upon the note. But the master, later on, says that, "during the time the orator was letting the defendant Johnson and Johnson and Chamberlin have the money named in the orator's exhibits, it was agreed by the parties that defendant Johnson should account for the money so advanced in the settlement of the claims that he might hold against the estate, and that any balance that might be either way, the orator and the defendant were to adjust;" and again, near the close of the report, he says: "The claims purchased in by the defendant and M. R. Chamberlin, and those named above purchased in by the defendant, are now held by him (defendant) with the same rights to a dividend in the estate of Jesse Johnson as the original holders." Upon the whole finding it is manifest that the defendant by the arrangement was the sole party to the accounting provided for by the agreement of all parties interested. The defendant alone holds all the claims in question, and he is bound to carry out the agreement established on the evidence.

The decrees of the Court of Chancery is affirmed, and the cause remanded, with mandate.

CHAMBERLAIN & Currier

v.

D. L. FULLER, Assignee of Hosea Welch, 2d.

1. In an action of **replevin** against the assignee of an insolvent debtor **to recover goods** claimed to have been obtained by the debtor **through fraud**, evidence of a demand made upon the messenger, or keeper under him, who had possession of the goods, awaiting the appointment of an assignee, as bearing upon the rescission of the contract, is sufficient.

2. Whether **one acts** with reasonable

promptitude in rescinding a contract induced by fraud is a **mixed question** of law and fact, proper for the jury.

3. The court, in its discretion, can admit the declaration of an agent before the agency is shown; and the question of agency does not arise when the evidence tended to prove it, and there was no request, and no exception to the neglect of the court to submit it to the jury.

4. The question was whether the debtor entered into a conspiracy with his sureties to get possession of the goods without paying for them. The evidence tended to show the conspiracy. He had money, but bought on credit. *Held*, that evidence was admissible to prove:

(a) How he could have purchased for cash.

(b) That the plaintiffs told their salesman, in the absence of the debtor, to sell him goods not exceeding \$500 in value.

(c) The acts and declarations of the other conspirators while the common design was being carried out, and in furtherance of it.

(d) That the conspiracy extended to the fraudulent purchase of goods of other parties.

(e) That the debtor's brother, five or six years before the failure, consulted an attorney as to his financial condition.

5. It is in the discretion of the trial court to admit evidence in rebuttal that should have been introduced in the opening, if the opposing party is not thereby injured.

6. The defendant made the plaintiffs' witness his own by asking him, on cross-examination, if his attention had been called by anyone to the debtor's condition,—a matter he had not testified to. It was not error to allow the plaintiffs, on re-examination, to inquire the name of the person.

7. For the purpose of showing that the debtor's stock of goods was not unreasonably large, evidence was not admissible to prove the stocks of other merchants in the same village.

8. It is immaterial whether the debtor's son was his agent in giving instructions to the scrivener as to what property should be put into the mortgage deed, as he ratified his acts by signing it, knowing its contents.

9. The plaintiffs, upon the rescission, were under no obligation to reimburse the insolvent for money paid for freight on the goods.

10. There was no error in the charge by which the jury were instructed that, if the insolvent represented that the mortgage on his property was all "fixed up," which was confessedly false, and that if they found the plaintiffs relied upon the truth of the statement,—would not have made the sale without it,—then they had the right to rescind; nor was there error in charging

the jury that the insolvent could have remained silent, but when he undertook to tell he should tell them fairly and fully.

11. When no exception is allowed, the question will not be considered, whether there was error or not in refusing a request to charge, made out of time.

(Caledonia—Decided June 20, 1887.)

REPLEVIN for certain ready-made clothing. *Plea*, general issue. Trial by jury, December Term, 1885, Caledonia County, Ross, J., presiding. Verdict and judgment for plaintiffs. *Affirmed*.

The plaintiffs' evidence tended to show that Hosea Welch, 2d, was a country merchant in Groton, and had been for about forty years; that, in the fall of 1881, his cousin, Hosea Welch, Jr., one Almon Clark, and Henry C. Glover, were holden as sureties for him for several thousand dollars; that Glover became alarmed, and, together with Clark, consulted a lawyer as to the best course to be taken, and it was learned that a mortgage would not be good in insolvency unless it had subsisted for four months; that in October, 1882, Welch, 2d, went to Boston and there purchased at various places goods amounting to about \$2,400; that, in the November following, Clark and Welch, Jr., who had taken a mortgage covering real and personal estate in November, 1881, took possession of all the goods in the store under the mortgage and an assignment of Welch, 2d; that, soon after, local creditors filed their petition in the court of insolvency against Welch, 2d, upon which he was duly adjudged an insolvent debtor; that the creditors elected the defendant the assignee of the insolvent estate, and on December 12, 1883, a deed of assignment was sent to him. It was claimed that the two Welch's were fraudulently acting in concert with Clark and Glover, in order that the goods might be got into the hands of Welch, 2d, so that the sureties might take possession of them as they did under the mortgage; that the mortgage was executed to cover property then in being and also that which might be acquired in the future, and that it was antedated nearly thirty days, and was left at the town clerk's office with instructions not to record it. The plaintiffs made demand of the messenger, and the keeper under him, for the return of the goods, pending the appointment of the assignee, and afterwards replevied the goods in question. The defendant's evidence tended to show the contrary; that there was no fraud on the part of the debtor.

Messrs. Bates & May, T. R. Gordon, and J. P. Lamson, for defendant:

The jury should have been asked to say whether the representations would have been likely to deceive a man of common prudence, and not whether it deceived the plaintiffs.

Gregory v. Schoenell, 55 Ind. 101; *Gunnison v. Bancroft*, 11 Vt. 491; *Pasley v. Freeman*, 8 T. R. 54; 33 Me. 17; 12 Vt. 519.

They must be made to influence the plaintiffs' conduct.

Byard v. Holmes, 84 N. J. L. 296; *Tyrron v. Whitmarsh*, 1 Met. 1; *Comins v. Coe*, 117 Mass. 45; 1 Benj. Sales, §§ 637, 694, and notes; *Phillip v. Gallant*, 62 N. Y. 256.

VT.

Representations must be made with intent to deceive.

Weatherford v. Fishback, 3 Scam. (Ill.) 170; 38 Ill. 200; 2 Wend. 385; 33 Me. 17; 109 Mass. 457.

The mere appointment of a person to the office of assignee gives him no control over the insolvent's property. The property vests a constructive control only from the deed of assignment. Such is the rule laid down in *Goss v. Cardell*, 53 Vt. 447.

The title of the assignee is entirely technical, and is created solely by statute.

Re Brainerd, 56 Vt. 495.

The plaintiffs should have returned the money paid for freight, and should have submitted the question in proper form to the jury. The party rescinding must put the other *in statu quo* by an entire surrender of possession and of everything he has obtained under the contract.

Voorhees v. East, 2 Hill, 293; Bish. Cont. 208; Chitty, Cont. 680; *Shaw v. Barnhart*, 17 Ind. 186.

Messrs. Ide & Stafford, and S. C. Shurtleff, for plaintiffs:

A defrauded seller does not lose the right to rescind because the buyer has incurred expenses with respect to the property in carrying out a fraud; nor is it necessary that the seller should make good such expenses, even though he receives an advantage from them by rescission.

Benj. Sales, 4th Am. ed. § 649, note; *Guckenheimer v. Angevine*, 81 N. Y. 394.

The possession of the messenger was the possession of the assignee. The assignee's title relates back to the date of the filing of the petition of insolvency.

Rev. Laws, § 1820.

The messenger holds the property until the assignee takes formal possession of it, solely for the assignee; and if he holds it wrongfully, it is the assignee who holds it wrongfully through him. But in this case the assignee ratifies the acts of the messenger and claims title to the goods in question.

Tripp v. Leland, 42 Vt. 487; *Sprague v. Clark*, 41 Vt. 6.

Taft, J., delivered the opinion of the court:

1. We do not understand that the question of demand made upon the trial was whether one was necessary to enable the plaintiffs to maintain the action, except as bearing upon, and a part of, the question of a rescission of the contract; and the real question presented by the exceptions is whether evidence of a demand of the goods made upon the messenger or the keeper under him was sufficient. We hold that it was. The goods were in possession of the messenger of the court of insolvency, awaiting the appointment of an assignee. The insolvent had no power over them, and could not surrender them if demanded of him. Except as against the plaintiffs, the messenger was the only person who had any right to the control or custody of the goods. We think a demand made of him or the keeper under him was a proper one. While the messenger had the goods we think he was the only person against whom an action of replevin could have been maintained; and if an action would lie against him, we think a demand of him would

be sufficient. In *Bussing v. Rice*, 2 Cush. 48, the action was replevin for goods fraudulently obtained by the insolvent, brought directly against the messenger, and the action was maintained without a demand.

2. Was the contract seasonably rescinded? When a party has been defrauded in the sale of goods, and desires to rescind the contract, he must do so as soon as he discovers the fraud, and is entitled to a reasonable time in which to do it. *Tilton Safe Co. v. Tisdale*, 48 Vt. 83. The request to charge upon this point was that the plaintiffs could not rescind at the time they undertook to do so upon the conceded facts of the case. This was asking the court to treat the question as one of law. We do not find in the exceptions any facts stated which would justify the court in so doing. If the goods were obtained by fraud, under the form of a contract, the plaintiffs had the right to rescind. Whether they acted with reasonable promptitude as soon as they discovered the fraud was a mixed question of law and fact, proper to submit to the jury. It was submitted, and no exception taken to the charge as given. We have no occasion, therefore, to examine the charge on that point.

8. The defendant objected to the testimony of Bridgeman as to the declarations of Welch, Jr., until it was shown that the latter was the agent of Welch, 2d. There was no error in this if there was testimony in the case tending to establish the agency, although the latter was given after the testimony of the declarations. The order in which evidence is introduced is within the discretion of the court. The testimony of both the Welch's tended to show that Welch, 2d, sent Welch, Jr., to the plaintiffs to obtain the goods in question upon the credit of the former; this testimony tended to establish the agency, and made the evidence of the declarations admissible, and the latter therefore was legitimately in the case. The defendant now claims that the question should have been submitted to the jury for them to find upon the evidence whether such an agency existed. No request was made to have the question submitted; no exception taken to the neglect to submit it. The question therefore does not arise upon the charge.

4. Was it error to show that Welch, 2d, could have bought goods for cash at 7 per cent discount? He knew that goods could be bought for cash at a discount. He had money. He bought his goods on credit and took his money home. We think this testimony admissible in support of the plaintiffs' claim that there was a conspiracy to buy the goods on credit, get them into the possession of Welch's surties, not pay for them, and thus defraud the plaintiffs. Welch, 2d, was so connected with the transaction of the purchase of the goods that we do not think it was error to show the terms upon which he might have purchased them for cash.

5. The witness Bridgeman was the plaintiffs' salesman. Welch, 2d, applied for credit, and the plaintiffs, after an examination of Welch in reference to his financial standing, told Bridgeman to sell him goods not exceeding \$500 in value. We can see no error in admitting the evidence of that fact. It was a part of the same transaction. The objection made

to the testimony was that Bridgeman was told this not in the hearing of Welch, 2d. The latter must have known the result of his application for credit, for Bridgeman at once sold him on credit goods substantially to the amount named, viz., \$486.50. No more direct way of imparting this information to Welch, 2d, could have been adopted.

6. The evidence tended to show a conspiracy claimed by the plaintiffs. The acts and declarations of one conspirator, while the common design was being carried out, and in furtherance of it, were legitimate evidence against the others. Under this rule, the testimony as to the acts and declarations of Welch, Jr., at the time of the purchase of the goods in question, and the testimony of Darling as to the instructions he received from Welch, Jr., and Clark, not to record the mortgage, were legitimate.

7. That the conspiracy extended to the fraudulent purchase of goods of other parties than the plaintiffs was proper to be shown under the rule laid down in *Eastman v. Premo*, 49 Vt. 355; and the evidence of Porter and Bulard was admissible for that purpose.

8. The inquiry of Welch, 2d, as to his brother's having consulted an attorney about the financial condition of the former was not error. The defendant's counsel state in their brief that "it tended to show knowledge on the part of Hosea, 2d, of insolvency, etc., or at least render it more probable." We think for this very reason it was admissible, as the question of his knowledge of his own insolvency was quite material to the issues on trial. His solvency would render the conspiracy much less probable, in fact useless. How far back in time a party should be permitted to go in the proof of such facts was a question within the discretion of the trial court. Upon the facts shown in this case we cannot say it was error. Having been in trade for forty years, his financial condition five or six years before the failure might have quite a bearing upon his standing at the time of the alleged conspiracy.

9. The objections to the evidence in relation to the phosphates and the interlineations in the bill of sale were that the evidence was offered in rebuttal, and that it was not in rebuttal of any of the defendant's testimony, and therefore out of time. This, if true, was not error, its admission being within the discretion of the county court. It does not appear that the defendant was in any way injured by its admission at that time instead of in the opening, or denied the privilege of afterwards offering any evidence that he had upon the same subject.

10. Glover, a witness introduced by the plaintiffs, was asked on cross-examination if his attention had been called to the condition of Welch, 2d, by anyone. He said it had. He had not been examined on this point by the plaintiffs, and he was thus made the defendant's witness upon that question. It was not error for the court, on re-examination, to permit the plaintiffs to ask him the name of the person.

11. The plaintiffs claimed that the stock of clothing carried by Welch, 2d, in the fall of 1882, was a large one,—unreasonably so,—and

that it bore on the issue of fraud. The defendant insisted that it was reasonable in amount for the place, and that he could show that fact by a comparison of the amount with the stocks of other merchants in the same village. This was a collateral fact, and would at once start the inquiry whether the other merchants were not carrying unreasonable amounts. This was not a legitimate way of proving it. *Camp v. Averill*, 54 Vt. 320; *Weeks v. Lyndon*, Id. 638.

12. The testimony of Darling, that E. M. Welch gave him some instructions as to what should be put into the mortgage deed, was objected to and admitted under exception. It is said that he was a sort of interloper,—“nobody’s agent.” He was in his father’s service at the time, helping him, and gave the scrivener instructions as to what property should be put into the mortgage deed. The deed was prepared, and his father executed it. Whether he was his father’s agent, or not, at the time he gave the instructions, is apparently of little moment. His acts were ratified by his father when he signed the deed, knowing its contents. That E. M. Welch gave the instructions was wholly immaterial. They were of no force until the deed was executed. The fact, if of any potency, was in favor of the defendant, showing that it was neither of the conspirators who gave directions in regard to what should be included in the mortgage deed.

13. Clark, one of the sureties, testified that, during the year prior to the failure, both before and after the giving of the mortgage to the sureties, he did not suspect the insolvency of Welch, 2d. The testimony of Glover as to the interview at Dunnett’s office tended to show that he did know of it during that time, and therefore to impeach him. It was admitted for that purpose, and properly.

14. The defendant claims that the plaintiffs, upon the rescission of the contract, were under an obligation to reimburse the insolvent for the money which he paid as freight on the goods to Groton. Such is not the law. They were under no obligation to the insolvent, or his assignee, who stands in his shoes in respect to the goods. They were obtained by fraud; the law avoids every such sale, and disables the guilty party from setting up the contract or deriving any advantage from the fruits of it. It vitiates every act, however fair in appearance, and though clothed with the forms of law. The exceptions upon this question, both as to the rulings upon evidence and the charge, were not well taken.

15. As to the exclusion of the testimony of Harry Blodgett. The defendant was entitled to all the conversation, and we think the exceptions show that the witness did testify to all that the defendant’s counsel offered to show by him.

16. Did the court err in its charge as to what constituted false or fraudulent representations? The jury were told that if Welch, 2d, represented to the plaintiffs that his property had been mortgaged, but that it was all fixed up (the latter fact being confessedly false); that if they found that the plaintiffs relied upon the truth of the statement,—would not have made the sale without it,—then it was such a fraudulent representation as would give them the

right to rescind the sale. What element is wanting in this statement of what would constitute fraud,—a false statement of a material fact, known by the party to be false, and relied upon by the other party? The defendant insists that the false representations must have been such as to deceive a man of ordinary care and prudence; *i. e.*, if a man is not endowed with those faculties he is at the mercy of every swindler who makes him his prey,—excluding from the benefits of the law the very class around whom its arm should be thrown; thus protecting the strong and robbing the weak. As well adopt Rob Roy’s rule, “that they should take who have the power, and they should keep who can.” No rogue should enjoy his ill gotten plunder for the simple reason that his victim is by chance a fool.

17. The defendant insists that the charge upon the subject of the intent not to pay for the goods was erroneous. The request was that, if Welch, 2d, had any intent not to pay for the goods at any other time than when he was purchasing them, then the plaintiffs cannot claim to rescind on that ground. The request was made out of time, and the exception not allowed. We do not consider it.

18. Defendant claims that the charge as given in reference to what Hosea, 2d, was bound to tell the plaintiffs was erroneous. The charge embodied sound and correct law. The jury were told that Welch, 2d, had the right to remain silent and say nothing; but that, if he undertook to tell them, “he should tell them fairly, fully, and frankly, so that they can determine whether they will trust him or not.” It is a fraud for a man to tell part of the truth in regard to what he is inquired “of, and keep back another part which he knows, if disclosed, would prevent the party’s dealing with him, and tell him something else to draw off his attention and prevent further inquiry.”

This disposes of all the questions presented by the brief for the defendant.

Judgment affirmed.

STATE of Vermont

v.

Joel M. HAVEN.

1. A count in an indictment, under the statute (Rev. Laws, § 4160),* is bad for argumentativeness, in which it is alleged that the respondent, as treasurer of a railroad company, did sign, with the intent that the same be issued and used, a certain false certificate of the ownership of 1,000 shares of its capital stock, falsely certifying that one Mead was then and there owner of 1,000 shares,

*Vt. Rev. Laws, § 4160, provides that “a president or other officer or agent of a bank, railroad, manufacturing, or other corporation, who willfully and designedly signs, with intent that it shall be issued or used, or caused to be issued or used, a false certificate or evidence of the ownership or transfer of shares of stock in such corporation, or a certificate or evidence of such ownership or transfer, which such officer has no authority to make or issue, shall be fined not more than \$1,000, and imprisoned in the State prison not more than ten years, nor less than one year.”

which he did not own or have standing in his name, and was not entitled to any share.

2. A count is bad for duplicity, in which it is alleged that the respondent signed a certain false certificate of stock with the intent that it be issued and used, and that he caused it to be issued and used,—as two offenses are charged.
3. An indictment is bad for repugnancy, in which it is alleged that the respondent caused to be issued to M a false and fraudulent certificate of the ownership of 1,000 shares of stock; that it was then and there signed in blank, and was and is of the following tenor,—setting it out; as a blank certificate cannot certify or purport ownership, or have a tenor.

(Rutland—Decided June 23, 1887.)

INDICTMENT charging the respondent with signing and issuing a false and fraudulent certificate of the capital stock of the Rutland Railroad Company. Heard on demurrer to the indictment, September Term, 1884, Rutland County, Ross, J., presiding. Demurrer *pro forma* overruled, and indictment adjudged sufficient. *Exceptions sustained.*

The questions presented are stated in the opinion.

Mr. E. B. Hard, for respondent:

The several counts are bad for repugnancy.

1 Bish. Cr. Proc. §§ 489, 490; Gould, Pl. 154, 155; 1 Chitty, Pl. 16th Am. ed. 255; *State v. Comfort*, 22 Minn. 271; *State v. Simpson*, 73 N. C. 269; *Covington v. State*, 6 Tex. App. 512; *Dillingham v. State*, 5 Ohio St. 280, 283; *State v. Keach*, 40 Vt. 118; *State v. Jones*, 33 Vt. 443.

They are also bad for duplicity.

1 Chitty, Pl. 246, and note, 558, and note; Gould, Pl. 219, 420; *State v. Nelson*, 8 N. H. 163; *People v. Cooper*, 53 Cal. 647; *Watriss v. Pierce*, 36 N. H. 232, 239, 240; *Ralston v. Strong*, 1 D. Chip. 287, 293; *Church v. Gilman*, 15 Wend. 656; *Fidler v. Delavan*, 20 Wend. 57, 59, 60.

The allegation that he did not own, etc., "any share or shares," etc., is denying his ownership, etc., only argumentatively, and is therefore insufficient.

1 Chitty, Pl. 16th Am. ed. 260; Gould, Pl. 63, 64; *Bourne v. Taylor*, 10 East, 189.

Under Rev. Laws, § 4160, the signing, with intent to issue, etc., is itself a distinct and substantive offense. The issuing of such an instrument as is mentioned in that section is another offense, distinct from the signing, and may be committed, in respect to the same certificate, by a person other than the one who signs; and the second count alleges the commission by the respondent of both these offenses. This count therefore embraces separate felonies, and is bad for duplicity.

1 Chitty, Pl. 246, and note, 558, note c; Gould, Pl. 219, 420; 1 Bish. Cr. Proc. §§ 432, 433; *State v. Nelson*, 8 N. H. 163; *People v. Cooper*, 53 Cal. 647; *Hunt v. Haven*, 52 N. H. 162, 163.

The fact that the alleged offense is charged in the indictment in language similar to, or even identical with, that used in the statute

upon which the indictment is based, does not obviate this objection.

1 Bish. Cr. Proc. §§ 612, 619, 633, 637, 639; *State v. Comfort*, 22 Minn. 271; *State v. Shenton*, Id. 811; *State v. Simpson*, 73 N. C. 269; *Harrington v. State*, 54 Miss. 490; *Covington v. State*, 6 Tex. App. 512; *Long v. State*, Id. 643; *Dillingham v. State*, 5 Ohio St. 280, 283; *United States v. Goggin*, 9 Biss. 269; *State v. Keach*, 40 Vt. 118; *State v. Jones*, 33 Vt. 443.

Messrs. F. S. Platt and P. R. Kendall, for the State:

The indictment is sufficient. The second and sixth counts are not double.

State v. Morton, 27 Vt. 310; 1 Bish. Cr. Proc. § 190; *State v. Matthews*, 42 Vt. 542; *State v. Brady*, 14 Vt. 853; *Byrne v. State*, 12 Wis. 519; *Commonwealth v. Twitchell*, 4 Cush. 74; Bish. Forms, 19.

This is a statutory crime, and it is sufficient to charge the offense in the words of the statute.

State v. Cook, 38 Vt. 487; *Harlan, J.*, in *United States v. Simmons*, 96 U. S. 360 (Bk. 24, L. ed. 819); *State v. Daley*, 41 Vt. 564; *State v. Jones*, 33 Vt. 443; *Tully v. Commonwealth*, 4 Met. 357; 8 Met. 464.

Rowell, J., delivered the opinion of the court:

The first and the fifth counts are bad for argumentativeness. They allege that Mead did not own, or have standing in his name, and was not entitled to, any share or shares of the capital stock of said company; which is but an argumentative way of saying that he did not own, and was not entitled to, the shares of stock purporting to be conveyed to him by said certificate. Thus, in trespass for breaking and entering the plaintiff's close, and subverting the soil thereof, and digging and boring the same, the defendant pleaded *seisin in fee* in the Duke of Northumberland of the manor of Tynemouth, of which the closes in question had immemorially been parcel and copyhold tenements; and that by reason thereof the Duke was *seised in fee* of all the veins and seams of coal lying within and under the copyhold tenements of said manor, together with the liberty of boring for, digging for, and getting, such veins and seams of coal there, and of doing all things necessary for that purpose. The plaintiff replied that as well the said veins and seams of coal, as the rest of the soil and ground within and under said closes, had from time immemorial been parcel of said manor and demises, and demisable by copy of court-roll, without any exception or reservation of the mines or seams of coal within and under said closes, etc.; to which the defendant demurred, for that the replications did not directly traverse, nor confess and avoid any of the matters alleged in the pleas, but were argumentative, and not issuable; and the court, construing the pleas to claim a liberty during the continuance of the copyhold estate, said that it required no argument to show that a replication that the copyholds had always been demised without any exception or reservation of the mines or seams of coal was not a confession of the liberty and an avoidance of it, but was a mere argumentative denial of its existence, and that the replications were bad on that ground. *Bourne v. Taylor*, 10 East, 189.

So, too, if in trespass for carrying away goods, the defendant should plead that the plaintiff never had any goods, that would be argumentatively saying "not guilty," and so no plea, although the argument would be infallible. *Dyer*, 48 a; *Steph.* Pl. 385.

The second and sixth counts are bad for duplicity. Under the statute, the act of signing a false certificate with intent that it shall be issued and used is of itself an offense, and causing it to be issued and used is another and distinct offense. Nor can they both be committed by the same act, but only by separate and distinct acts, though they may be committed on the same occasion.

When a crime may be committed in different ways, in contemplation of law the ways are the same act, and so a count charging its commission in all the ways is not double. *State v. Morton*, 27 Vt. 310, and *State v. Matthews*, 42 Vt. 542, are cases of this character. See *People v. Davis*, 56 N. Y. 95.

In *Commonwealth v. Eaton*, 15 Pick. 273, the prisoner was charged in one count with both offering for sale and selling half of a lottery ticket; and the count was held to charge but one offense, on the ground that a sale includes an offer to sell, the same as a battery includes an assault. And in *Commonwealth v. Twitchell*, 4 Cush. 74, a count charging both the setting up and the promotion of a certain prohibited exhibition was held good on the same ground.

Indeed, no matters, however multifarious, will operate to make a count double if they constitute but one connected charge or transaction, provided that, in no view, can they be regarded as more than one offense. But if they can be so regarded, the count will be double. 1 Bish. Cr. Proc. § 193.

Applying these principles, these counts are clearly double.

The third and fourth counts each allege that the respondent, as treasurer, caused to be issued to Mead a false and fraudulent certificate of the ownership of 1,000 shares of the capital stock of the company, the said certificate falsely certifying and purporting that said Mead was then and there the owner of 1,000 shares of said capital stock. They then go on to allege that said certificate was then and there signed in blanks by Page as president, and by the respondent as treasurer, and that it was—without saying when—and is of the following tenor,—setting it out.

Now, a blank certificate cannot certify or purport ownership, or have a tenor, as alleged; and so the allegations are inconsistent and repugnant; and as the allegation of signing is material and cannot be rejected as surplusage, —as then it would not appear that the certificate was signed at all when issued,—the counts are bad.

Thus, an indictment charging the respondent with having forged an instrument whereby one person is bound to another is bad for repugnancy; for a forged instrument can bind nobody.

So in trespass, declaring for taking and carrying away timber lying in a certain place, for the completion of a house "then lately" built, and; for the timber could not be for a house already built. *Nevill v. Soper*, 1 Salk. 213.

So a count in assumpsit, declaring on a promise to pay a sum certain if the plaintiff would provide another with necessities, and also on a promise to pay as much as the plaintiff reasonably deserved to have on the same account, is both double and repugnant. 1 Chitty, Pl. 231.

Exceptions sustained, indictment adjudged insufficient and quashed, and respondent discharged.

George H. VERDER

v.

John D. ELLSWORTH et al.

The trustees of an incorporated village, under its charter and by-laws authorizing the abatement of a nuisance, but requiring them first to give notice and an order to the owner to remove it, **cannot justify** their acts in removing a fence, under a notice to remove it, when the court below found that it was not the fence nor the lot, but the use of the lot sheltered by the fence, that created the nuisance. A notice of the identical nuisance is condition precedent to the exercise of such power by the trustees.

(Rutland—Decided July 7, 1887.)

TRESPASS quare clausum. Plea, general issue, with notice. Trial by court, September Term, 1886, Rutland County, Veazey, J., presiding. Judgment for the plaintiff. *Affirmed.*

The plaintiff owned a vacant lot in the village of Rutland. In the summer of 1885 he rented to Barnum's circus the right to erect a fence or bill-board on two sides of the lot for the display of advertisements; and the fence was built about 12 feet high. It was afterwards used for the display of posters of shows and patent medicines, etc. Certain houses and buildings overlook the lot, which was used to such an extent by persons going behind the fence to meet the demands of nature, that the residents complained to the trustees that it was a nuisance, and requested that it be abated. The court found that the lot, used as aforesaid, was a nuisance, but ruled that the removal of the fence was beyond the power of the trustees; and that their order to the street commissioner did not justify the trespass. The notice to the plaintiff was that "the bill-board * * * had been adjudged a nuisance;" and he was ordered to remove it.

Messrs. Walker & Swington, for defendant, cited—

1 Dill. Mun. Corp. §§ 95, 308, 369, 374, 380; Wood, Nuis. § 738; *Harvey v. Dewody*, 18 Ark. 252; *State v. Smith*, 54 Vt. 403; 13 Reporter, 586; *Kennedy v. Phelps*, 10 La. Ann. 227; *Hart v. Albany*, 3 Paige, 218.

Mr. J. C. Baker, for plaintiff, cited—

Wood, Nuis. 22, 27, 738; *State v. Woodward*, 23 Vt. 92; Sedg. Stat. & Const. L. 465; *Miller v. Burch*, 32 Tex. 208; Rev. Laws, § 3924; *State v. Burlington*, 36 Vt. 521; *Underwood v. Green*, 42 N. Y. 140; *Clark v. Syracuse*, 18 Barb. 32.

Ross, J., delivered the opinion of the court:

The notice, given by the trustees to the plaintiff, was to remove the bill-boards, or fence, in contention. It was these which the plaintiff refused to remove, and which the trustees adjudged to be a nuisance. It is not found by the county court that the fence was a nuisance, nor that the plaintiff's lot was a nuisance, but that the use made of the lot under the shelter of the fence constituted the nuisance. The defendants justify the removal under the charter and by-laws or ordinances of the village of Rutland, as trustees thereof. The charter authorizes and empowers the village to make ordinances, regulations, and by-laws, among other things, "to abate and remove all public and private nuisances." It enacted ordinances making it the duty of the trustees to "restrain, remove, or abate nuisances;" and also prohibited any person or persons from permitting any nuisance to remain on his or their premises, and commanding such person or persons, by notice and order from such trustees or any one of them, to remove such nuisance; and, on his or their failure to do so, "the trustees shall cause the same to be removed and abated." These are all the provisions made by the village, under the charter, for the abatement and removal of nuisances. It will be observed that the ordinances first cast the duty of abating and removing them upon the trustees, and then prescribe the manner in which they shall proceed, by notice and order to the person permitting it; and on his failure to comply, it is then made their duty to cause it to be removed and abated. It is elementary and fundamental that tribunals of limited jurisdiction, especially in summary proceedings, must strictly comply with the limitations prescribed, in the exercise of their powers. By the ordinance, before the

trustees can cause to be abated and removed, the person permitting it must have notice of the identical nuisance required to be removed and abated. Such notice is condition precedent to the exercise of the power of removal by the trustees. The trustees so understood the ordinance, and undertook to comply with its requirements. But instead of notifying the plaintiff of the real nuisance, and commanding its removal, they notified and commanded him to remove the fence, which was not the nuisance, and only a shelter to those who, so far as found, unlawfully, and against the will of the plaintiff, so used the lot, which the fence partly surrounded, as to create the nuisance. The want of proper notice is not answered by the fact that the removal of the fence would have the effect, indirectly, to abate the nuisance, because it made the unlawful acts of those frequenting the lot so open that they ceased to occupy it for unlawful purposes. The act of the defendants in removing the fence cannot be justified; because the fence itself was not a nuisance, and has not been found to be one, although the notice of justification, under the general issue, attempts to set it up as such. From the notice of justification it is quite evident that the trustees adjudged the fence itself, because of its height and use for exhibiting show-bills, a nuisance, and for that reason ordered the plaintiff to remove it. Without considering the other questions relating to nuisances, presented in the argument of counsel, we think the defendants cannot justify their removal of the fence under the village ordinance. Whether they might have had the right to remove the fence, as the only practical means of abating the nuisance, if they had commanded the plaintiff to remove the real nuisance, was not to be considered, and it is not decided.

The judgment is affirmed.

MASSACHUSETTS.

SUPREME JUDICIAL COURT.

Nellie FREEMAN,

v.
TRAVELERS INSURANCE CO., of Hartford.

1. In an action to recover on a policy of insurance against death by accident, by which the company insured against bodily injuries effected through external, violent, and accidental means, subject to the condition that the amount insured should not be payable unless the insured used "all due diligence for personal safety and protection."—*Held*, that the burden was on defendant to show that the insured had not used all due diligence for his personal safety and protection.
2. Contributory negligence on the part of the insured is not a defense, and by the use of the word "accidental," injuries to which the negligence of the insured contributed are not excluded from the protection of the policy.
3. The rule of pleading in declaring upon a contract which contains an exception, or a proviso, or a condition, is, if such instrument contain, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something that would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause, which operates as an exception; but if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it, together with the exception.
4. It is necessary for a party to prove the substantive facts which he is required affirmatively to allege in his pleading.
5. Although the policy only insures against bodily injuries effected by the means described "within the intent and meaning of this contract, and the conditions hereunto annexed," this does not change the nature of the conditions; they still take effect as conditions.
6. An insurance company should allege and prove the want of compliance with any particular proviso or condition on which it relies.
7. Testimony of the conductor, who had previously been a brakeman, that in his opinion the train ought to have been stopped quicker than it was; that it ought to have been stopped in from three to five minutes, and in 40 to 50 rods, and that there was not much steam used after he heard the whistle,—*Held*, admissible.

(Worcester—Filed June 29, 1887.)

ON defendant's exceptions. *Overruled*.
This was an action to recover a policy of
2 MASS.

insurance on the life of John J. Murray, payable to the plaintiff. Murray was an employee on the Boston, Barre, & Gardner Railroad and was killed by a freight train on that road December 26, 1888. No question was made as to sufficient and timely proof of death, and the issue of liability was tried solely on the merits of the case. At the trial in the superior court before Bacon, J., evidence was presented in support and in disproof of the special ground of defense set up in the answer, that the deceased was intoxicated, which was submitted to the jury, under instructions not excepted to, and which the verdict made immaterial to these exceptions, except as the verdict establishes as a fact that he was not intoxicated, and as that fact had a bearing upon the issue of due care as set forth in the evidence. At the conclusion of the evidence the defendant asked the court to instruct the jury "that there is no sufficient evidence in this case to warrant the jury in finding that the deceased was in the exercise of due diligence for personal safety and protection, at the time of the injury, and that therefore the plaintiff cannot recover." This ruling was refused, and that issue submitted to the jury, the court ruling that such diligence or due care must be proved by the plaintiff affirmatively. To this refusal and the submission of this issue to the jury, the defendant excepted. It was the first condition of the policy that "the party insured is required to use all due diligence for personal safety and protection." The plaintiff offered evidence tending to show that the railroad was nearly straight for a long distance from said crossing toward the north, and that the planking on the crossing could be seen by a man standing on the track at a distance of about 90 rods from the crossing; and if a man was elevated as high as the engineer would be in his cab, he could see said planking for a considerable distance further. The plaintiff proved the death by Edward Doody, conductor of the freight train, who testified in substance as follows: "On the forenoon of December 26, 1888, was in my saloon car on the Boston, Barre & Gardner Railroad; knew the deceased; was conductor of the train that struck him. The first I knew of the accident was the picking up of Murray just below Davis Crossing. I heard the whistle for crossing, and then the whistle for brakes, the latter whistle about a few minutes after the first. I got out when the train stopped and went back to where Murray was lying. He was lying beside the rail on the outside of the track, on the right coming toward Worcester. I said, 'Is this you, John?' He said, 'Yes.' I said, 'You are in a pretty hard fix.' He said he didn't know as he was. The fireman and brakeman then came up, and Mitchell, the engineer, and we took Murray into the saloon car; taking him down to the train, which was some distance away, on a dump car. His legs seemed to be hurt and his head a little bloody. I should judge his legs were broken. After getting him into the car he asked for a drink of water. He said a few words just before he died; gave his love to his friends in Gardner. He died on the train soon after making the last remark. He was growing unconscious at the time he said that, and was dying. He died just before reaching Worcester." Wit-

ness also testified that Murray had on a dark-blue shirt and dark coat.

It had previously been proved that deceased went out that morning from Worcester on a passenger train, and reported to the section foreman, who sent him off with his pick and shovel to clear snow from the rails at crossings, the first crossing being Davis' Crossing, a mile and a half south, where in an hour or more he was killed.

The defense called A. W. Mitchell, the engineer of the freight train, who was the only eye-witness of the occurrence called, who testified substantially as follows: "Was running the engine of the train when the accident to Murray occurred. The track was slippery, caused by light snow; the snow being about three inches deep. After leaving Brooks' Station, which is about half a mile to a mile from Davis' Crossing,—it is down grade,—the engine and the train run without steam under the control of the brakes, running about 15 miles per hour. I sounded the whistle, on the day of the accident, at the whistling-post nearest to the crossing, rounding a sharp curve, and observed what I thought to be a coat on the snow. I was on the right-hand side of the engine, and had a clear view of the track. On getting closer, or nearer, saw a man as if lying on his face, feet towards the engine, his limbs covered with light snow; coat did not seem to have much of any snow on it; whistled for brakes and sounded the whistle for the man to get off. He did not move. I reversed the engine; the man did not start, and the fireman applied the tender brake. As we struck him, the clothing caught on the scraper and threw him one side; one limb might have gone under the fore wheel. The clothing held, and kept him from being thrown under and mangled, and drew him along quite a ways and then threw him out one side. We carried him about 100 rods. When we struck him he was lying on his face—his face in the snow—across the track; I noticed a pick and shovel near by. When the train stopped I went back to where the man was lying, heard him say, 'Don't tell Mike.' He told us where the dump car was on which we took him to the saloon car." On cross-examination witness testified that he did not think he could have seen a man lying on the track if the latter was more than 80 rods from the curve mentioned above; that as soon as he saw what he thought was a coat on the track, he (witness) began to stir himself; that when he noticed snow on the man's limbs, he was about a rod distant; that he had been an engineer about four and one half years, and had before that been a fireman for several years.

The plaintiff, in reply, stating that it was for the purpose of controlling the testimony of Mitchell, by showing him to have been reckless and to have run over the defendant unnecessarily, recalled Doody, the conductor, and, against the defendant's objection and exception (the objection being stated to cover both the competency of the evidence and the qualification of Doody to give his opinions, especially as he was in the caboose at the rear of the train at the time of the occurrence), the latter testified that he had been a conductor until the day of the accident, and had previ-

ously been a brakeman; that in his opinion the train ought to have been stopped quicker than it was; that it ought to have been stopped in from three to five minutes; that it ought to have been stopped in 40 or 50 rods; that there was not much steam used after he heard the whistle; that he did not see any evidences of Murray's having been drinking liquor, and did not think he was intoxicated. The jury found for the plaintiff, and the defendant alleged exceptions.

Mr. W. S. B. Hopkins, for defendant:

In this policy, in the first "condition," the party has contracted to "use all due diligence for personal safety and protection," which makes reasonable care under all the circumstances a fact which the plaintiff must prove, even though, were there no such provision, the courts may hold that only wanton exposure—the "voluntary exposure to unnecessary danger, hazard, or perilous adventure," mentioned in the third proviso of the policy—will be such conduct as to defeat recovery.

Tooley v. Railway Passenger Assur. Co. 3 Bim. 399; *Morrel v. Mississippi V. L. Ins. Co.* 4 Bush, 535; *Theobald v. Railway Passenger Assur. Co.* 10 Exch. 44; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28; May, Ins. § 580.

All the circumstances under which the injury was received being proved, if they show nothing in the conduct of the plaintiff, either of acts or neglect, to which the injuries may be attributed in whole or in part, the inference of due care may be drawn from the absence of all appearance of fault.

Prentiss v. Boston, 112 Mass. 43, 47; *Mayo v. Boston & M. R. R.* 104 Mass. 140.

If there were no evidence that the injured person had been seen by anyone from the time he started from his home until he was found lying on the ground, having been knocked down by the car, it would hardly be contended that there was evidence of due care on his part.

Hinckley v. Cape Cod R. R. Co. 120 Mass. 257, 262, 263; *Crafts v. Boston*, 109 Mass. 519; *O'Connor v. Boston & L. R. R. Corp.* 135 Mass. 352, 361.

Whether the absence of evidence results from fault, or is only the misfortune of the plaintiff, is immaterial to the decision of the question of law.

Crafts v. Boston, 109 Mass. 519, 521; *Nelson v. Chicago, R. I. & P. R. R. Co.* 38 Iowa, 567.

The declaration of the deceased, immediately after the accident,—“Don't tell Mike,” his foreman,—was evidence tending to show consciousness of negligent conduct on his part. At all events it was not evidence of due care.

This case is likewise clearly distinguished from *Smith v. Boston Gaslight Co.* 129 Mass. 320; *Commonwealth v. Lowell R. R. Corp.* 126 Mass. 61; *Prentiss v. Boston*, 112 Mass. 43.

The remaining question is whether the witness Doody was properly allowed to testify as an expert. It was a subject proper for expert testimony, but had the witness such knowledge of the fact and such skill as to qualify him as an expert.

The decision below is conclusive unless, upon a report of all the evidence before the judge, it plainly appears that his decision was not justified by the facts proved.

Hawks v. Charlemont, 110 Mass. 110, 112; *Perkins v. Stickney*, 132 Mass. 217.

Messrs. F. P. Goulding and W. H. Atwood, for plaintiff:

Where the credibility of witnesses is in question, or some material fact is in doubt, or some inference is attempted to be drawn from some fact not distinctly sworn to, the judge must submit the question to the jury.

1 Greenl. Ev. 18th ed. § 49, note 1, p. 64; *Mitchell v. Williams*, 11 M. & W. 205, 216, 217.

It is only where there is an entire absence of any facts to authorize the inference that the plaintiff was conducting himself with reasonable prudence and discretion, or the undisputed facts of the case prove actual negligence, that a case like the present should be withdrawn from the consideration of the jury.

Fox v. Sackett, 10 Allen, 585; *Copley v. New Haven & N. Co.* 136 Mass. 6; *Reed v. Deerfield*, 8 Allen, 523; *Chaffee v. Boston & L. R. R. Corp.* 104 Mass. 115; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 212; *French v. Taunton Branch R. R.* 116 Mass. 537; *Craig v. New York, N. H. & H. R. R.* 118 Mass. 437; *Tyler v. New York & N. E. R. R. Co.* 187 Mass. 238.

The evidence offered by plaintiff tending to show that the deceased, on the morning of the accident, reported, in health, to the section foreman; was sent to work on the crossings; that a freight train came along; a whistle was blown for the crossing, and then another for brakes; that the train came to a stop; and the deceased was found lying outside of or near the track, with his legs apparently broken, his head bloody, conscious, saying a few words after he was taken aboard the train, and dying in course of an hour or less,—was sufficient to entitle plaintiff to go to the jury upon the question whether he “sustained bodily injuries effected through external, violent, and accidental means.”

Trew v. Railway Passenger Ins. Co. 6 H. & N. 889; *Mallory v. Travellers Ins. Co.* 47 N. Y. 52.

Negligence, or want of due care, is not a defense.

May, Ins. §§ 530, 531; *Providence L. Ins. Co. v. Martin*, 32 Md. 310; *Stone v. United States Casualty Co.* 34 N. J. L. 371.

It was necessary for defendant to plead the violation of the condition requiring due diligence for personal safety and protection.

Stearns v. Barrett, 1 Pick. 443; *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541.

The necessity of proof rests on each party according to the material averments of his pleadings.

Jones v. Andover, 10 Allen, 18; *Haskins v. Hamilton Mut. Ins. Co.* 5 Gray, 432; *Goss v. Austin*, 11 Allen, 525; *Lamson & Goodnow Mfg. Co. v. Russell*, 112 Mass. 387; *Forbes v. American Mut. L. Ins. Co.* 15 Gray, 249.

The question whether a witness called as an expert has the requisite qualification and knowledge to enable him to testify is a preliminary question for the courts. The decision is conclusive, unless it appears on the evidence to have been erroneous, or to have been founded on some error in law.

Perkins v. Stickney, 132 Mass. 217; *Nunes v. Perry*, 118 Mass. 274, 276; *Hawks v. Charlemont*, 110 Mass. 110; *Tucker v. Massachusetts Cent. R. R.* 118 Mass. 546.

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Everything which goes to affect the credit of a witness as to particular facts to which he is called to testify, is material and admissible.

Greenl. Ev. 18th ed. § 449, note 7; *Commonwealth v. Hunt*, 4 Gray, 431.

Field, J., delivered the opinion of the court:

The policy insures J. J. Murray against bodily injuries “effected through external, violent, and accidental means within the intent and meaning of this contract, and the conditions hereinto annexed,” etc. After the principal clause of the policy, there follow five provisos and eight conditions. The second proviso is, “provided always that this policy is issued and accepted subject to all the provisions herein contained or referred to,” etc. The third proviso is “that this insurance shall not extend to any bodily injury * * * when the death or injury may have happened in consequence of * * * voluntary exposure to unnecessary danger, hazard, or perilous adventure,” etc. The conditions are introduced by the following clause: “Claims under this policy are payable only at the company’s office in Hartford, and this policy is subject also to the following conditions.” The first condition is: “The party insured is required to use all due diligence for personal safety and protection, and to notify the agent writing this policy immediately, and in writing, of any change from the occupation, profession, or employment under which this insurance is granted,” etc.; and by the last condition, “the provisions and conditions aforesaid, and a strict compliance therewith, during the continuance of the policy, are conditions precedent to the making of this contract.” This last condition cannot take effect universally, because many of the provisos and conditions relate to matters which must happen, if at all, after the making of the contract.

Clearly there was evidence for the jury that Murray received bodily injury through external, violent, and accidental means; and that he did not voluntarily expose himself to unnecessary danger. He was rightfully upon the railroad track, under his employment. The questions involved in the exceptions are whether the burden of proof was on the plaintiff to show that Murray used “all due diligence for personal safety and protection,” and whether there was sufficient evidence for the jury to warrant them in finding this as a fact. A majority of the court is of opinion that the burden was on the defendant to show that Murray had not used all due diligence for his personal safety and protection. So far as this first condition is concerned, the policy means that the company insures Murray against bodily injuries effected through external, violent, and accidental means, provided, however, and subject to the condition, that the amount insured shall not be payable unless Murray uses all due diligence for personal safety and protection.” The defendant’s liability is to be determined by the contract, independently of the special provisions of the contract. Contributory negligence on the part of Murray would not be a defense; and by the use of the word “accidental,” injuries to which the negligence of Murray contributed are not excluded from the protection of the party. *Schneider v. Provident L. Ins.*

Co. 24 Wis. 28; Trew v. Railway Passenger Ins. Co. 6 H. & N. 839; Providence L. Ins. Co. v. Martin, 32 Md. 310; Stone v. United States Casualty Co. 34 N. J. L. 371.

In *Schier v. Norwich F. Ins. Co.* 11 Allen, 386, after the description of the property insured against fire, this clause was inserted: "This policy not to cover any loss or damage by fire which may originate in the theatre proper." It was held that the burden was on the plaintiff to show a loss not originating in the theatre proper. The court says that, "If that clause can be regarded as a proviso,—that is, a stipulation added to the principal contract to avoid the defendant's promise by way of defeasance or excuse,—then it is for the defendant to plead it in defense, and support it by evidence. But if, on the other hand, it is an exception, so that the promise is only to perform what remains after the part excepted is taken away, then the plaintiff must negative the exception to establish a cause of action. It is not always easy to determine to which class, whether of proviso or exception, a particular stipulation belongs; and this one is certainly very near the line." The court held it to be an exception, saying that "the provisos are set forth together in a different part of the instrument."

In *Kingsley v. New England Mut. F. Ins. Co.* 8 Cush. 393, the policy recited that the Kingsleys had paid the premium, etc., for insuring their paper mill, "on condition that the applicants take all risks from cotton waste," in consideration whereof the company insured the property in the sum of \$2,000. The court held that the burden "was not on the plaintiff to show that the loss occurred from some other way than from cotton waste;" that the clause was not an exception, but a proviso; and that the defendant must set it up in defense and support it by evidence.

The rule of pleading in declaring upon a contract which contains an exception, or a proviso, or a condition, is stated in *Commonwealth v. Hart*, 11 Cush. 180, 184, as follows: "If such instrument contains in it, first, a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something that would otherwise be included in it, a party relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception; but if the exception itself be incorporated in the general clause, then the party relying on it must, in pleading, state it, together with the exception." It is a general rule of the law of evidence that it is necessary for a party to prove the substantive facts which he is required affirmatively to aver in his pleading.

It is true that this policy only insures against bodily injuries effected by the means described "within the intent and meaning of this contract, and the conditions hereunto annexed," but this does not change the nature of the conditions. They still take effect as conditions, and the insertion of these words in the principal clause of the contract does not vary the legal effect of the contract. The condition we are considering is essentially an executory stipulation, in the form of a condition, that Murray shall use all due diligence for his personal safety and protection, and it is the breach of

this condition by Murray which the defendant sets up as a defense. We are not aware that it has ever been held that the introduction of the words we have quoted, or of other similar words, into the principal clause of a policy of insurance, incorporates into this clause the conditions of the policy within the meaning of the rule of pleading we have stated; and in some of the decisions where it has been held that the defendant must plead, or that the burden of proof was on him to show that a representation was false, or that a stipulation contained in a condition had not been complied with, the policy contained these or similar words in the principal clause. Every case depends upon the nature of the stipulation or condition as well as upon the form of it. This condition does not differ in its character from the provision in life insurance policies, that they shall be void, or that the amount insured shall not be payable, if the assured shall die by his own hand. The burden of proving the breach of such a provision is on the company, and we think that the ruling in the present case upon the burden of proof was erroneous. *Haskins v. Hamilton Mut. Ins. Co.* 5 Gray, 432; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 426; *Pierce v. Cohasset Mut. F. Ins. Co.* 123 Mass. 573; *Murray v. Mohawk Valley Ins. Co.* 5 Gray, 541; *Hodsdon v. Guardian L. Ins. Co.* 97 Mass. 144; *Cluff v. Mutual Benefit L. Ins. Co.* 13 Allen, 308; 99 Mass. 817; *Jones Mfg. Co. v. Manufacturers Mut. F. Ins. Co.* 8 Cush. 82; *Orrell v. Hampden F. Ins. Co.* 18 Gray, 431; *Redman v. Aetna Ins. Co.* 49 Wis. 481; *Grangers Life Ins. Co. v. Brown*, 57 Miss. 806; *Germain v. Brooklyn Life Ins. Co.* 80 Hun, 535; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381.

In an action upon a policy which contains many provisos and conditions, there is a practical wisdom, which courts have recognized, in compelling the insurance company to allege and prove the want of compliance with any particular proviso or condition on which it relies. *Piedmont & A. L. Ins. Co. v. Boring*, 93 U. S. 377 [Bk. 23, L. ed. 610].

The court refused to rule that there was not sufficient evidence to warrant the jury in finding that Murray used due diligence, and to this the defendant excepted. It is evident that this refusal has not harmed the defendant, because the burden of proof was on the defendant.

We cannot say that the witness Doody had not sufficient experience to justify the court in permitting him to answer the questions asked. The answers had some tendency to show that the defendant's witness, Mitchell, had not testified correctly, and that he had not exercised due care in stopping the train, and they had perhaps some relevancy to the matter in dispute, which was whether Murray was injured through his own fault or that of the managers of the train.

Exceptions overruled.

Arthur W. BLAKE *et al.*, Exrs.,
v.

TRADERS NATIONAL BANK of
Boston *et al.*

1. Where a trustee pledged certain stocks, a part of the trust estate, to

defendant, to secure a debt due from the firm of which the trustee was a member, and defendant sold the stocks and applied the proceeds on the debt, the certificate and assignment showing that the stock was held in trust, and the trustee was afterwards removed, and a new trustee appointed in his place,—*Held*, that **defendant received and sold the stocks with notice of the trust, and is liable to the new trustee and to the cestui que trust for the avails.**

2. **When a creditor who holds collateral security for a debt gets satisfaction from a surety of the debtor, the surety takes the place of the creditor as to the debts and as to the security.**
3. **When the sureties of a trustee have been compelled to answer for his breach of trust, they are subrogated to the rights of both the trustee and cestui que trust against those who have participated in his wrongful act.**
4. **The defendant took the stocks charged with the trust, and held the stocks and the proceeds of the sale of them as a trust fund under a trust to return them to the trustee. The trustee and the cestui que trust both had an equitable remedy against defendant which would not be affected by the Statute of Limitations.**
5. **This right of action against the defendant, to compel it to account for and restore trust property which it knowingly received and withheld, is a right to which a surety of the trustee, who was compelled to make good the amount to the fund, would be subrogated.**
6. **The surety of the trustee was justified in the delay necessary to defend the suit against himself; and where he, within a reasonable time after his liability was declared, brought this bill,—*Held*, that there had been no such unreasonable delay as would deprive him of his remedy.**

(Suffolk—Filed June 30, 1887.)

ON report. Decree for plaintiffs.

Suit in equity by executors of surety on probate bond of trustee, for accounting for sale of trust funds by holder as collateral security with knowledge of wrongful misappropriation thereof.

The case was heard before Gardner, J., upon the pleadings, the agreed statement of facts, the interrogatories and answers, and the evidence.

The following facts are sufficient to present the issues of the case:

James M. Howe, as trustee under the will of Henry Todd, held 105 shares of stock of the Troy & Greenbush Railroad Association, for which a certificate had been issued to him, which on its face recited that he held the shares as trustee. This certificate he pledged to the Traders Bank on March 16, 1864, as security for a pre-existing debt owed by his firm. The date of the pledge is shown by the power of attorney to transfer the shares, which was

given when the certificate was delivered, blanks being left in which the names of the attorney and transferees were subsequently inserted. The only debt then held by the Traders Bank was a note dated February 27, 1864. Two others entered on the books are dated more than a month after March 16, 1864, and were given when they were dated. In 1865 the Traders Bank organized as a national bank, and its business was continued without interruption by the change, the assets of the State bank being taken by the national bank, and, among them, the claims against J. M. Howe & Co., and the shares in the Troy & Greenbush Railroad Association held as security.

On October 30, 1867, Howe requested the Traders National Bank to sell these shares and apply the proceeds to the payment of its claim against his firm; and in December, 1867, the sale was made, and the proceeds, which amounted to \$4,750.77, with some interest, were applied by the bank as requested. The trust estate received no benefit from the sale or pledge of the stock. The misappropriation of the shares was concealed by Howe from the parties interested until August, 1877, when it was discovered; but Howe continued to hold his position until July 1, 1878, when he was removed, and James B. Thayer and James C. Davis were appointed in his place. George Baty Blake was surety on Howe's probate bond as trustee until 1869, and a suit was brought against his executors on November 15, 1877, in which judgment was ordered against them. Thereafter proceedings to ascertain the amount of their liability, which was quite uncertain, were had before an assessor, and the final decision in the case was not reached till June 29, 1885, the judgment being fully satisfied on July 22, 1885.

Before this time, however, and while the amount of their liability was still undetermined, to wit, on June 27, 1884, the complainants paid to the new trustees the amount lost by the trust through the misappropriation of the Troy & Greenbush Railroad stock, with interest and costs, and on the same day, after the payment, this bill was filed.

Mr. Moorfield Storey, for plaintiffs:

The bank took with notice that the trustee had no right to pledge the shares as security for his firm's debt, or to authorize their sale and the application of the proceeds to the payment of that debt.

Atkinson v. Atkinson, 8 Allen, 15; *Shaw v. Spencer*, 100 Mass. 382; *Loring v. Salisbury Mills*, 125 Mass. 138; *Loring v. Brodie*, 184 Mass. 453.

The successors in the trust had the right in equity to compel the bank to account for the value of the shares.

Duncan v. Jaudon, 15 Wall. 165 (82 U. S. bk. 21, L. ed. 142); *Ashton v. Atlantic Bank*, 8 Allen, 217; *Atkinson v. Atkinson*; *Loring v. Salisbury Mills*, and *Loring v. Brodie*, *supra*; *Story*, Eq. §§ 533, 1257, 1258; *Lewin*, Tr. 6th ed. 804.

The general right of subrogation is clearly established.

Hodgson v. Shaw, 3 M. & K. 183, 190, 191; *Latouche v. Pallas*, Hayes, 450; *Gedye v. Matson*, 25 Beav. 310; *Brandon v. Brandon*, 3 De G. &

J. 523; *Propeller Monticello v. Mollison*, 17 How. 152, 155 (58 U. S. bk. 15, L. ed. 68); *Garrison v. Memphis Ins. Co.* 19 How. 312, 317 (60 U. S. bk. 15, L. ed. 658); *Hall v. Nashville & C. R. R. Co.* 13 Wall. 367 (80 U. S. bk. 20, L. ed. 594); *Hart v. Western R. R. Corp.* 13 Met. 99; *Amory v. Lovell*, 1 Allen, 504; *Wall v. Mason*, 102 Mass. 313; *Mercantile M. Ins. Co. v. Clark*, 118 Mass. 288.

Its application in the manner for which the complainants contend is not less supported by authorities.

Sheldon, Subr. p. 104; *Parsons v. Briddock*, 2 Vern. 608; *Wright v. Morley*, 11 Ves. 12, 21, 22; *Drew v. Lockett*, 32 Beav. 499; *Bunting v. Ricks*, 2 Dev. & B. Eq. 130; *Powell v. Jones*, 1 Ired. Eq. 337; *For v. Alexander*, Id. 341; *Kennedy v. Pickens*, 3 Ired. Eq. 147; *Rhame v. Lewis*, 13 Rich. (S. C.) Eq. 269, 330; *McNiel v. Morrow*, Rich. (S. C.) Cas. in Ch. 172, 177; *Edmunds v. Venable*, 1 Patt. & H. (Va.) 121; *Taylor v. Taylor*, 8 B. Mon. 419; *Schoofield v. Rudd*, 9 B. Mon. 291; *Waddington v. Vredenburgh*, 2 Johns. 228, and note; *Townsend v. Whitney*, 75 N. Y. 425, 430 *et seq.*; *Keokuk v. Love*, 31 Iowa, 119.

The well-established equity of subrogation cannot be defeated by the very election which makes the subrogation necessary.

Loring v. Salisbury Mills, 125 Mass. 138.

The reorganization of a bank as a national bank does not affect its liabilities.

Atlantic Nat. Bank v. Harris, 118 Mass. 147; *Watrous v. First Nat. Bank*, 124 Mass. 571.

The Statute of Limitations does not affect trusts.

Duncan v. Jaudon, *supra*; Story, Eq. §§ 1257, 1258, 1520 a; *Hemenway v. Gates*, 5 Pick. 321, 322; *Baker v. Whiting*, 3 Sum. 486.

The defense of laches rests upon the ground that the equity of the respondent, arising from the acts or acquiescence of the complainant, is greater than the equity set up in the bill. Every case must be decided according to its own circumstances.

Stackhouse v. Barnston, 10 Ves. 453, 463-468; *Clarke v. Hart*, 6 H. L. Cas. 633, 655, 656; *Prendergast v. Turton*, 1 Young & C. C. Ct. 98; *Clegg v. Edmondson*, 8 D. M. & G. 787, 804, 807, 808; *Bright v. Legerton*, 2 De G. F. & J. 606, 615, 616; *Tarbell v. Bowman*, 103 Mass. 341, 344; *Nudd v. Powers*, 136 Mass. 273, 277; *Bowers v. Hammond*, 139 Mass. 360, 365; *Sullivan v. Portland & R. R. Co.* 94 U. S. 806, 811 (Bk. 24, L. ed. 324); *Re Baker*, 20 Ch. Div. 230.

Messrs. H. G. Parker and E. R. Hoar, for defendants:

A surety, on paying his principal's debt, is entitled to be subrogated to all the securities, funds, liens, and equities which the creditor holds against the principal debtor.

Sheldon, Subr. 99, § 86, and cases cited.

The surety takes the rights of the creditor, and no more.

Bayl. Sur. & Guar. 362, notes 5, 6.

Subrogation is not to be allowed, except in a clear case and when it works no injustice to others.

Wallace's Estate, 59 Pa. 401.

Neither the trustees nor the *cestui que trust* could reach this stock.

Winslow v. Otis, 5 Gray, 360, 363, 364.

The delivery of the stock, with the power

of attorney, by Howe to the Traders Bank, March 16, 1864, was a conversion by Howe. It was a good delivery and conveyance as to both Howe and the bank.

Colebrook, Col. Secur. 352, § 271; *Sargent v. Essex M. R. Corp.* 9 Pick. 202; *Fay v. Gray*, 124 Mass. 500; *Dickinson v. Central Nat. Bank*, 29 Mass. 279, 282, 283; *Johnston v. Laffin*, 103 U. S. 800 (Bk. 26, L. ed. 532), and cases cited.

The Statute of Limitations is a bar to a surety's right of subrogation.

Sheldon, Subr. § 110.

Constructive trusts are subject to the statute. *Farnam v. Brooks*, 9 Pick. 213.

The doctrine of subrogation will not be enforced against a legal right.

Fink v. Mahaffy, 8 Watts, 384; *Gowder's Estate*, 3 Pen. & W. 200.

Laches in taking advantage of the right of subrogation will forfeit it as against one who is injured by such laches.

Gring's App. 89 Pa. 336; *Royal Band v. Grand Junction R. & D. Co.* 125 Mass. 490 See *Farnam v. Brooks*, *supra*.

W. Allen, J., delivered the opinion of the court:

In 1855 the plaintiffs' testator became a surety upon the probate bond of a trustee. In 1864 the trustee pledged certain stocks, a part of the trust estate, to the Traders Bank, to secure a debt due from the firm of which he was a member. In 1865 the Traders Bank was organized as the Traders National Bank, the defendant, and received the stock in question, the debt not being paid. In 1867 the defendant, at the request of the trustee, sold the stock and applied the proceeds on the debt. The certificate and the assignment showed that the stock was held in trust. The trust estate received no benefit from the pledge or the sale of the stock. The trustee was afterwards removed, and new trustees appointed in his place. Before the removal of the trustee, suit was commenced against the plaintiffs on the bond, which was prosecuted after the appointment of the new trustees, and judgment recovered, upon which execution issued for the value of the stocks, among other things, which was paid by the plaintiffs. These facts show that the defendant received and sold the stocks with notice of the trust, and was liable to the new trustees, and to the *cestui que trust*, for the avails. *Shaw v. Spencer*, 100 Mass. 332; *Loring v. Brodie*, 134 Mass. 453.

The general rule as stated by Lord Brougham in *Hodgson v. Shaw*, 3 Myl. & K. 190, is "that the surety paying a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement." In this case the judge of probate was the obligee in the bond which constituted the debt; but it was for the benefit of the trust estate, and the legal and beneficial owners of that estate were the real creditors to whose rights the surety would be subrogated on paying the debt. It is true that the trustees elected to pursue their remedy upon the bond against the surety, and neither the trustees nor the *cestui que trust* would have a right of action against the defendant, after full indemnity had been obtained in the action on the bond.

but there was no other election of remedy, or discharge or satisfaction of a cause of action, than is always the case when a creditor who holds collateral security for a debt gets satisfaction from a surety of the debtor. The surety takes the place of the creditor as to the debt and as to the security. See cases cited in notes to *Deering v. Winchelsea*, 1 White & T. Lead. Cas. in Eq. 100. If, as is argued, the original trustee had no right of action against the defendant, and the stock was not his property, and was not pledged by him as security for the debt which the plaintiffs paid; and if the defendant was only liable to the new trustee as holding, or for having converted, the trust fund; and if the fund was made good by the payment to the trustees by the surety,—it would make no difference. The payment was to the trustees, and was a substitute for the fund which was in the hands of the defendant, and which it was bound to account for to the trustees, and would give to the surety all the rights which the trustees had to recover the fund; it would operate as an assignment, to the surety, of the fund and of the right of action of the trustees to recover it. In this case the defendant and the surety were both liable to the trustees for the amount of the trust property,—the former in consequence of participating in the wrongful act of the first trustee, and the latter by his contract to indemnify the estate against such act. The cases are analogous where one owner of property has claims for a loss against an insurer and a tortfeasor. The insurer is in the nature of a surety, and upon paying the loss he is subrogated to the rights of the owner to recover for the tort. *Hart v. Western R. R. Corp.* 13 Met. 99; *Clark v. Wilson*, 108 Mass. 219; *Mercantile M. Ins. Co. v. Clark*, 118 Mass. 288.

The cases cited in *Sheldon* on Subrogation, § 89, sustain the proposition in the text that, where the sureties of the trustee have been compelled to answer for his breach of trust, they are subrogated to the rights of both the trustee and the *cestuis que trust* against those who have participated in his wrongful act.

The defendant bank contends that the right of action to which the surety was subrogated was barred by the Statute of Limitations.

The bank took the stock charged with the trust, and it held the specific property and the proceeds of the sale of it as a trust fund under a trust to return it to the trustees. The trustees and *cestuis que trust* both had an equitable remedy against it as such trustee. This remedy would not be affected by the Statute of Limitations. 1 Perry, Tr. § 217; 2 Id. § 828.

Whether an action of tort for the conversion of the stock would be barred we need not consider. If the trustees could have elected to sue the defendant for damages for the sale and conversion of the stock, they did not do so, and no question arises as to the effect of such election upon the right of the trustee, or of the *cestuis que trust*, to treat the proceeds of the sale as trust money to which they were entitled. Their right of action against the defendant, to compel it to account for and restore trust property which it knowingly received and withheld, is a right to which a surety on the bond, who was compelled to make good the amount to the fund, would be subrogated.

It is contended that there was such delay and laches on the part of the plaintiffs and those under whom they claim as to prevent a recovery.

The surety was released from the bond, by order of the probate court, on May 9, 1869. The only account rendered by the trustee in the probate court was allowed December 8, 1856, but he, from time to time, rendered accounts to the *cestuis que trust*, and paid to them the balance appearing to be due. It appeared by these accounts that the stock in question was held by the trustee, and the *cestuis que trust* did not know of the breach of trust until August, 1877. In November, 1877, a suit on the bond was commenced against the plaintiffs, under the order of probate court, for the benefit of the *cestuis que trust*. The plaintiffs defended this action on the ground that the surety had been released, but judgment was rendered for the plaintiffs for the penal sum of the bond, in March, 1882. The amount for which execution should issue was not fixed until after this bill was brought. Before then the plaintiffs had paid to the trustees the amount claimed from the defendant, and have since paid the whole amount found due upon the bond. This bill was filed on the 27th day of June, 1884.

There was not such laches on the part of the *cestuis que trust*, in failing to have the trustee summoned to render an account in the probate court, as would prevent them from following the fund into the hands of the bank. They had no reason to suppose that anything was not right until August, 1877. Soon after that the action on the bond was commenced. Neither they nor the trustees lost one remedy by not pursuing both at the same time. The plaintiffs were justified in the delay necessary to defend that suit, and, within a reasonable time after their liability was declared, they brought this bill. The delinquent trustee was removed and new trustees appointed July 1, 1878. The new trustees found the suit on the bond pending, and there was no occasion for them to take any further steps. It does not appear that there has been any unreasonable delay, or that it has been any detriment to the defendant bank; and it would be inequitable to deprive the plaintiffs of their remedy on account of it.

In 1858 the surety received from the trustee security in the form of the bond of one Bacon for \$50,000, which he surrendered when he was discharged from the probate bond in 1869. There is no doubt that this surrender was made in the belief that there had been no breach of the bond, and that the surety was not liable upon it. There is nothing in the evidence to show the value of the bond when it was surrendered, except the statement, referring to the time when the security was received, that it was believed by all parties to be ample. The surety did not stand in the relation of a co-surety with the defendant, and there was no misconduct or negligence by him in regard to it shown.

On the whole, the plaintiffs are entitled to recover from the defendant bank the amount for which the stock was sold by it, with interest from the time of the sale.

Decree for plaintiffs.

Calvin S. CROCKER

v.

Benjamin S. ATWOOD.

1. **Where a mortgage of goods provides that if the mortgagor shall suffer the goods, or any part of them, to be attached on mesne process, the mortgagee may sell the goods at auction and retain the moneys secured thereby, if the mortgagor suffers the goods to be taken and held by virtue of an attachment as his property, with his consent, the mortgagee has the immediate right of possession of the goods; and it is immaterial that the attachment was illegal and void.**
2. The taking and sale of the property on an illegal attachment was a conversion of it.
3. A collusive attachment in a fictitious suit, for the purpose of depriving a mortgagee of the property, is void as to him.
4. That the mortgagee was defendant in the action in which the property was attached does not limit his remedy to an action for malicious prosecution; that the suit was malicious, or the attachment invalid, cannot deprive him of his right to the property.

(Suffolk—Filed June 29, 1887.)

ON defendant's exceptions. *Overruled.*

Action of tort for the conversion of certain personal property, brought in the Superior Court.

The case was heard before Henry W. Bragg, Esq., as auditor, whose report, from which the facts appear, was as follows:

On October 20, 1883, the plaintiff and one Leonard Snell were copartners in the manufacture of a compound called the "Star Compound," doing business at Nos. 278, 280, and 282 Pyncheon Street, Boston, and on that day made an agreement with one Wm. H. Nash, whereby he became a partner with them under the firm name of "Wills Manufacturing Company," the plaintiff and Snell, by the terms of said agreement, retaining the title to the stock, machinery, and implements used in said business,—being substantially that alleged to have been converted,—and Nash agreeing to lend the new firm \$1,500 during the six months then next ensuing; each partner to receive specified sums for services, and the profits to be shared equally, said Nash having the option of purchasing at the expiration of said six months one third of the business and property of the firm, upon payment of \$1,000 additional, to the plaintiff and Snell, payable \$500 in cash, and \$500 in any notes of the company then held by Nash, and in case Nash should not then elect to purchase, and should retire from the firm, Snell and Crocker should have six months from such retirement in which to pay such indebtedness of the company to Nash.

Nash was induced to enter into this agreement by the defendant Atwood, who agreed either to let him have the money, or to pay him back such sums as he should put into the business; and Nash was, to all intents and purposes, the agent of Atwood for the purposes

of such agreement, and up to January 19, 1884, put into said business the sum of \$1,700.

On or about January 19, 1884, the defendant paid Nash the amount he had put into the firm, amounting to about \$1,700, and thereby became the owner of all Nash's interest, and the partnership was dissolved by mutual consent, and an agreement made whereby Snell and Atwood should continue the business, and the plaintiff should retire and receive \$1,600 for his advances and labor theretofore in said business, this sum being paid him by a note of Snell for \$1,600, secured by a mortgage given by Snell to the plaintiff upon all the business and property of the late firm,—being the same property described in the plaintiff's declaration, and conveyed to Snell to enable him to make such mortgages,—said note being payable in installments. Atwood and Snell continued the business until August 20, 1884, Atwood in the mean time paying the plaintiff on account of said note, as follows, viz.: April 5, 1884, \$50; May 3, 1884, \$20; May 8, \$15,—making \$85 in all.

On August 20, 1884, Atwood and Snell made a conditional agreement with Alonzo G. Faye, Jr., whereby Faye, for a commission, was to place said compound as manufactured by Atwood and Snell upon the market and promote the sale thereof, and in consideration of this agreement, and at the solicitation of Atwood, the plaintiff, by a written agreement, agreed with Atwood and Snell that he would extend the time of payment of his note and mortgage for one year from August 20, 1884, Atwood and Snell agreeing that said mortgage should be paid out of the profits first accruing under said agreement with Faye, and the plaintiff and Snell agreeing that Atwood should be paid \$3,400 and interest out of the profits next accruing under said agreement with Faye, and all agreeing that after both said sums of \$1,600 and \$3,400 were paid, the defendant Atwood should then have five sixths and the plaintiff one sixth of the profits accruing under said Faye agreement. A day or two after August 20, 1884, Atwood purchased of Snell all his interest in the business and property, and thereby became the sole owner thereof, subject to the plaintiff's said mortgage thereon, and employed Snell to carry on the business as his, Atwood's, agent, under the same firm name.

The \$3,400 thus to be paid Atwood included the \$1,700 put into the business by Nash as aforesaid.

Atwood continued the business, and on February 21, 1885, Faye abandoned his conditional agreement, as he had a right to do, and with the consent of Atwood.

On March 3, 1885, while Atwood still carried on said business, with Snell as his agent and manager, the plaintiff learned that the bill for boarding the horse named in said mortgage was not paid, and that the stable-keeper had a lien thereon for such keeping, amounting to about \$102. The plaintiff thereupon gave notice to Atwood of his intention to sell the property on March 14, 1885, under the power of sale contained in the mortgage. Said property was then owned by and in the possession of the defendant, in the charge of said Snell as his agent, at said place of business on Fya-

chon Street. The plaintiff attempted to gain admission to said place of business, but the defendant kept it closed most of the time between March 3, 1885, and April 25, 1885, the date of the sheriff's sale hereinafter mentioned.

On March 10, 1885, the defendant, by written notice dated March 10, 1885, notified the plaintiff to remove from said premises all personal property claimed by him under said mortgage, within forty-eight hours; but I find this notice was a mere pretense, and the defendant continued to keep said property so that the plaintiff could not gain access to it, and did not intend that the plaintiff should obtain possession of it, though the plaintiff made attempts so to do.

On March 13, 1885, the defendant notified the plaintiff in writing not to trespass upon said premises, and not to hold or advertise any sale thereon under foreclosure of mortgage or otherwise.

Said sale under such foreclosure was advertised for March 14, 1885, at 10 A. M.

On March 18, 1885, the defendant, for the purpose of preventing the plaintiff from obtaining possession of said property, and for the purpose of obtaining a colorable title to said property in himself by a sheriff's sale, and defeating the plaintiff's mortgage thereby, procured said Nash to cause said property to be attached as the property of the plaintiff and said Snell as copartners, upon a writ against them in favor of said Nash, in an action to recover the said \$1,700, which Nash had put into said business as aforesaid as the agent of the defendant, and which the defendant had in fact already repaid to said Nash, as he had originally agreed to do.

The day after said attachment was made, the defendant Atwood was deputed, at his own request, as the sheriff's keeper of the property attached, and on April 25, 1885, caused said property to be sold at sheriff's sale on such mesne process, at said place of business; and at such sale the defendant purchased, or caused to be purchased, such portions thereof as he needed to continue the same business at the same place, the defendant continuing to act as such keeper until such sale, still retaining said Snell in his employ as agent and manager of said business and the custodian of said property, notwithstanding Snell was one of the defendants in said suit.

The defendant purchased nearly all of said property at said sheriff's sale, and has continued in the possession and use thereof till after the commencement of this action.

After a trial of said suit of Nash against Snell and Crocker, judgment was rendered for Crocker and against Snell, who subsequently went into insolvency and has since obtained his discharge.

Said suit of *Nash v. Snell & Crocker*, upon which said attachment and sale was made, was wholly fictitious and known by this defendant to be such when he caused it to be brought in the name of Nash as the nominal plaintiff, while the defendant herein was the real plaintiff therein,—said Atwood, Nash, and Snell being in collusion to thereby fraudulently deprive this plaintiff of said property and to defeat his said mortgage.

I find that, upon said attachment being made,

this plaintiff was entitled to the immediate possession of said property, and that the proceedings under said attachment and sale so caused by this defendant, together with the other facts hereinbefore found, constituted a conversion of said property by this defendant. The defendant objected to evidence as to said suit being fictitious or instigated by this defendant; but I ruled that the plaintiff might show that said suit was fictitious, and that the defendant had instigated it, knowing it to be such.

At the time of said sheriff's sale on April 25, 1885, there was due on the plaintiff's said mortgage the sum of \$1,543.37.

The value of the property so attached and sold at sheriff's sale, being that named in the plaintiff's declaration, was \$1,531, and this property I find the defendant has converted to his own use, and find for the plaintiff in said sum of \$1,531, together with interest thereon to the date of this report, amounting to \$180.13, amounting in all to \$1,661.13, for which sum last named I find for the plaintiff.

The following is a copy of the mortgage referred to in the foregoing report:

Know all men by these presents, that I, Leonard Snell, of Boston, Massachusetts, in consideration of \$1,600 to me paid by Calvin S. Crocker, of said Boston, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said Crocker all my right, title, and interest in and to the business of manufacturing and selling "Wills Star Compound," as heretofore carried on by the Wills Manufacturing Company, at Nos. 278, 280, and 282 Pynchon Street, Boston, Massachusetts, and all my right, title, and interest in and to the fixtures and appliances used in connection with said business, particularly one steam boiler, one tank, one kettle, one safe, all jugs, cans, boxes, desks, and pipes; also one bay mare, one covered Concord express wagon, one carryall, one brass-mounted harness and one rubber-mounted harness.

To have and to hold all and singular the said goods and chattels to the said Crocker and his executors, administrators, and assigns, to their own use and behoof forever.

And I hereby covenant with the said Crocker that I am the lawful owner of the said goods and chattels, that they are free from all incumbrances, that I have good right to sell the same as aforesaid, and that I will warrant and defend the same against the lawful claims of all persons.

Provided, nevertheless, that if I, or my executors, administrators, or assigns, shall pay unto the said Crocker, or his executors, administrators, or assigns the sum of \$1,600, in installments and with interest, as stated in a note of even date herewith, signed by me; and, until such payment, shall not waste or destroy the said goods and chattels, nor suffer them or any part thereof to be attached on mesne process, and shall not, except with the consent of the said Crocker or his representatives, in writing, attempt to sell or remove the same from their present location,—then this deed and said note shall be void.

But upon any default in the performance or observance of the foregoing condition, the said

Crocker or his representatives may sell the said goods and chattels at public auction, first giving ten days' notice in writing, of the time and place of sale, to me or my representatives; and out of the money arising out of such sale, the said Crocker or his representatives may retain all sums then secured by this mortgage, whether then or thereafter payable, including all costs, charges, and expenses incurred by him or them in relation to said property, or to discharge any liens of third persons affecting the same,—paying the surplus, if any, to me or my representatives.

And it is agreed that the said Crocker may purchase at any sale made as aforesaid, and that, until default in the performance of the condition of this deed, I and my representatives may retain possession and use and enjoy said property; but after such default the said Crocker and his representatives may take immediate possession of the same. The said Snell shall have the right to manufacture said compound under the name of Wills Star Compound, and to use any trademark on the same, notwithstanding any foreclosure of this mortgage, or sale hereunder of the goods and chattels conveyed. [Signed, sealed, and recorded.]

The auditor's report was sustained by the court, Bacon, J., and the defendant alleged exceptions.

The questions presented are stated in the opinion.

Messrs. C. H. Drew and Perkins & Lyman, for defendant:

Parol contemporaneous evidence is inadmissible to vary the terms of a written contract. 1 Greenl. Ev. § 275.

The rule cannot affect third persons, who might be prejudiced by things recited in the writings.

Id. § 279, and see cases in manuscript at bottom of page.

This rule has always been liberally construed by the court.

Battles v. Fobes, 21 Pick. 289; *Davenport v. Mason*, 15 Mass. 85; *Munros v. Perkins*, 9 Pick. 298.

That a bill of sale was intended only as collateral security may be shown by parol evidence for the purpose of negating an authority to secure supplies on the credit of its holder.

Howard v. Odell, 1 Allen, 85; *Blanchard v. Fearing*, 4 Allen, 118; *Clark v. Washington Ins. Co.* 100 Mass. 509.

The transfer of personal property may be shown by parol evidence to have been only a pledge, although a common bill of parcels was given at the time.

Hazard v. Loring, 10 Cush. 267; *Caswell v. Keith*, 12 Gray, 351; *Fletcher v. Willard*, 14 Pick. 464.

A conveyance of land, absolute in form, may be shown by parol evidence to have been intended as security for a debt.

Campbell v. Dearborn, 109 Mass. 180; *McDonough v. Squire*, 111 Mass. 217; *Hassam v. Barrett*, 115 Mass. 256; *Dempsey v. Kipp*, 61 N. Y. 462; *Husman v. Wilke*, 50 Cal. 250; *Furbush v. Goodwin*, 25 N. H. 425; *Hughes v. Sandal*, 25 Tex. 162; *Blake v. Hall*, 19 La. Ann. 49, cited in note to *Best*, Ev. (Am. ed.); *Reeve v. Dennett*, 137 Mass. 315.

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So also of a conveyance of personal property (*Newton v. Fay*, 10 Allen, 505); likewise of an assignment of a mortgage (*Pond v. Eddy*, 113 Mass. 149).

For all actions as keeper, the defendant can justify under the writ; and as no claim is here made of any irregularity in the service of the same, all acts of the defendant in such capacity are to be presumed lawful.

McGough v. Wellington, 6 Allen, 505.

In *Wing v. Bishop*, 9 Gray, 223, an action of tort for the conversion of personal property described in the plaintiff's mortgage, the court says: "The attachment was legal and valid as against the plaintiff until he made a demand of the officer for the amount due under his mortgage and the time allowed for the payment of this amount had expired. Without proof of such a demand and a failure to pay the sum demanded, the defendants were not tortfeasors."

Even where the plaintiff holds the goods by a bill of sale, absolute on its face but really given as collateral security, it is held that he must make a demand in conformity with the statutes in order to dissolve the attachment.

Putnam v. Rowe, 110 Mass. 28.

See also *Howe v. Bartlett*, 1 Allen, 29, in which the court held that the mortgagee who sued for the conversion of the mortgaged property by the defendant—who had taken same on various attachments—could not be allowed to show that the attachments were excessive, or that the claims upon which they were founded were invalid.

If plaintiff has a legal cause of action, it would be his right to enforce it by the remedies provided by law, and he would not be liable for any injuries which might accidentally result, although he acted with malice. In so doing he commits no unlawful act for which an action will lie against him.

Lindsay v. Larned, 17 Mass. 190; *Randall v. Hazeltin*, 12 Allen, 412; *O'Brien v. Barry*, 106 Mass. 300; *Hamilburgh v. Shepard*, 119 Mass. 30.

By the judgment in favor of Crocker the attachment as to him was dissolved, and the auditor having found that Snell had disposed of all his interest in the property, the entire proceeds reverted to Crocker.

First Ward Nat. Bank v. Thomas, 125 Mass. 278; *Thomas v. Blake*, 126 Mass. 320; *Appleton v. Bancroft*, 10 Met. 281; *Wheelock v. Hastings*, 4 Met. 504; *Edwards v. Sumner*, 4 Cush. 393.

The proceeds from the sale of the property attached on mesne process are considered in law as the property itself.

Pollard v. Baker, 101 Mass. 259.

Mr. P. H. Cooney, for plaintiff:

A mortgagee's interest in personal property is not subject to attachment.

Prout v. Root, 116 Mass. 410.

The attachment, therefore, of the property was tortious.

Woodbury v. Long, 8 Pick. 543; *Deyo v. Jenkinson*, 10 Allen, 410; *Bean v. Hubbard*, 4 Cush. 85; *Stearns v. Dean*, 129 Mass. 139; *St. George v. O'Connell*, 110 Mass. 475; *McAvey v. Wright*, 187 Mass. 207; *McPartland v. Read*, 11 Allen, 281.

When mortgaged personal property is attached, the mortgagee is not a party and has

no right to be heard. When the suit is fraudulent, plaintiff and defendant may agree to any judgment best adapted to prejudice the rights of the mortgagee; but when that said judgment is relied on as a justification for interfering with the plaintiff's rights in the mortgaged property, he should be held to prove that he is a creditor and pursuing the rights of an attaching creditor under the statute.

Downs v. Fuller, 2 Met. 135; *Inman v. Mead*, 97 Mass. 310; *Miller v. Bannister*, 109 Mass. 289; *Ames v. Sturtevant*, 2 Allen, 583; *Damon v. Bryant*, 2 Pick. 411.

Where an attachment is not authorized by law, and so known to plaintiff, he is guilty of a trespass and liable for the conversion of the property under it.

Sartwell v. Horton, 28 Vt. 370; *Cadaval v. Collins*, 4 A. & E. 858; *Chandler v. Sanger*, 114 Mass. 364; *Emery v. Hapgood*, 7 Gray, 55; *Cody v. Adams*, 7 Gray, 59; *Allen v. Wright*, 134 Mass. 347; *Porter v. Warren*, 119 Mass. 535; *Granger v. Hill*, 4 Bing. (N. C.) 212; *Steward v. Gromett*, 7 C. B. N. S. 191; *Gilding v. Eyre*, 10 C. B. N. S. 592.

Even if the attachment was valid, defendant, being deputed as keeper at his own request, and retaining Snell in his employ as agent and manager of said business, and as the custodian of said property, notwithstanding Snell was one of the defendants in said suit, dissolved this attachment; and the plaintiff was thereupon entitled to the possession of the property.

Boynon v. Warren, 99 Mass. 172; *Martin v. Bayley*, 1 Allen, 381.

The subsequent collusive and fraudulent attachment certainly did not purge the original wrong, but rather added to its force.

Coughlin v. Ball, 4 Allen, 334; *Pine v. Morrison*, 121 Mass. 296; *Moody v. Blake*, 117 Mass. 23; *Carter v. Kingman*, 103 Mass. 517.

The evidence was rightly excluded. The question simply called for the construction and legal effect of a formal bill of sale under seal, with full covenants of warranty by one of the parties to it.

Harper v. Ross, 10 Allen, 332; *Pennock v. McCormick*, 120 Mass. 275; *Philbrook v. Eaton*, 184 Mass. 398.

W. Allen, J., delivered the opinion of the court:

The attachment of the property on March 18, 1885, was a breach of the condition that the mortgagor should not suffer the property to be attached on mesne process. It was immaterial that the attachment was void, and that the mortgagor had no attachable interest in the property. It was taken and held by virtue of the attachment as his property, and with his consent, and by his procurement. The plaintiff therefore had the right of possession on the 23d of March, when this suit was commenced, unless the property could be held against him under the attachment. The defendant caused the property to be taken on the attachment and was in possession of it as keeper under the attachment, holding in denial of the plaintiff's right. If the attachment was not valid, there was evidence of the plaintiff's right of possession of the property, and of the conversion of it by the defendant.

In January, 1884, a copartnership existing 2 Mass.

between the plaintiff and one Snell and one Nash was dissolved, and Snell became the sole owner of certain personal property used in the business, which on the same day he mortgaged to the plaintiff, and which included the property in question. The plaintiff retired, and the defendant, who had been behind Nash, bought out his interest, and the business was carried on by Snell and the defendant, Snell owning the property. In August, 1884, the defendant bought the property, and Snell's interest in the business, and continued the business under the agency of Snell. In March, 1885, when the attachment was made, the plaintiff was the mortgagee of the property, which was owned by and in the possession of the defendant, in charge of his agent Snell, the mortgagor. The attachment was at the suit of Nash against Crocker and Snell, the mortgagee and mortgagor. The mortgaged property was attached, and, at the request of the defendant, was put into his hands as keeper; and the property was sold on mesne process and bought by him.

It is found that "said suit of Nash against Snell and Crocker, upon which said attachment and sale was made, was wholly fictitious, and known by this defendant to be such when he caused it to be brought in the name of Nash as the nominal plaintiff, while the defendant herein was the real plaintiff therein; said Atwood, Nash, and Snell being in collusion to thereby fraudulently deprive this plaintiff of said property and to defeat his said mortgage."

It is not contended that this plaintiff, the mortgagee, had any attachable interest in the property. But the defendant contended that Snell, the mortgagor, had such an interest for the reason that the sale by him to this defendant was conditional and left a right of redemption in Snell which could be attached; and excepted to the exclusion of a question whether the sale was "absolute or conditional or intended by way of security."

We think the question was wholly immaterial, whether the attachment was or was not void, because neither defendant had an attachable interest in the property; it was plainly void against this plaintiff for fraud. A collusive attachment of Snell's interest in a fictitious suit, for the purpose of depriving the plaintiff of the property, was void as to him. *Spear v. Hubbard*, 4 Pick. 143; *Bull v. Loveland*, 10 Pick. 9; *Parsons v. Dickinson*, 11 Pick. 352; *Fairfield v. Baldwin*, 12 Pick. 388; *Pierce v. Partridge*, 3 Met. 44; *Deyo v. Jennison*, 10 Allen, 410; *Pine v. Morrison*, 121 Mass. 296.

It is said that, as the plaintiff was a defendant in the action in which the property was attached, his only remedy is an action for malicious prosecution. But the fact that the suit was malicious cannot deprive the plaintiff of his right to the property. If he had been sole defendant, and the property had been attached as his, he could have maintained replevin for it although the suit were malicious. If the suit had been against the plaintiff alone, or against Snell alone, the plaintiff could have maintained replevin for the property taken on the attachment, and it would have been no defense that the suits were malicious. Can the action be defeated by fraudu-

lently naming both as defendants? If the attachment was invalid, whether because neither defendant had an attachable interest in the property, or because warned by putting the property into the possession of the defendant owner, or for fraud, it could not deprive the plaintiff of his right to the possession of the property. It is immaterial that the evidence which shows it to be void is also sufficient to prove that the suit was malicious.

It is not necessary to notice the particular requests for the rulings made by the defendant. The decision covers every point presented by them.

Exceptions overruled.

Michael SULLIVAN *et al.*

v.

City of FALL RIVER.

1. Under Pub. Stat. chap. 49, specific repairs upon a highway or townway are to be ordered by the person authorized to lay out the highway or townway; and the damages to a landowner are to be estimated by the same person.
2. If such damages are not given in the order directing the specific repairs, or in the return made upon it, this is equivalent to an adjudication that no damages have been suffered, and the party aggrieved may apply for a jury.
3. Under Pub. Stat. chap. 52, the landowner must file a petition with the selectmen, road commissioners, or mayor and aldermen, within one year from the completion of the work, and an adjudication must be made within thirty days after filing the petition; and if the petitioner is aggrieved by the estimate of damages, or by a refusal or omission to estimate them, he may, within one year, apply for a jury.
4. When a change is made in the grade of a public way in a city, if it is made by an authority competent to fix the grade, and the nature and extent of the change is specifically declared in and made a part of the record of the proceedings, the repairs made in accordance therewith are regarded as specific repairs under the statute first cited. But if the repairs are ordered by an authority not competent to fix the grade of the way, or if made or ordered by an authority competent to fix the grade, and the order does not determine specifically the nature and extent of the change to be made, but the way is repaired, either by an actual change of grade or otherwise, under an authority competent to direct the repair of ways, the damages to property occasioned by such repairs are recoverable under the statutes last cited.
5. A petition for damages sustained by the execution of an order of the mayor and board of aldermen of the city of Fall River, that granite curbing be laid on the north side of a street in that

city, is not rightfully brought under Pub. Stat. chap. 49; and it cannot be maintained under Pub. Stat. chap. 52, without the presentation of a petition to the mayor and aldermen.

(Bristol—Filed June 29, 1887.)

ON defendant's exceptions. *Sustained.*

Petition under Pub. Stat. chap. 49, for damages sustained by the petitioner by reason of an order passed by the mayor and board of aldermen May 18, 1885. The material parts of the order and petition were substantially as follows:

To the Honorable the Justices of the Superior Court holden at Taunton, within and for the County of Bristol. Respectfully represents Michael Sullivan and Julia Sullivan, both of Fall River, in said county; that they were the owners of a certain tract or parcel of land situated in said Fall River, on the northerly side of Bank Street, a public highway; that their said land adjoins the said highway and extends along the northerly side of the same from Seventh to Chestnut, now Eighth Street; that on May 18, 1885, there was an order passed by the mayor and board of aldermen of said Fall River, which authorized and directed the superintendent of streets to cause to be laid granite curbing on the north side of Bank Street, from Seventh Street to Chestnut Street, where the petitioners' property abuts on said street called Bank Street; that in pursuance of such order, and in execution of the powers conferred thereby, the superintendent of streets caused said granite curbing to be laid on said Bank Street, between Seventh and Chestnut Streets, now Eighth Street, and in laying said curbing the grade of said Bank Street was lowered, and the surface thereof was cut down several feet in places along the line of petitioners' land abutting on said Bank Street, below its former established level, thereby greatly injuring and damaging petitioners' land, and the buildings standing thereon, abutting on said Bank Street; that a year has not elapsed since the passage of said order, by virtue of which the said alterations and repairs were made; that neither at the time of the passage of said order, nor at any time since the same was passed, have the mayor and board of aldermen, or their successors in office, estimated, assessed, or paid any damages to petitioners for the injury which they have suffered in their property by reason of the specific repairs and the lowering of the grade of said Bank Street; that the said Chestnut Street named in said order is the same street which is now called and known as Eighth Street. The petitioners therefore pray for a jury to estimate and assess the damages which they have suffered in their property by reason of the said specific repairs and lowering the grade of said Bank Street, made pursuant to said order.

The respondent in its answer denies that the superintendent of streets varied the legal grade of the street as duly established and as appears by the records of said city in 1870; but conformed to and obeyed the same as was his duty; and avers that the petition was not brought within the period allowed by the statutes, and not within one year from the establishment of said grade in 1870; and that this court has no

jurisdiction of the matters of said petition, nor to grant its prayer, nor to proceed to a trial by jury therein; that if any work has been done, except as pursuant to said order, the same was illegal, and nothing is recoverable therefor in this proceeding.

At the trial in the superior court, before Thompson, J., it appeared that on December 23, 1870, the city council laid out Bank Street from Oak Street to Chestnut, now Eighth Street, and established its grade at the time of location, and awarded no damages; said street was petitioned for, and the petition filed with the city clerk April 4, 1870; and that the petitioner's (Michael Sullivan's) name was upon that petition; but he denied that he signed the same, as he could not write, but admitted that he wanted the street.

It appeared that shortly after, and within a year, the defendant removed large stones, and part of a bridge from said Bank Street; coated the same with gravel at the surface, and put the street in a passable condition; that it was wrought for travel, and opened for public use, and was used as a public highway. About two years after, when stones began to show through the surface, more gravel was put upon the street, and at other times since then, up to 1885, the superintendent of streets put gravel upon said street and kept it in repair for public travel, and it was used as a public highway; that said street was for a short distance in front of petitioners' property, from the corner of Seventh Street, at the grade as established at the time of opening said street.

The order of May 18, 1885, ordering curbing to be laid by the superintendent of streets on the northerly side of said Bank Street from Seventh to Eighth Street, was executed by the superintendent of streets upon the grade established in 1870, and the injury complained of was occasioned by the laying of the curbing as aforesaid. The superintendent of streets is also the surveyor of highways.

The petitioners own all the property on the northerly side of Bank Street, between Seventh and Eighth streets, and they owned the same on December 23, 1870. In 1875 water-pipes were laid in Bank Street 4½ feet below the surface as opened to public travel, in the southerly side of said Bank Street, and were laid at the request of the petitioners by the defendant. In 1878 a sewer was constructed in said Bank Street from Eighth Street about 100 feet, or about midway between Seventh and Eighth streets, by the defendant at the request of the petitioners. Said sewer was constructed about 4 feet below the surface of Bank Street. It appeared by the evidence of one Philip D. Borden, Jr., that sewers are not constructed by any fixed rule establishing the depth below the established grade. There was also evidence that the defendant city made repairs upon said Bank Street, such as filling in after water-pipes were laid and sewer constructed, and filling in cavities after taking out large stones at the time the street was opened for travel. There was no evidence of any orders for specific repairs other than those passed December 23, 1870, and May 18, 1885. The city did nothing toward working Bank Street to grade of 1870, up to 1885.

The defendant asked the court to rule that

the petitioners could not introduce evidence showing that they suffered damages resulting from the order of May 18, 1885, as set forth in the petition, said order being merely to lay curbing, and that no damage could be incurred, as the order itself did not affect their property, but related to a line in the street; and that the petitioners did not file their petition within one year from the order of December 23, 1870, locating and establishing the grade of said street; both of which were refused. It also appeared that the petitioners' land was cut down in some places, the deepest cut being 3 feet and 4 inches. The defendant requested the following instructions to the jury:

"1. That the petitioners are entitled to only such damages as they have sustained by reason of the order of May 18, 1885, which was an order for specific repairs, and related only to the laying of curbing on said street.

"2. That the city is not liable for acts done in excess of said order by any of its servants, and that the petitioners cannot recover, under their petition, for any damage sustained by the cutting down and working said street by the superintendent of streets.

"3. That the grade has never been changed since it was established in 1870, and the petitioners are barred by Pub. Stat. chap. 49, § 79, from bringing this petition for damages for working said street to the established grade of 1870.

"4. That the surveyor of highways cannot change or alter an established grade of a street once made and established by the mayor and board of aldermen, and acts done in the repairs of said street were not an alteration or change of the grade, and that such acts of repair did not alter or change the grade of said street as established in 1870.

"5. That there was no abandonment of said location and grade of 1870 by reason of repairs done by the superintendent of streets, or by laying a sewer to accommodate petitioners' premises, or by laying water-pipes without regard to any established grade."

The court refused to give the instructions requested, but ruled and instructed the jury that this was a case of specific repairs, and the petition was rightfully brought under Pub. Stat. chap. 49; that if the city in passing the order of May 18, 1885, left the superintendent of streets to place the curbing without specifying the grade at which it should be placed, and he assumed that the grade of 1870 was the grade intended by the order, and acted upon that assumption and placed the curbing upon that grade, and wrought the sidewalk to meet that grade, without any notice from the city that the grade of 1870 was not intended by the order of May 18, 1885,—then the city may be held liable if that grade was not in fact the true grade of the street, and the petitioners suffered damage by reason of the placing of the curbing. The grade of 1870 was not necessarily the grade of Bank Street of 1885; the city may so act with reference to the grade of the street as to give the party whose land abuts upon it the right to assume that a different grade has been established by the city from that fixed by an order by the city council, and entitle the party to damages for a change of such assumed grade. In this case it is left to

the jury to say whether or not the defendant city has so acted with reference to the grade of Bank Street as to give the petitioners the right to assume that the grade as it existed just prior to the order of May 18, 1885, was the true grade of Bank Street. The jury, from the evidence before them, will determine whether or not the city had abandoned the grade as fixed in 1870, and adopted the grade as it was in fact from 1870 up to May, 1885. If they so find, and under said order of May, 1885, the superintendent of streets placed the curbing at the grade fixed in 1870, and cut down the sidewalk to meet that grade and to accommodate the sidewalk to it as indicated by the placing of the curbing, and made necessary on account thereof, and the petitioners suffered damages thereby, then the petitioners may recover. The jury returned a verdict for the petitioners, and the defendant alleged exceptions.

Mr. D. V. Sullivan, for defendant:

An order of the proper authorities, permanently and legally fixing and establishing the grade of a street, is a jurisdictional act of record; and being such, the damages must be assessed in and as part of the act itself. Such act differs from a mere act "done for the purpose of repairs." Where no damages are awarded, it is equivalent to a determination that none have been sustained.

Monagle v. Bristol County, 8 Cush. 360; *Sisson v. New Bedford*, 187 Mass. 255.

Under Pub. Stat. chap. 52, the road commissioners have the power to make alterations and repairs.

Brady v. Fall River, 121 Mass. 262; *Sisson v. New Bedford*, *supra*.

It does not appear from Pub. Stat. chap. 49, that the Legislature intended to restrict the mayor and aldermen or selectmen to any positive rule as to the time in which they shall order a street, duly laid out and with grade established, to be worked to grade.

Fairbanks v. Fitchburg, 132 Mass. 48; *Sisson v. New Bedford*, 187 Mass. 259.

Defendant is not concluded by the illegal and unauthorized act of any officials.

Haskell v. New Bedford, 108 Mass. 208.

The questions submitted to the jury were questions it had no right to consider.

Riley v. Lowell, 117 Mass. 76; Pub. Stat. chap. 49, §§ 44, 105.

Messrs. T. W. Cummings and T. F. McDonough, for petitioners:

The petitioners were entitled at once to apply for a jury without first presenting a petition to the mayor and board of aldermen.

Monagle v. Bristol County, 8 Cush. 360; *Sisson v. New Bedford*, 187 Mass. 255.

The respondent passed the order of May 18 without specifying at what grade the curbing was to be laid, and avers in its answer that in pursuance of said order, and in execution of the powers conferred thereby, the superintendent of streets laid the curbing at the grade established in 1870; and the respondent is liable for the acts so done by the superintendent of streets.

Benjamin v. Wheeler, 8 Gray, 409; *Burr v. Leicester*, 121 Mass. 241; *Denniston v. Clark*, 125 Mass. 216; *Cambridge v. Middlesex County*, 128 Mass. 529.

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The original construction in 1870, and the subsequent repairs made by virtue of the order of May 18, are distinctly independent proceedings.

Snow v. Provincetown, 109 Mass. 123.

Field, J., delivered the opinion of the court:

The distinction between specific repairs upon a highway or townway, ordered under Pub. Stat. chap. 49, § 10, or § 65, and repairing a highway or townway by raising or lowering it,—or doing some other act upon it, under Pub. Stat. chap. 52, § 15,—was discussed and the history of these statutes carefully traced in *Sisson v. New Bedford*, 187 Mass. 255. Under the provisions of the statutes first cited, the specific repairs are ordered by the persons authorized to lay out a highway or townway, and the damages are to be estimated by them. Pub. Stat. chap. 49, §§ 15, 16, 32, 68, 79.

The reason for these provisions appears in Stat. 1884, chap. 152, § 7, when they were first enacted in reference to highways. That section reads: "That whenever * * * the county commissioners * * * shall be of opinion that the existing highway, between the termini named in the petition, can be so far amended as to supersede the necessity of laying out a new highway or altering the location of existing ways, they shall, after due notice to the towns interested, be empowered and required to direct specific repairs to be made in the existing ways so as to promote the public convenience." The commissioners, on the revision of the statutes in 1856, recommended a similar provision in reference to townways, and Gen. Stat. chap. 43, § 59, enacts that "the selectmen of the several towns may lay out or alter townways for the use of their respective towns, * * * or may order specific repairs to be made upon such ways."

When county commissioners order specific repairs upon highways, which occasion damage to persons or property, they are required to "estimate the same and make return thereof." Gen. Stat. chap. 43, § 15; Pub. Stat. chap. 49, § 15. When selectmen or road commissioners order specific repairs upon townways, the selectmen or road commissioners are to determine the damages. Gen. Stat. chap. 43, § 62; Pub. Stat. chap. 49, § 68. The intention is that the repairs to be made shall be specified in the order so that the condition of the way, after the repairs are made, can be determined from the order, and the damages can be assessed before the repairs are completed. If damages are not given in the order directing the specific repairs, or in the return made upon it, this is held to be an adjudication that no damages have been suffered, and the party aggrieved may apply for a jury.

Pub. Stat. chap. 52, § 15, is in substance a re-enactment of Gen. Stat. chap. 44, § 19, and of Rev. Stat. chap. 25, § 6; and this provision was inserted in the Revised Statutes in consequence of the decision of *Callender v. Marsh*, 1 Pick. 418. The purpose of this provision was to give to an owner of property a remedy when the authorities charged with the duty of keeping a public way in repair raised or lowered the way, or did any other act upon it for the purpose of repairing it, whereby his property

was damaged. The landowner must file a petition with the selectmen, road commissioners, or mayor and aldermen, "after the commencement and within one year from the completion of the work," and an adjudication must be made "within thirty days after the filing of the petition;" and if the petitioner is aggrieved by the estimate of damages, or by a refusal or neglect to estimate them, he may, within one year from the expiration of said thirty days, apply for a jury. See Pub. Stat. chap. 52, § 16. The damage accrues when the act is done. *Page v. Boston*, 106 Mass. 84.

When, then, a change is made in the grade of a public way in a city, if it is made by an authority competent to fix the grade, and the nature and extent of the change is specifically declared in, and made a part of, the record of the proceedings, the repairs made in accordance therewith are regarded as specific repairs under the statutes first cited. But if the repairs are made or ordered by an authority not competent to fix the grade of the way, or if made or ordered by an authority competent to fix the grade, and the order does not determine specifically the nature and extent of the change to be made, but the way is repaired, either by an actual change of grade or otherwise, under an authority competent to direct the repair of ways, so that they may be safe and convenient for travelers, the damages to property occasioned by such repairs are recoverable under the statutes last cited. *Thurston v. Lynn*, 116 Mass. 544.

Without considering whether, under the charter of the city of Fall River in force when the order of May 18, 1885, was passed, the mayor and aldermen, without the concurrence of the common council, could alter the grade of a street (see Stat. 1864, chap. 257, §§ 8, 14), we are of opinion that by this order they have not attempted to change or fix the grade of the streets. The order passed is simply that granite curbing be laid on the north side of Bank Street, and is like an order directing the street to be paved, and the cutting down of the grade of the street must be regarded as a repair of the street by lowering its surface. Whether the grade originally established was abandoned by the city need not be determined. If it was not abandoned, the petitioners' remedy was under the original taking and is now gone. If the original grade was abandoned, the petitioners' remedy for lowering the actual grade of the street, if they now have any against the city, is under Pub. Stat. chap. 52, § 15. See *Cambridge v. Middlesex County*, 125 Mass. 529; *Mitchell v. Bridgewater*, 10 Cush. 411. The ruling of the court that the petition was rightfully brought under Pub. Stat. chap. 49, was therefore erroneous.

Apparently the petitioners have never presented any petition to the mayor and aldermen, and therefore cannot maintain the present petition; but if the fact is otherwise, they can apply for leave to amend their petition. *Brown v. Lovell*, 8 Met. 172.

The facts proved raise a question of law on which the defendant is not concluded by its answer.

Exceptions sustained.

Samuel BIRCH *et ux.*

v.

Henry T. HUTCHINGS.

1. Where the defendant covenanted "that he will transfer to her, the said Eunice [Trefethen], the moneys originally deposited in her name in the Portsmouth Savings Bank, amounting to about \$284;" and in a suit upon the covenant he denied every allegation of the declaration; and it appeared there was on deposit, at a date prior to the date of the covenant, in said bank, to the credit of James Trefethen \$284.01, and to the credit of Eunice Trefethen \$491.72, and that on that date both sums had been transferred to the defendant; and there was no evidence that Eunice Trefethen ever had anything to do with the deposit to the credit of James Trefethen, or that she was aware of its existence, or that the covenant of the defendant applied to that deposit,—the plaintiff was held entitled to recover the \$491.72 which stood to her credit, and which was transferred by her to the defendant, with interest from the date of the covenant, no demand being necessary.
2. A statement that a witness for the defense was allowed to give certain testimony, which was "without contradiction," is not equivalent to a statement that the court found his testimony to be true. As there was no application for the reformation of the covenant, testimony given as to its legality would be immaterial.
3. Where the plaintiff appears to have been an ignorant woman, and the indenture was read to her, and there may have been a mistake on her part, her receipt of the bank-book containing the credit of \$284.01 transferred to her by the defendant created no estoppel, no injury having happened to the defendant in consequence.

(Suffolk—Filed June 3, 1887.)

ON defendant's exceptions. *Overruled.*

The nature of the case, the facts, and questions raised appear from the opinion.

Messrs. P. West and E. B. Callender, for defendant:

As there were two accounts in the said bank, evidence was properly admitted to identify the subject-matter of the transfer in the agreement on which the action is brought.

Stoops v. Smith, 100 Mass. 66.

The acceptance of the bank-book, on which was credited \$284.01, estopped the female plaintiff from claiming that any other book or sum of money was due her under the contract.

Where parties in dispute have agreed to a certain basis of settlement, and have accepted, with full knowledge of the facts, and without objection, the benefit of the terms of the settlement, they are estopped to claim that a different construction should be put upon the agreement.

Males v. Lowenstein, 10 Ohio St. 512.

So, one who accepts the benefit of a judg-

ment will not thereafter be permitted to assign error upon it.

Ruckman v. Alwood, 44 Ill. 183.

Interest should not be allowed in this case without evidence of a demand. The defendant was not a wrongdoer in acquiring or detaining the money, and, until demand, cannot be made liable for interest.

Hunt v. Nevers, 15 Pick. 505.

Mr. Henry F. May, for plaintiffs:

I. The contract gives a false description of the amount of money deposited,—a description that does not pretend to be accurate; and such description is mere surplage, and must not be allowed to limit the definite sum named.

Goodtitle v. Southern, 1 M. & S. 299.

Parol evidence is inadmissible to vary or contradict the terms of a valid written instrument.

Greenl. Ev. § 275, and cases cited.

Verba chartarum fortius accipiuntur contra proferentem.

II. Estoppel from conduct only arises where conduct has been such as to mislead.

Bigelow, Estop. 4th ed. p. 544.

"A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights."

Willmott v. Barber, 15 Ch. D. 105; *Russell v. Watts*, 25 Ch. D. 586.

A man is not estopped or concluded by admissions, whether implied from conduct or express, unless another person has been induced by them to alter his condition.

Devey v. Field, 4 Met. 381, citing *Heane v. Rogers*, 9 B. & C. 577.

III. Interest is to be allowed where the law, by implication, makes it the duty of the party to pay over the money to the owner without any previous demand on his part; so, where there has been a default of paying according to agreement, express or implied, to pay on a day certain, or after demand, or after a reasonable time.

Dodge v. Perkins, 9 Pick. 368, 388; *Foot v. Blanchard*, 6 Allen, 221; 2 Sedg. 168, 170, 176, note.

C. Allen, J., delivered the opinion of the court:

The declaration is upon an indenture dated April 13, 1877, whereby the defendant covenanted "that he will transfer to her, the said Eunice, the moneys originally deposited in her name in the Portsmouth Savings Bank, amounting to about \$284." The answer denies every allegation of the declaration; but it must now be assumed, though it is not stated, that the execution of the indenture was proved.

The defendant's bill of exceptions is quite meagre in its statement of facts, and most of those which are material are to be gathered solely from the contents of the indenture itself. From this source of information the circumstances appear to have been as follows:

On February 10, 1877, the plaintiff Eunice, before her marriage to her present husband, executed to the defendant a deed which contained a conveyance of certain real estate, an assignment of a mortgage running to her, and also a transfer of "moneys deposited in savings banks." The deed itself is not before us,

and the only information we have as to its contents is what can be gathered from the indenture. There is nothing to make it definite what "moneys deposited in savings banks" were included in the transfer. On March 23, 1877, Eunice, being then married, executed an instrument, which was recorded with Suffolk deeds, whereby said deed to the defendant was declared by her to be void. On April 13, 1877, a settlement between her and the defendant having been arrived at, the indenture upon which the present action is brought was executed between her and her husband, of the first part, and the defendant, of the second part, by which she ratified and confirmed her deed of February 10, 1877, and the defendant, among other things, entered into the covenant cited above.

At the trial, there was "evidence showing that on March 7, 1877, there was on deposit in the Portsmouth Savings Bank, to the credit of James Trefethen, \$284.01, and to the credit of Eunice Trefethen, \$491.72, and on that date both sums had been transferred to the defendant." But it does not appear who James Trefethen was. There is nothing to show that Eunice Trefethen ever had anything to do with the deposit to the credit of James Trefethen, or that she was aware of its existence. There is no other reference to James Trefethen in the bill of exceptions, or in any of the papers in the case, except the isolated fact above quoted. It does not appear that Eunice ever had any other money on deposit in the Portsmouth Savings Bank, except the sum of \$491.72, or that she ever had any money on deposit in any other savings bank. There is nothing in the case to show that the first part of the description of what the defendant agreed to transfer, viz.: "the moneys originally deposited in her name in the Portsmouth Savings Bank," can, by any elasticity of construction, be held applicable to anything except the deposit in her own name. We have no occasion to consider what would be the rule of law if this were otherwise.

It must therefore be now assumed that the judge found this description to be without ambiguity, and unsusceptible of more than one construction. This being so, the case falls within the rule that, where the descriptive words of a grant are wholly unambiguous, and are followed by a clause repugnant, the second clause is to be rejected. A mistake in the detail will not control the general and perfect description. *Cutler v. Tufts*, 3 Pick. 272, 277; *Bot v. Burnell*, 11 Mass. 163, 167; *Melvin v. Prop. of Locks & Canals*, 5 Met. 28; *Keith v. Reynolds*, 3 Greenl. 393. The grant of a farm on which J. J. D. now lives, to contain 87 acres, was held to pass the whole farm, containing 149 acres. *Jackson v. Barringer*, 15 Johns. 471. See also Shep. Touch. 100; 3 Washb. Real Prop. *628, 630. The devise of "all that my farm, called Trogue's Farm, now in the occupation of A. C." was held to include lands which were a part of that farm, though not in the occupation of A. C. *Goodtitle v. Southern*, 1 M. & S. 299. So here, since the words of description are without ambiguity, they must prevail over the inconsistent statement of the amount. If this construction does not carry out the intention of the parties, the defendant's

proper remedy was to seek for a reformation of the indenture. Its true construction as it stands is all that is before us.

It further appears that a witness for the defense was allowed to give certain testimony, which was "without contradiction." This is not equivalent to a statement that the court found his testimony to be true. But even assuming its truth, so long as the indenture stood as it was, and there was no application for its reformation, and the question was simply as to its legal construction, the testimony given was ineffectual.

The receipt by Eunice of the bank-book containing a credit of \$284.01, which sum had been transferred to her by the defendant, created no estoppel. Various elements of an estoppel are wanting. She appears to have been an ignorant woman. She signed the indenture with her mark. It was read to her, instead of her reading it herself.

There may have been a mistake on her part. No injury has happened to the defendant in consequence.

Interest was properly allowed. No demand was necessary. The promise implied a transfer at once.

Exceptions overruled.

Maximilian KAISER, *Petitioner to Prove Exceptions,*
v.

Charles ALEXANDER *et al.**

1. A petition to prove exceptions is exclusively within the jurisdiction of the full court; and a party has the right to have the full court revise the findings of the commissioner appointed to aid the court.
2. It seems that the respondent to a petition to prove exceptions has a right to have the material evidence taken by the commissioner reported to the full court.
3. The following verification to a petition to prove exceptions is insufficient: "Then personally appeared the above-named A. B. (petitioner's attorney), and made oath that the facts set forth in the foregoing petition and all the allegations therein subscribed by him, are true, to the best of my knowledge and belief;" but the respondent having waived the right to object thereto, the report will not be set aside by reason thereof.

(Filed January 12, 1887.)

PETITION by defendant, to prove exceptions in an action on an account annexed.
Report recommended.

The petition was as follows:

To the Honorable the Justices of the Supreme Judicial Court respectfully represents

*The opinion now reported should properly have appeared before the opinion on final hearing on the exceptions (Alexander v. Kaiser, 3 New Eng. Rep. 795), but through being withdrawn from the files it did not become accessible to the public until recently.
2 Mass.

your petitioner, Maximilian Kaiser, that he was the defendant in a suit brought against him by Charles Alexander *et al.*, pending in the Superior Court for the County of Suffolk; that at a trial of said suit in the January Term, 1885, of said Superior Court, before a justice of said court without a jury, on the 30th of January, 1885, a verdict was found against the defendant and for the plaintiff, and damages were assessed in the sum of \$2,174.22; that at said trial the presiding justice made certain rulings, and refused to make certain other rulings, by which the defendant was aggrieved, and to which rulings and refusals to rule the defendant, your petitioner, duly excepted, and duly reduced said exceptions to writing, and filed said exceptions with the clerk of said court, and gave notice thereof to the adverse party before the adjournment without day of the term in which said exceptions were taken, and within three days after the verdict in said case, to wit, on February 2, 1885, and asked that they might be allowed; but the presiding justice refused to allow said exceptions as requested by the defendant, and failed to sign and return them, greatly to your petitioner's prejudice and damage. And your petitioner says that said bill of exceptions—a copy of which is hereto annexed, marked "A," and made a part of this petition—is in conformity with the truth, and should have been allowed. And your petitioner further says that the said presiding justice filed in the clerk's office of the said superior court a certain bill of exceptions purporting to be the exceptions asked for by the defendant, but which were an alteration of his said bill; and that the said justice failed to sign and return the bill of exceptions prayed for by your petitioner. A copy of the said bill of exceptions filed by said justice is hereto annexed, and marked "B;" but said bill was not duly returned to the files of the court in conformity with the provisions of the statutes in such case made and provided. Wherefore said petitioner, within twenty days after notice of such refusal and failure to allow and return said bill of exceptions, and being aggrieved by such failure and refusal, respectfully petitions this honorable court he may be allowed to prove his said bill of exceptions.

Maximilian Kaiser.

By his Attorney, S. A. B. Abbott.

Suffolk, ss.

Boston, March 25, 1885.

Then personally appeared the above-named S. A. B. Abbott, and made oath that the facts set forth in the foregoing petition, and all the allegations therein subscribed by him, are true, to the best of my knowledge and belief.

Before me,

Jabez A. Sawyer,
Justice of the Peace.

[A]

Superior Court.

Suffolk, ss.

January Term, 1885.

Chas. Alexander *et al.* v. Maximilian Kaiser.

Defendant's Bill of Exceptions.

This was an action of contract. The declaration and answer are referred to and made part of this bill of exceptions. The declara-

tion consists of a single count upon an account annexed. All but three of the items in the account annexed are for goods sold and delivered by the plaintiffs to the defendant. The three last items are as follows:

"Frost note \$34.55; protest, \$1.31 - \$ 35.86
Judgment on Howard A. Tucker, - 560.00
Interest - - - - - 12.21"

Defendant contended that, if the goods described in the declaration were sold by the plaintiffs, they were not sold to him, the defendant. Among other evidence tending to prove that these goods were sold and delivered to the defendant, the plaintiffs offered their books of original entry, supported by the supplementary oath of the clerk who made the entries. The defendant objected to the admission of the entries in these books for the purpose of showing that credit was given to the defendant for the goods in question; but the presiding justice admitted the books for this purpose, as well as for the purpose of showing a delivery of the goods; and to this ruling the defendant excepted. Before the plaintiffs began to put in their case, the defendant notified them and the court that he should object to the admission of any evidence in support of the three items before set forth, on the ground that nothing was recoverable upon them under the pleadings. To prove the item, "Judgment on Howard A. Tucker," the plaintiffs offered evidence tending to prove that they made an agreement with the defendant to sue one Tucker, upon a claim that the defendant had against Tucker, if the plaintiff would pay the expenses of the suit; that they caused suit to be brought against Tucker, and obtained judgment therein for the benefit of the defendant, and that they paid the sum set forth in the item for the services of the attorney who conducted the suit. The defendant excepted to the admission of this evidence. To prove the item "Frost note," etc., the plaintiffs offered in evidence a note purporting to be made by one Frost, payable to the order of the defendant, and by him indorsed in blank, together with evidence tending to show that they were holders of said note. The defendant objected to the admission of this evidence, upon the ground that it was inadmissible under the pleadings; but the presiding justice admitted it, and the defendant excepted to this ruling.

Under the item "Interest," the plaintiffs contended that they could recover interest in the nature of damages for the detention of money due them, on the account sued upon, after demand made, before the bringing of the action, and offered evidence, which was objected to by the defendant, but admitted by the presiding justice, tending to prove a demand. To the ruling admitting this evidence the defendant excepted. The defendant contended that, under the pleading, no interest in the nature of damages could be recovered before the date of the beginning of this suit, and offered no evidence under this item. The presiding justice ruled, against the objection of the defendant, that interest in the nature of damages was recoverable under the pleadings, for the detention by the defendant, before the bringing of this action and after demand made, of money due by the defendant to the plain-

tiffs. To this ruling the defendant excepted. A verdict was found for the plaintiffs, and the damages were assessed in the sum of \$3,174.22.

The defendant, being aggrieved by the foregoing rulings and refusals to rule, excepted thereto, and prays that his exceptions be allowed.

By his attorney,

S. A. B. Abbott.

[B]

Superior Court.

Suffolk, ss.

January Term, 1885.

Chas. Alexander *et al.* v. Maximilian Kaiser.

Defendant's Bill of Exceptions.

This was an action of contract. The declaration and answer are referred to and made part of this bill of exceptions. The declaration consists of a single count upon an account annexed. All but three of the items in the account annexed are for goods sold and delivered by the plaintiffs to the defendant. The last two items are as follows:

"Judgment on Howard A. Tucker, \$560.00
Interest - - - - - 12.21"

Before the plaintiffs began to put in their case, the defendant notified them and the court that he should object to the admission of any evidence in support of the two items before set forth, on the ground that nothing was recoverable upon them under the pleadings. To prove the item "Judgment on Howard A. Tucker," the plaintiffs offered evidence tending to prove that they made an agreement with the defendant to sue one Tucker, upon a claim that the defendant had against Tucker, if the plaintiff would pay the expenses of the suit; that they caused suit to be brought against Tucker, and obtained judgment therein for the benefit of the defendant; and that they paid the sum set forth in the item for the services of the attorney who conducted the suit. The defendant excepted to the admission of this evidence. There was evidence tending to prove, and the court found, that the goods were sold by the plaintiffs to the defendant upon a credit of sixty days from the dates of the respective sales, and that, at some time after the expiration of more than sixty days from the date of the last sale, and before July 1, 1878, the plaintiffs called the attention of the defendant to the account, and demanded payment. The defendant asked the court to rule that, upon their evidence, the plaintiffs were not entitled, upon the declaration, to receive interest except from the date of their suit. But the court declined to rule as requested, and, in assessing damages, allowed the plaintiffs the sum of \$456 for interest from July 1, 1878, to the date of the suit. To the refusal to rule as requested, and to the allowance of said sum and interest, the defendant excepted. The plaintiffs, in the closing argument of their counsel, claimed interest only for the time when payment was demanded of the defendant; and the only ground for the recovery of interest prior to the date of the suit, which was discussed by counsel on either side, was that payment was demanded as before stated, and refused by the defendant. The court found for the plaintiffs, and ordered damages in the sum of \$3,174.22.

The defendant, being aggrieved by the fore-

going rulings and refusals to rule, excepted thereto, and prays that his exceptions be allowed.

By his Attorney,
S. A. B. Abbott.

Exceptions allowed.

Caleb Blodgett,
Judge Superior Court.

The court thereupon appointed Lewis S. Dabney, Esq., commissioner, to hear the parties, settle the truth of the exceptions, and report thereon to the court; and thereafter the commissioner presented the following report:

I, the undersigned, commissioner appointed by the foregoing orders, having met the parties, and heard their evidence and the arguments of their counsel, respectfully report:

I find that the bill of exceptions, whereof a copy marked "A" is annexed to the petition, as originally alleged and filed by the petitioner, is true.

I further report that, in reaching this conclusion as to the exception relating to the allowance of interest, I have regarded as affirmative evidence, supporting in all material respects the truth of said exception, as alleged in said bill of exceptions "A," the statement of the same exception, as amended by the judge who heard the case, which appears in the bill of exceptions, whereof a copy marked "B" is annexed to said petition, excepting only as to the allegations contained in said bill "A," that the petitioner objected to the evidence offered by the plaintiffs to prove a demand made prior to the beginning of the suit, and excepted to its admission. These allegations do not appear in said amended bill "B," but I, nevertheless, find them, on the evidence, to be true.

Lewis S. Dabney,
Commissioner.

Mr. S. A. B. Abbott, for petitioner.
Messrs. Sohler & Welch, for respondents.

Morton, Ch. J., delivered the opinion of the court:

Upon examining the papers it appears that the only material respect in which the bill found by the commissioner differs from the bill as allowed by the judge is as to the exception found to have been taken in regard to the Frost note for \$35.86, and as to the exception as to all the items, except the three hereafter mentioned, to the admission of the original books of entries supported by the supplementary oath of the clerk. In other respects, the two bills are in legal effect the same.

As to the item "Judgment on Howard A. Tucker," the two bills are identical, even in words. As to the item of "Interest," the bill allowed by the judge fully reserves to the defendant the question whether this could be recovered under the pleadings. This is the same question involved in the exception to the admission of evidence of a demand. The latter exception is therefore immaterial.

A petition to prove exceptions is exclusively within the jurisdiction of the full court. For convenience, a commissioner is appointed to aid the court in this duty; but a party has the right to have the full court revise the findings of the commissioner, if he takes proper steps to have the evidence taken reported to the full

court, if there is a conflict of testimony. *Ela v. Cockshot*, 119 Mass. 416. Whether the respondents might not be deemed to have waived this right by failing to ask the commissioner to report the evidence, we do not discuss. There is no rule of court on the subject, and, as matter of discretion, we think it is just that they should have the evidence reported, if the commissioner is able to report it. If the commissioner is not now able to do so, upon its so appearing, we will consider what are the rights of the parties, and what ought to be the discretion of the court.

But no sufficient reason is shown for reopening the case before the commissioner for any other purpose; and there is no occasion for reporting the evidence upon immaterial points, or upon points in which the commissioner agrees with the judge of the superior court.

As to the verification of the petition, it is informal, and would be held insufficient if brought to the attention of the court in due season (see *Hadley v. Watson*, 148 Mass. 27, 3 New Eng. Rep. 367); but the respondents have waived their right to object to it, and we think it would be unjust to set aside the commissioner's report at this late stage of the case.

The petition may be recommitted to the commissioner to report the evidence upon the two exceptions found by him and not allowed by the judge; namely, that as to the admission of the books, and that as to the Frost note. Under the circumstances, the commissioner ought to be requested to make an immediate report.

Report recommitted.

Margaret ADDISON
v.

NEW ENGLAND COMMERCIAL TRAVELLERS ASSOCIATION.

Where, in an application for membership to the defendant association, the following questions and answers were asked and given: "Q. To whom will you have your death loss paid? A. To my heirs. Q. State relationship to you, if any, of the person or persons to whom payable? A. Wife or daughters," the applicant then having a wife and two minor daughters,—*Held*, that he intended that the payment should be to his widow, or, if he left no widow, to his surviving daughters; and therefore,—*Held*, that payment of the death loss should be made to the widow.

(Suffolk—Filed June 29, 1887.)

ON report. *Judgment for plaintiff.*

Action to determine the ownership of a fund of \$3,000, which the defendant, a charitable association, admits to be payable as a death loss. The fund is claimed by the widow of the deceased member, as widow, and also as administratrix, and also by the representative of his daughter. At the hearing in the superior court, before Barker, J., the following facts appeared:

James Addison became a member of defendant association on November 7, 1878, and continued so, in good standing, until his death, on April 9, 1885, of which death suitable and due proof was given. The said Margaret Addison was married to him on January 25, 1857, and lived with him until his death.

The following questions were asked of said James Addison in his original application: Q. To whom will you have your death loss paid? A. To my heirs. Q. State relationship to you, if any, of the person or persons to whom payable. A. Wife or daughters.

No other designation of beneficiaries appears than those above mentioned.

At that time he had two daughters, Elizabeth C., aged sixteen years, and Mary E., aged twenty years, living with and dependent upon him. In 1882 Elizabeth died, never having married. Mary E. married Wm. L. Pratt in 1880, and died July 31, 1885. From the time of her marriage until her death Mary E. was supported by her husband.

Said Margaret Addison was dependent upon said James at the time he became a member of the association, and until his death. He left no property. Said Margaret was appointed administratrix of said James September 28, 1886.

Under exceptions by Margaret Addison, the court admitted, on offer by James McDonald, administrator of Mary E. Pratt, deceased, the certificate of membership to said James Addison, and also the stub from the corporation book, for the purpose of showing that the only designation made on both were the words "his heirs."

The said Margaret Addison asked the court to rule upon said facts: (1) that she was entitled to all of said money; (2) that said designation, on said application of "wife or daughters," was the designation by which the court should be guided in this question; and that it was the only proper designation of a person or persons which the deceased had made; and (3) that she was entitled to it because she was a dependent of said deceased at the time of his death, and said Mrs. Pratt was not dependent upon him at that time; and (4) that the meaning and proper construction of the designation "wife or daughters" was that it was to be given to her if living; if not, then to the daughters; and (5) that if she was not entitled to it as his widow, she is entitled to it as administratrix; but the court refused so to rule, and the said Margaret Addison excepted thereto.

The said James McDonald, administrator, asked the court to find and rule: (1) that he was entitled to the whole of said fund, as his intestate was the only heir of James Addison; (2) that according to the constitution of the association, art. 11, § 2, the fund was payable "to the person or persons previously designated by the deceased upon his application for membership, upon the books of the association, and upon his certificate of membership," and that no persons except "his heirs" were so designated; (3) that, at the date of the death of said James Addison, said Mary E. Pratt was entitled to take as "a relative," though not a dependent, if the relation of the person designated to the deceased at the time of his death

was material; (4) that if the said James McDonald be not entitled to the whole of said fund, then he is entitled to take two thirds thereof as the share of his intestate as heir of said Addison, or under the Statute of Distribution.

These requests were refused so far as they are inconsistent with the rulings and findings hereinafter stated; and the claimant, McDonald, duly excepted.

The court found, upon said facts and papers, that the meaning and intent of the said James Addison in the designation was that the said wife and two daughters were to receive the death loss; and, one of the daughters having deceased during his life, the said widow and surviving daughter should take said fund in equal shares, and so adjudged and decreed said fund to be paid, to wit: the sum of \$1,500 to said Margaret Addison, and the sum of \$1,500 to James McDonald, as administrator of Mary E. Pratt; to which order and decree each of the said parties excepted, and requested the court to report the facts and findings; and, at the request of both parties, facts and findings are reported to the supreme judicial court for its determination of the cause.

Mr. J. B. Richardson, for plaintiff, Margaret Addison:

Acts 1882, chap. 195, cannot affect the contract made in 1878.

Am. Legion of Honor v. Perry, 140 Mass. 580, 592, 1 New Eng. Rep. 715.

It was not within the scheme of the association to make provision for the benefit of estates, or of heirs,—which is the same thing.

Elsey v. Odd Fellows Mut. R. Asso. 142 Mass. 224, 2 New Eng. Rep. 667; *Briggs v. Earl*, 139 Mass. 478.

"My heirs" was not a legal or proper designation of a beneficiary.

Elsey v. Odd Fellows Mut. R. Asso. supra; *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 18 Bush, 489.

The act of the secretary in writing "heirs" upon the certificate and stub, under the impression that "heirs" was the same as "wife or daughters," cannot exclude Mrs. Addison.

Sweet v. Dutton, 109 Mass. 589; *Lavery v. Egan*, 143 Mass. 389, 8 New Eng. Rep. 439.

The question of dependency is an important one.

Briggs v. Earl, 139 Mass. 478.

Mrs. Addison is the only one now living who it can be claimed was a beneficiary.

Ballou v. Gile, 50 Wis. 614.

There is no authority for reading "and" "or" in this designation; the context does not require it. The word "heirs" does not require the money to be given to two or more persons. "wife or daughters" does not mean both. At this point it is like—

Whitcher v. Penley, 9 Beav. 477; *Crook v. De Vandes*, 9 Ves. Jr. 197; *Turner v. Montague*, 5 Ves. Jr. 557; *Montagu v. Nucella*, 1 Russ. 2.

Mr. George Fred. Williams, for James McDonald, administrator of Mary E. Pratt:

The construction of the designation "heirs" should not be affected by the subsequent answer; the construction must be of the contract into which the association entered, which was to pay to "my heirs."

Elsey v. Odd Fellows Mut. R. Asso. 142 Mass.

224, 2 New Eng. Rep. 667; *Barton v. Provident Mut. R. Asso.* 63 N. H. 585, 587; *Commonwealth v. Wetherbee*, 105 Mass. 149; *Bauer v. Samson Lodge Knights of Pythias*, 102 Ind. 262.

The word "or" is often construed to mean "and," to carry the intention into effect.

Fairfield v. Morgan, 2 B. & P. N. R. 38; *Right v. Day*, 16 East. 67; *Arnold v. Bufum*, 2 Mass. 208; *Ray v. Enslin*, 2 Mass. 554; *White v. Crawford*, 10 Mass. 183; *Carpenter v. Heard*, 14 Pick. 449, 458; *Litchfield v. Cudworth*, 15 Pick. 24, 27; *Parker v. Parker*, 5 Met. 184, 137; *Hunt v. Hunt*, 11 Met. 88, 98.

The certificate of a benefit association is, in legal contemplation, a policy of insurance, and governed by the same rules of law.

Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593, 4 West. Rep. 712; *Bailey v. Mut. Benefit Asso.* 15 Ins. L. J. 798; *Dolan v. Court Good Samaritan*, No. 6910, 128 Mass. 488.

This case is within the distinction made in *Fabens v. Fabens*, 141 Mass. 395, 399, 2 New Eng. Rep. 330, between gifts to heirs by way of substitution or succession, and gifts to heirs as persons designated to take in their own right. In such cases the courts have usually held that the word "heirs" must receive the meaning which it bears at common law, as the persons entitled to succeed to real estate in case of intestacy.

Nor does the recent case of *Lavery v. Egan*, 143 Mass. 389, 3 New Eng. Rep. 489, seem to conflict with this rule.

W. Allen, J., delivered the opinion of the court:

The only designation which the deceased attempted to make was in answers to the printed questions in his application for membership. The persons whom he could designate were limited by the statute (Stat. 1877, chap. 204), and by the charter or certificate of incorporation, to his widow, his orphan children, and other persons dependent upon him. The by-laws of the corporation provided that, if he made no designation, the amount should be paid to his widow, or, if he left no widow, to a guardian or trustee of his minor children. At the time of making his application, in 1878, he had a wife and two minor children,—daughters. In answer to the question, "To whom will you have your death loss paid?" he answered, "To my heirs." Had this been all, his meaning might have been doubtful. It could not have been presumed that he intended to include heirs who could not lawfully be designated, or that he intended to exclude his widow; and it might be presumed that he had in mind only his wife and children, and intended to designate them. But it might have been doubtful whether he intended to designate them to take as distributees, under the Statute of Distributions, or as beneficiaries under the charter and by-laws of the corporation. The word "heirs," used to designate such beneficiaries, excluding one class,—mere dependents,—and including the other two,—widow and orphan children,—applies as naturally to the classes as to the individuals comprising them, and indicates the widow and orphan children quite as plainly as it indicates the widow and surviving daughters.

But we think that the answer to the next

question leaves no doubt as to the meaning. The question was, "State the relationship of any of the persons to whom payable," and the answer is, "Wife or daughters." The answer involved a more particular description of the beneficiaries intended to be designated than was contained in the former answer; and, in thus designating them, the applicant separates the two classes which he included in the general word "heirs," and says in substance: "The person or persons to whom it is payable are my wife or my daughters." The answer is short and concise, but the meaning is sufficiently plain that he intended that the payment should be to his widow, or, if he left no widow, to his surviving daughters. This is the natural meaning of the language, and it is what would be expected. If his wife should survive him she would have the care and nurture of their minor children; and she, and not they, would be the person to whom payment was intended to be made by the statute and by the charter and by-laws of the corporation; and the payment to her would be for their use as well as for her. The intention that the money should be divided between the widow and surviving children is not in accordance with the purpose of the association, or the probable object of the applicant, and is not shown by the language of the designation. See *Hall v. Hall*, 140 Mass. 267, 1 New Eng. Rep. 233. If there was any designation, it was to the widow, or, if there should be no widow, to the surviving daughters. If there was no valid designation, the widow is entitled to the money. It is therefore unnecessary to consider the several objections presented to the sufficiency or validity of the designation. In any aspect of the case, the money is to be paid to the widow.

Order accordingly.

Mary T. AMMIDOWN, Admx.,
v.

Joseph KINSEY.

1. A bill in equity, brought by the administratrix *de bonis non* with the will annexed, against a former executor, alleging that defendant, as executor, sold real estate under a power in the will, and misappropriated the proceeds, and refuses to account for them, cannot be maintained.
2. An executor's account of an estate in process of settlement in the probate court can be rendered only in that court, and this court has jurisdiction of it only as the supreme court of probate on appeal.

(Suffolk—Filed June 29, 1887.)

A PPEAL by plaintiff from the decree of a single justice of the Supreme Judicial Court (Gardner, J.), sustaining a demurrer to a bill in equity. *Bill dismissed.*

The following is a copy of the bill:

To the Honorable the Justices of the Supreme Judicial Court, sitting in Equity, in and for the County of Suffolk:

Mary T. Ammidown complains and shows:

1. That in June, 1869, Henry C. Ammidown, late of Southbridge in the county of Worcester, died testate, and on the 10th day of September, 1869, Joseph Kinsey, the respondent, was duly appointed his sole executor, and so continued until the 6th day of April last, at which time he resigned, and the complainant was duly appointed and still is administratrix, *c. t. a., d. b. n.* of said estate; that among the provisions of the will of said Henry C. Ammidown is the following, viz.: "I also * * * authorize them (his executors) to sell any or all my estate, real or personal, without leave of court, as they may think best for convenience or economy in settling and arranging my said estate; but in case they sell real estate my wife shall be entitled only to the income from a proper investment of the proceeds of said real estate or her share of it, the same as she would have been if it had remained in real estate. And my executors shall make the said proper investment of proceeds of real estate;" as will more fully appear by reference to the copy annexed, marked "A." That, under claim of said authority, said Kinsey, during his said incumbency, at various times, sold the so-called homestead lot of land, for \$6,000; the Hibbard lot, for \$3,866; and the Columbian lot in two parcels, one for \$650 and one for \$400,—all being of the said estate.

2. That the said several sales were not made for the payment of debts or legacies, nor best for the convenience or economy in settling and arranging said estate, nor so considered by said Kinsey; that the proceeds of said sales were not properly invested according to the terms of the will, nor according to law; but the same, or a large portion thereof, were improperly invested, and were converted and appropriated by said Kinsey to his own use, and were applied to the benefit of the corporation of Post & Co., of said Cincinnati, and to other uses to your complainant unknown; that said Kinsey has derived large profits from said proceeds, and that the accounts of said Post & Co. and of said Kinsey will show such appropriation; but said Kinsey refuses to show the same or either of them, though able so to do, and refuses to render a just and true account of said proceeds, or to pay and deliver them to complainant; and your complainant, without the aid of this honorable court, is unable to discover and obtain said proceeds and profits, and is remediless in the premises.

By her attorney,
Henry H. Buck.

Messrs. Henry H. Buck and F. P. Goulding, for plaintiff:

The bill sets forth a proper case in equity.

Pub. Stat. chap. 151, § 4; *Buttrick v. King*, 7 Met. 20; *Varnum v. Meserve*, 8 Allen, 158; *Rogers v. Daniell*, 8 Allen, 848; *Rich v. Rich*, 113 Mass. 197; *Johnson v. Johnson*, 120 Mass. 465, 467; *Sevall v. Patch*, 132 Mass. 826.

Equity is the most appropriate remedy.

Story, Eq. Jur. § 534; *First Cong. Soc. v. Trustees*, 23 Pick. 148, 153; *Burlingame v. Hobbs*, 12 Gray, 867, 871; *Sigourney v. Wetherell*, 6 Met. 553, 559.

An executor investing the trust funds in trade or speculation must account for and pay

over all profits; and he is bound to produce the books of account, even though they contain his private accounts, or the accounts of the company in which the funds are invested.

Perry, Tr. §§ 454, 821; Wms. Exrs. 1964, and cases cited.

No action would lie on the defendant's bond.

White v. Ditson, 140 Mass. 351, 1 New Eng. Rep. 485.

The court will be astute to enforce the performance of the trust by one who has his appointment under Massachusetts law.

Sigourney v. Wetherell, 6 Met. 559; *Chase v. Chase*, 2 Allen, 101; *Felch v. Hooper*, 119 Mass. 52; *Jenkins v. Lester*, 131 Mass. 357.

Under a prayer for general relief in a suit in equity, any relief in addition to that specifically prayed for may be granted, which the nature of the case requires.

Franklin v. Greene, 2 Allen, 519; *Miller v. Lord*, 11 Pick. 11; *Story, Eq. Pl. § 41*, note 2; *Dan. Ch. Pr. 378*.

Mr. J. M. Cochran, for defendant:

This bill, as a bill for discovery, is fatally defective in that it does not aver that any suit at law has been brought, or is intended to be brought, to the support or defense of which the discovery which is sought is material.

Pease v. Pease, 8 Met. 398; *Haskins v. Burr*, 106 Mass. 48; *Mitchell v. Green*, 10 Met. 108; *Coop. Eq. Pl. 58; Moody v. Gay*, 15 Gray, 457.

Treating it as a bill for relief as well as discovery, it is bad because no relief is prayed for in the bill.

Pike v. Slack, 21 Pick. 361; *Story, Eq. Pl. §§ 318, 319*.

If discovery can be had by interrogatories under the statute, the bill will be dismissed.

Ahrend v. Odiorne, 118 Mass. 269; *Pool v. Lloyd*, 5 Met. 525; *Ward v. Peck*, 114 Mass. 121.

Until the executor sets apart a specific sum to be held by him as trustee, he is responsible as executor for the same, and must account therefor as executor, and his sureties are liable therefor.

Miller v. Congdon, 14 Gray, 114; *Prior v. Talbot*, 10 Cush. 1.

A bill is demurrable, not only if it shows that plaintiff has a remedy at law equally sufficient and available, but also if he fails to show that he is without remedy.

Jones v. Newhall, 115 Mass. 247, and cases cited; *Suter v. Matthews*, 115 Mass. 255; 123 Mass. 287; 134 Mass. 593.

If a bill seeks either general or special relief, and also a discovery, if the plaintiff shows no title to the relief sought, a demurrer lies to the whole bill.

Emery v. Bidwell, 140 Mass. 271, 1 New Eng. Rep. 231; *Ahrend v. Odiorne*, 118 Mass. 261; *Walker v. Brooks*, 125 Mass. 248; *Pool v. Lloyd*, 5 Met. 525.

This bill shows no case for an account or relief that cannot be obtained at law.

Walker v. Brooks, *supra*; *Badger v. McNamara*, 123 Mass. 117.

W. Allen, J., delivered the opinion of the court:

This bill is exceedingly meagre. It is brought by the administratrix *de bonis non* with the will annexed, of Henry C. Ammidown, against

the former executor. The substantial allegations are that the defendant as executor sold real estate under a power in the will, and misappropriated the proceeds, and refuses to account for them. The bill contains no prayer, and it is not sworn to. It is not a bill for discovery, and apparently was framed as a bill for an account of the proceeds of the sale and of the profits received by the defendant from their use, and must be sustained as such, if at all.

If the proceeds did not belong to the estate of the testator, the plaintiff, as administratrix of that estate, cannot require an account of them; if they belonged to the estate, the defendant was and is bound to account for them as executor. The statute requires that an executor's account of an estate in process of settlement in the probate court shall be rendered only in that court, and this court has jurisdiction of it only as the supreme court of probate on appeal. Pub. Stat. chap. 144, § 156; *Wilson v. Leishman*, 12 Met. 816; *Sever v. Russell*, 4 Cush. 518; *Southwick v. Morrell*, 121 Mass. 520; *Blake v. Pogram*, 101 Mass. 592, 597; *Parker v. Parker*, 118 Mass. 110, 118.

Defendant was appointed executor before Stat. 1880, chap. 152 (Pub. Stat. chap. 129, § 5), was enacted, and while Gen. Stat. chap. 98, § 2, was in force, by which the condition of the general bond of an executor was to account for the proceeds of real estate sold for the payment of debts. It is argued that the defendant would not be liable upon such a bond for the proceeds of the real estate sold by him under the power in the will; and that, as the plaintiff has no remedy upon the probate bond, she should be allowed to maintain a suit without accounting in the probate court. There is no allegation in the bill in regard to a bond, or to the manner of the sale, except that it was made by the defendant under claim of the authority given by the will. It is consistent with this, that he may have applied to the probate court and given a special bond provided for by Gen. Stat. chap. 102, § 6. But if it sufficiently appears that the sale was without an order of court, and that only the general bond was given, the proceeds would be goods and estate of the testator in the hands of the executor, for which he would be bound to account as such. *Minot v. Norcross*, 148 Mass. 826, 8 New Eng. Rep. 488. It may be that, after the liability of the defendant is ascertained and fixed by an accounting in the probate court, an action will lie by the plaintiff against the defendant to recover it. *Buttrick v. King*, 7 Met. 20. But this bill is for an account by an executor, and contains no allegations which show that this court has jurisdiction of the matter.

Bill dismissed.

James P. HAMILTON *et al.*

v.

M. J. McLAUGHLIN.

1. **Where the only ground defendant has for keeping property demanded is a lien upon it,—a claim to hold it, and a refusal to deliver it to the owner on demand, under and in assertion of a right other than that given by the lien, are evidence of a conversion.**

2 MASS.

2. **A refusal to deliver the property unless, not only the amount of the lien upon it, but also another debt, is paid, was a refusal to deliver it upon the payment of the amount of the lien, and rendered a tender of it unnecessary.**

(Suffolk—Filed July 1, 1887.)

ON defendant's exceptions. Overruled.

Tort for conversion of horse. Answer, general denial, and also a lien claim for board of the horse. One Peasley, offered by plaintiffs, testified that from November, 1881, until April, 1883, he was superintendent of the stable, at Worcester, Massachusetts, of the Worcester Herdic Phaeton Company, which had given a mortgage on the horse in suit to plaintiff; that the horse for which this suit was brought was there when he went there; that, in the spring of 1884, he went to defendant's stable in Boston to identify the horse, and did so; and that defendant refused to give him up unless paid for the board bill, the amount of which witness did not ask. The horse was worth about \$50.

One Backall, plaintiffs' agent, in March, 1884, to recover some horses that plaintiffs had a mortgage on, testified that he learned where the horse was from one Strapney, who boarded the horse with defendant, and who had hired the horse previously from one Nutting, and who at one time represented the Worcester Company—but whether at that time or not witness did not know. Some few days afterwards witness got a postal card from defendant informing him that he had a horse of the company's, and the amount of the board due, and to come for him. In the course of two or three weeks witness went there with Peasley to identify the horse, and was again refused possession until the board bill was paid. The amount of the bill was for the whole time that remained unpaid, both before and after notice to the plaintiffs' agent that the horse was there.

The plaintiffs' counsel offered a mortgage from the Worcester Herdic Phaeton Company to the plaintiffs, dated April 15, 1883. The subscribing witness being dead, and plaintiffs' counsel stating that he personally knew his signature, defendant's counsel waived the formal proof of the handwriting of the subscribing witness, and the mortgage was put in evidence. The mortgage was for \$10,000, on one hundred horses and other personal property, and contained the usual covenant that, until default, the mortgagor should retain the use and possession of the mortgaged property. It was proved that the condition of the mortgage had been broken.

The mortgage concluded as follows, viz.:

In witness whereof, the said Worcester Herdic Phaeton Company has caused its corporate seal to be hereto affixed, and these presents to be signed by Wade Hampton Hill, its president, this 15th day of April, 1883.

Worcester Herdic Phaeton Co.,

By W. H. Hill, President.

Impression of seal engraved,

"Worcester Herdic Phaeton Co."

August, 1881.

In presence of F. T. Blackmar.

The mortgagor was described in the begin-

ning of the mortgage as "The Worcester Herdic Phaeton Company, a corporation duly established by law, and having its place of business in the city and county of Worcester, and Commonwealth of Massachusetts."

The defendant contended that it was incumbent upon the plaintiffs to prove that the Worcester Herdic Phaeton Company was a corporation, and that the person signing the mortgage was duly authorized thereto. The court ruled that the evidence was sufficient to warrant the jury in so finding. The plaintiffs rested their case.

Defendant testified that he kept a boarding and livery stable in Boston, in 1884. Strapney boarded the horse there before that time, and continued after defendant took the place. In April defendant learned that the horse belonged to the company, and notified its attorney to come for him, and also of the amount of the bill then due. The agent came and refused to pay anything, and went away. The entire amount of the board bill was about \$40, and the horse was worth about \$40 or \$50.

The evidence was uncontradicted that the horse was left in possession of the mortgagor up to the time of the alleged conversion. Upon plaintiffs' contention that the horse was taken to defendant's stable without plaintiffs' knowledge or consent, and therefore no lien would run against them, the court instructed the jury that, if the horse was taken to defendant's stable with the express or implied consent of plaintiffs, they could not recover, and instructed the jury as to what would constitute implied consent, in terms not excepted to.

Defendant contended that, even though there was no lien prior to the notice to plaintiffs' attorney, there would be a lien for the term subsequent to the notice; and requested the following instructions:

"1. That it was incumbent upon the plaintiffs to prove that the mortgage was, at the time of bringing of this suit, or the refusal to deliver the horse, a valid existing mortgage; and, incident thereto, that it was their duty to prove that the Worcester Herdic Phaeton Company was a corporation duly established by law, and that the person signing the name of said company to this mortgage had authority, by vote of that corporation, so to do. A failure of such proof is fatal to the plaintiffs' case."

The court gave the ruling, but also added: "I also instruct you that the introduction of the mortgage in evidence is sufficient to allow you to find those facts. The signature and seal appear to be regular and proper, and are sufficient *prima facie* to establish their claim, unless attacked;" to which the defendant excepted.

"2. If the jury find that the duly authorized agent of the plaintiffs was notified by the defendant that their horse was at his stable, and they saw fit to permit the horse to remain with the defendant for one or two weeks after such notice, the law implies a promise to pay for the keep of the horse for that period at least, and would entitle the defendant to a lien for that period against the plaintiffs."

"3. If, at the time of the demand upon the defendant, by the plaintiffs, for the horse, there was any sum due for board after notice to them that their horse was in his possession, he

has a lien on the horse, and was entitled to hold the horse until his claim was satisfied."

The second and third requests for ruling the court refused to give, and gave no equivalent instructions; and the defendant excepted.

Messrs. Collins, Burke, & Griffin, for defendant:

Plaintiffs were duly notified, through the attorney, that their horse was at his stable, and to call for him, which plaintiffs did not do till two or three weeks had elapsed. During such time defendant boarded the horse with the implied consent of plaintiffs, and their attached thereon for the same. Plaintiffs' consent may be implied, it being for the interest of mortgagees and mortgagors to preserve security.

126 Mass. 294.

Mr. W. B. Orcutt, for plaintiffs:

Proof of the execution of a mortgage by the president of a corporation, in the corporation name, and under the corporate seal, is sufficient *prima facie* evidence that it was duly authorized act of the corporation.

Murphy v. Welch, 128 Mass. 489; *Talbot v. Hodson*, 7 Taunt. 251; *McQueen v. Farry*, 11 Ves. 467; *Griffin v. Mason*, 3 Camp. 481; *Davis v. Jenney*, 1 Met. 221; *Williams v. F. Ins. Co. v. Frothingham*, 122 Mass. 39.

If one having a lien includes in this another, to which no lien attached, he takes the whole, or loses his lien.

Lambard v. Pike, 33 Me. 141; *Alcock v. 14 Ill. 75*; *Chase v. Westmore*, 5 M. & S. 100; *McPherson v. Neuffer*, 11 Rich. (S. C.) 20.

One obtaining property tortiously cannot hold the same by virtue of any lien.

Taylor v. Robinson, 2 Moore. 730.

Notice alone is not enough to charge a lien.

Sargent v. Usher, 55 N. H. 287; *Robinson v. Baker*, 5 Cush. 137; *Storms v. Smith*, 157 Mass. 201.

Statutory liens are *stricti juris*.

Rogers v. Currier, 18 Gray, 129, 184.

W. Allen, J., delivered the opinion of the court:

The only lien which the defendant claimed for keeping the horse after notice to the plaintiffs and request to take it away. Whether the evidence was sufficient to prove that there was such a lien, and whether the instructions in regard to it were sound, we do not deem it necessary to consider. It is immaterial whether the defendant had a lien, if he waived it at the time of the demand. A claim to hold the horse for the session of the property, and a refusal to deliver it on demand, under and in assertion of a right other than that given by the lien, is evidence of a conversion. There is no dispute about the facts. When the defendant notified the plaintiffs that the horse was at his stable, he sent a bill for the keep of the horse for that time, amounting to about \$40. When the demand was made by the plaintiffs a few weeks later, the defendant refused to deliver the horse unless the whole bill for board was paid. He made no distinction between what accrued before, and what accrued after, the notice to the plaintiffs, but demanded the whole in one sum and as one debt. He claimed distinct liens for distinct debts.

what accrued before, and what accrued after, the notice to the plaintiffs,—it may be that he would not thereby have waived a valid lien for one of the debts only, without the refusal of a tender of that alone; but the demand for the whole as one debt, and the refusal to deliver the property unless the whole was paid, was a refusal to deliver the property upon the payment of the amount which had accrued after the notice, or to accept a tender of that; and rendered a tender of it unnecessary. *Jones v. Tarleton*, 9 M. & W. 675; *The Norway*, B. & L. 404; *Kerford v. Mondel*, 5 H. & N. 931; *Dirks v. Richards*, 4 M. & G. 574; *Scarfe v. Morgan*, 4 M. & W. 270.

The evidence of plaintiffs' title was sufficient, and there was no error in the instructions in regard to it.

Exceptions overruled.

Helen M. KEITH

v.

Charles H. McCAFFREY.

1. In a proceeding under a complaint in **bastardy**, where a judgment by default was entered within four days after the default,—*Held*, that Pub. Stat. chap. 171, § 1, does not apply to such proceedings, and that the judgment was not irregular because entered on the day of the default.
2. A court has authority to vacate a judgment rendered by it, for the reason that it was entered by fraud or by the mistake of the court or of the party.
3. It is not necessary that the mistake should be of the court, or in the mere rendering or entering of the judgment. A judgment regularly entered upon a default suffered by mistake may be said to be rendered by mistake, and the court may, in its discretion, vacate it for that reason; especially when the motion to vacate is made at the same term as the entry of the judgment.

(Suffolk—Filed July 1, 1887.)

ON defendant's exceptions. *Sustained.*

Motion by defendant that judgment or decree entered in a proceeding under a complaint in **bastardy** be vacated or stricken off, and the case brought forward for trial, on the ground that decree had been entered by mistake. In the proceeding, defendant had duly appeared by counsel and filed his answer of not guilty, and a general denial. When the case was called for trial, he was not present in court in person or by attorney, and was thereupon defaulted; and on the same day a decree was entered against him.

The court, Dewey, J., ruled as follows:

"I am not satisfied that the judgment or decree referred to in the motion was entered by mistake, or is in any way irregular; but I am satisfied that defendant did not intend to make default; that his failure to be present when the case was reached for trial is reasonably explained, and that upon the merits, so far as

vacating the judgment and restoring the case for trial are concerned, the motion ought to be allowed; and I deny the motion for the reason that I doubt the authority of the court to grant in this manner the relief sought for."

Messrs. Upham & Prctor, for defendant: The bastardy process under our statutes is a civil action.

Maloney v. Piper, 105 Mass. 234; *Woodman v. Jarvis*, 12 Gray, 192; *Young v. Makepeace*, 108 Mass. 55; *Bailey v. Chesley*, 10 Cush. 284.

Judgment should not have been entered until four days after default.

Pub. Stat. chap. 181, § 1.

If a judgment was erroneously entered by mistake, the court has power to vacate the same and bring the action forward on motion.

Stickney v. Davis, 17 Pick. 170; *Capen v. Stoughton*, 16 Gray, 384; *Lucy v. Dowling*, 114 Mass. 93.

Mr. Thomas E. Barry, for plaintiff:

The decree was properly entered on the day of default. A *mittimus* even might have been issued on the same day, and it makes no difference that the statute provides that these prosecutions should be according to the course of proceedings in civil cases.

Young v. Makepeace, 108 Mass. 50.

W. Allen, J., delivered the opinion of the court:

The defendant was defaulted for failing to appear when the case was called for trial, and on the same day a decree was entered against him. Subsequently, at the same term, he made a motion that the judgment be vacated for the reason that it was entered by mistake. After a hearing upon the motion, the judge filed a ruling which recited that he was not satisfied that the judgment was entered by mistake, or was irregular, and stated certain facts or findings in regard to the default, and concluded in these words: "I deny the motion, for the reason that I doubt the authority of the court to grant in this manner the relief sought for."

We understand the question intended to be presented by the ruling, which is in the nature of a report of the case, to be whether, upon the record and the statements in the ruling, the court had authority to grant the motion. The court did not find as a fact that the judgment was, or that it was not, entered by mistake. The principal mistake relied on by the defendant was in irregularly and in advertently entering the judgment within four days after the default, in disregard of Pub. Stat. chap. 171, § 1. This would be a mistake of the court in irregularly rendering the judgment. The other mistake suggested was, not of the court in entering the judgment, but of the defendant in suffering the default upon which the judgment was founded. We understand the ruling of the judge that he was not satisfied that the judgment was entered by mistake or was irregular to have more particular reference to the former of the alleged mistakes, and to have been intended as a ruling that there was no irregularity found, and not a finding of fact that the judgment was not entered by mistake; and the whole ruling to present the questions whether, by reason of the supposed irregularity, or of the facts and findings relative to the default, the court had authority

to find that the judgment was rendered by mistake, and to vacate it for that reason.

Upon the first question we are inclined to think that Pub. Stat. chap. 171, § 1, does not apply to these proceedings, and that the judgment was not irregular because entered on the day of the default.

In regard to the other question, we think that the facts stated are sufficient to authorize a finding that the judgment was entered by mistake.

The authority of a court over a judgment which it has rendered, to bring the cause forward and vacate the judgment for the reason that it was entered by fraud or by the mistake of the court or of the party, is well settled. *Edson v. Edson*, 108 Mass. 590; *Marshall v. Merritt*, 108 Mass. 45; *Stickney v. Davis*, 17 Pick. 169; *Capen v. Stoughton*, 16 Gray, 364; *Commonwealth v. Weymouth*, 2 Allen, 144; *Mason v. Pearson*, 118 Mass. 61; *Cannon v. Reynolds*, 5 El. & Bl. 301; *Atwood v. Chichester*, L. R. 3 Q. B. Div. 722.

It is not necessary that the mistake should be of the court, or in the mere rendering or entry of the judgment. A judgment regularly entered upon a default suffered by mistake may be said to be rendered by mistake. When, as in this case, a party appears and answers, and is defaulted because he is not present when the case is called for trial, and judgment is entered on the default, when he did not intend to make default and his absence is reasonably explained, and he shows circumstances from which the court finds that the judgment ought to be vacated and a trial allowed, we think that the court might and ought to find that the judgment was rendered by mistake. It would be within the authority and in the discretion of the court to bring forward the case and vacate the judgment for that reason. One consideration, among many others, in determining that discretion, would be the lapse of time after the judgment was entered; another would be the sufficiency of other remedies. Without regard to the question whether Pub. Stat. chap. 187, § 17, includes the judgment in this case and provides another remedy, and having regard to the fact that the motion to vacate the judgment was made at the same term or sitting of the court at which the judgment was entered, we have no doubt that the court had authority to bring forward the case and vacate the judgment, either on petition or on motion.

Exceptions sustained.

BOSTON MANUFACTURING CO.

v.

COMMONWEALTH of Massachusetts.

1. The excise imposed upon corporations by Pub. Stat. chap. 13, § 38 (founded upon Acts 1864, chap. 208; Stat. 1865, chap. 283; and Stat. 1867, chap. 52), is a tax upon the franchise of a corporation, and not upon its property, and is thus constitutional.
2. In permitting a petition to this court to recover back a tax or excise which should not have been exacted, it was not intended to enable a corporation to

bring before this court the inquiry whether there had not been an over-valuation of that which was taxable, but whether there had been a wrongful assessment of a tax or excise upon that which was not the proper subject of taxation.

3. In providing for an assessment by the deputy tax commissioner, and for a board of appeal, all the provision was made which was deemed necessary, so far as valuation is concerned.
4. Jurisdiction has been given to this court to determine whether a tax or excise has been imposed upon that which was a lawful subject of tax or excise, but not to determine whether the valuation made by the board of appeal was correct in amount, for which inquiry a bill in equity is not adapted.
5. An excise imposed by virtue of Pub. Stat. chap. 13, § 38, can not be held to be assessed without authority of law in this case, even if the evidence before the board should seem to this court to have been insufficient to justify the valuation which it saw fit to place upon the shares.

(Suffolk—Filed June 20, 1887.)

ON report. *Petition dismissed.*

Petition under Pub. Stat. chap. 13, § 64, to the supreme judicial court by a corporation aggrieved by exaction of tax or excise. The case came on to be heard on petition, demurrer, and answer before Holmes, J., who overruled the demurrer, and heard evidence of parties *de bene* as to the valuation of shares of stock, subject to all objections on either side.

The facts appear in the opinion.

Messrs. T. L. Livermore and F. P. Fish, for petitioner:

The law imposing the excise on corporations can be upheld as constitutional only under Const. chap. 1, pt. 2, § 1, art. 4, which gives authority to impose and levy reasonable duty and excises upon any parties, goods, etc., whatsoever, brought into, produced, manufactured, or being within the Commonwealth.

Commonwealth v. Hamilton Mfg. Co. 13 Allen, 298, 302, 304; *Commonwealth v. Cary Imp. Co.* 98 Mass. 22; *Oliver v. Washington Mills*, 11 Allen, 268; *Commonwealth v. New England & T. Co.* 13 Allen, 391; *Commonwealth v. Berkshire L. Ins. Co.* 98 Mass. 25; *Boston & L. R. Co. v. Commonwealth*, 100 Mass. 399.

Where the facts are undisputed, and the evidence, through the inference which the jury can rightfully draw from it, does not, as a matter of law, have a tendency to establish a proposition which is essential to the maintenance of plaintiff's case, the judge should so instruct the jury.

Lane v. Old Colony & F. R. R. Co. 14 Gray, 147.

Where all the evidence is reported, the inquiry is whether it will justify the finding as a legitimate inference, not whether the finding is against the weight of the evidence.

Great Barrington v. County Comrs. 112 Mass. 218, 224; *Farmington R. W. P. v. County Comrs.* 112 Mass. 206.

Mr. Harvey N. Shepard, Asst. Atty.-Gen., for the Commonwealth.

Devens, J., delivered the opinion of the court:

The excise which the petitioner seeks to recover was imposed by virtue of Pub. Stat. chap. 13, § 38, under the previous Acts of 1864, chap. 208; Stat. 1865, chap. 288; and Stat. 1867, chap. 52, upon which the section in question is founded. This excise has repeatedly been held to be a tax upon the franchises of a corporation, and not upon its property, and thus constitutional. *Commonwealth v. Hamilton Mfg. Co.* 12 Allen, 298; *Commonwealth v. Cary Imp. Co.* 98 Mass. 32; *Commonwealth v. Berkshire L. Ins. Co.* 98 Mass. 25; *Manufacturers Ins. Co. v. Loud,* 99 Mass. 146.

The sections of the statute which apply to the petition are as follows:

"The tax commissioner shall ascertain from the returns, or otherwise, the true market value of the shares of each corporation, * * * and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock." Pub. Stat. chap. 13, § 39.

Section 62 provides: "The treasurer and auditor of the Commonwealth, together with one member of the council, * * * shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner * * * may apply for a correction of the same. Upon such appeal said board shall, as soon as may be, give a hearing to such party, and shall thereupon decide the matter in question; * * * and such decision shall be final and conclusive as to the rights of the parties affected."

Section 64 provides: "Any corporation * * * aggrieved by the exaction of said tax * * * may * * * file a petition to the supreme judicial court, in the nature of a petition of right, setting forth the amount of the tax or excise and * * * the general legal grounds, if any, upon which it is claimed such tax or excise should not have been exacted; and specifically the grounds in fact, if any, upon which it is so claimed."

The petition alleges and the answer admits that the capital stock of the petitioner was 800 shares of the par value of \$1,000 each; that the deputy tax commissioners, under Pub. Stat. chap. 13, assessed a tax upon the petitioner of \$1,097.58; that the petitioner appealed to the board of appeal from the decision of the deputy tax commissioner, and that the board affirmed his decision, and fixed the value of the shares at \$1,250 each, and determined the credits which should be allowed and deducted for real estate and machinery subject to local taxation, to be \$924,200; and that the petitioner thereupon paid said tax under protest, reserving the right to file this petition.

The petition further alleges that the true market value of the shares was \$1,050 each. Reckoning the shares at their true market value of \$1,050 would make their total valuation \$850,000; and the petitioner contends that, inasmuch as there was no excess in the value of its shares over the credit allowed for the local tax, no excise should have been required by the Commonwealth.

What the petition sets forth is therefore an
2 MASS.

error of judgment, by which the shares in the plaintiff corporation have been overvalued; and further, that, if they had been correctly valued, no assessment whatever should have been made upon the corporation, by reason that amounts which it was entitled to have deducted on account of the property held by it, and elsewhere taxable, would have exceeded the aggregate value of the shares. In permitting a petition to this court to recover back a tax or excise which should not have been exacted, it was not intended to enable a corporation to bring before this court the inquiry whether there had not been an over-valuation on that which was taxable, but whether there had been a wrongful assessment of a tax or excise upon that which was not the proper subject of taxation. In its petition, the plaintiff is to set forth the "general legal grounds" on which it is alleged the tax should not have been exacted, as well as "the grounds of fact," if any, on which it is so claimed. It is contemplated that there is a legal ground of objection to the tax, and not an error of judgment by which the property or franchises of a corporation has been over-valued and thus subjected to taxation. In providing for an assessment by the deputy tax commissioner, and for a board of appeal, all the provision was made which was deemed necessary, so far as valuation was concerned. To determine whether a tax or excise had been imposed upon that which was a lawful subject of tax or excise would seem a proper inquiry by a proceeding in the nature of a bill in equity, and might be an appropriate supplement to the action of a board of appeal which had estimated the value of property or a franchise which might become a subject of taxation. For this purpose jurisdiction has been given to this court, but not for the purpose of determining, by a proceeding here, whether the valuation made by the board of appeal was correct in amount,—for which inquiry a bill in equity would be best ill adapted.

The plaintiff contends that, upon the testimony which was received *de bene* in this court, it appears that there was no evidence before the board of appeal which would warrant a finding by that tribunal that the true market value of the shares was \$1,250 each, or any other sum the aggregate of which would exceed the deduction to be made, and thus leave any value in the shares which might represent the value of the franchise of the corporation. It further contends that, as the board of appeal had no evidence before it on which to base its finding, it acted without authority of law, and the tax here in controversy was thus illegally exacted, and that it is therefore the duty of this court to interpose. While the evidence as to the testimony before the board of appeal was admitted by the presiding judge, it was so only *de bene*, and for the purpose of raising the inquiry whether in this proceeding we can review its actions. The board was dealing with a matter which we must hold was wholly within its own jurisdiction. It did this upon evidence satisfactory to itself. It is not for us in this proceeding to determine whether it did so or not on sufficient evidence. The franchise of the corporation, the value of which was ascertained to some extent by determining the

value of the shares, was a lawful subject of taxation; and the board was in the lawful exercise of the duty imposed upon it in determining this value. The excise could not be held to be assessed without authority of law,—which is the only tax or portion of a tax that could be abated by this proceeding,—even if the evidence before the board should seem to us to have been insufficient to justify the valuation which it saw fit to place upon the shares.

Petition dismissed.

Eugene F. GILBERT

v.

George K. GUILD *et al.*

1. In an action by an employee against his employers for damages for a personal injury,—*Held*, that defendants are not liable to plaintiff simply because they used a dangerous machine, but are liable if they employed the plaintiff to use it in ignorance of the danger.
2. If the plaintiff undertook the work knowing the danger, the defendants are not liable, although they might have prevented the danger by guarding against it. If the plaintiff did not know of the danger, proof that the defendants could not have guarded against it would be no defense.
3. Want of due care by plaintiff, or knowledge of the danger by him, if the machine was dangerous, will prevent a recovery, equally, whether the defendants could or could not have guarded against the danger.
4. The question whether the danger was obvious to the common mind, or required a special education and experience to see and appreciate it, is addressed to the common knowledge of the jury, and not to the special knowledge of an expert; hence, the question addressed to a witness as an expert, whether the danger of the operative's hands being drawn under the revolving knives of a machine to cut the nap from woolen cloth, if placed upon the cloth, would be obvious to an inexperienced operator, is improper.
5. Questions to witness, as an expert, as to whether guards should be used on such machines are immaterial; defendants are liable on account of the actual danger, and not from the fact that they might have prevented it.

(Suffolk—Filed June 29, 1887.)

ON plaintiff's exceptions. *Overruled.*

Action of tort for personal injuries.

The following facts appeared on the trial in the superior court, before Brigham, J.:

The defendants were the owners of a woolen mill. The plaintiff, aged about 19 years, in their employ, met with an accident while working at a machine in their mill, having been in their employ about a fortnight. The

judge rejected evidence offered by the plaintiff tending to show that the defendants were negligent in not providing the machinery with the usual safeguards. He also rejected certain expert testimony, mentioned in opinion, as to the obviousness of the danger attending the use of the defendants' machines.

The jury found for the defendants, and plaintiff excepted.

Messrs. John C. Ropes and William L. Putnam, for plaintiff:

It may be assumed, for the purposes of this discussion, that the witness Carr would, if he had been allowed to answer the questions put to him, have testified: (1) that these machines, as manufactured, are supplied with guards; (2) that he had always seen the guards in use on them. That is, it would have appeared that the defendant had omitted a precaution which had come to be regarded by the manufacturer as an essential part of the machine as manufactured, and which was also in general use.

This is not at all analogous to the cases in which it has been held that the plaintiff cannot put in evidence that it would have been easy to make the machine safer, or evidence of isolated instances of contrivances calculated to afford greater protection than existed in the defendants' factory, or in that part of it where the accident happened. Such cases are—

Coombs v. New Bedford Cordage Co. 103 Mass. 573, 581; *Sullivan v. India Mfg. Co.* 113 Mass. 396, 399; *Rock v. Indian Orchard Mills*, 143 Mass. 522, 3 New Eng. Rep. 69.

But evidence of the usual and ordinary structure and condition of such machines as the defendants used, and of the safeguards ordinarily attached to them, is clearly admissible to show that the defendants did not exercise due care to supply suitable and proper machinery.

Wheeler v. Wason Mfg. Co. 135 Mass. 294; *Smith v. New York & H. R. Co.* 19 N. Y. 157; *Greenleaf v. Illinois Cent. R. R. Co.* 29 Iowa, 14, 41.

In similar actions against warehousemen for negligently allowing goods in their charge to be injured, evidence that they took the same precautions that other warehousemen did was held admissible to show that they had used due care; and, since such evidence is admissible for the defendant, no one can question that it is admissible for the plaintiff also.

Cass v. Boston & L. R. Co. 14 Allen, 448; *Lane v. Boston & A. R. Co.* 113 Mass. 453; *Shattuck v. Rand*, 143 Mass. 83, 2 New Eng. Rep. 378.

The first count of plaintiff's declaration alleged in substance that the plaintiff, while in the exercise of due care, was injured through the negligence of the defendants in not using due care to furnish a proper and suitable machine and proper and suitable appliances.

There can be no question that this count of the plaintiff's declaration stated a good cause of action. It is precisely the ground of recovery in—

Cayzer v. Taylor, 10 Gray, 274; *Snow v. Housatonic R. R. Co.* 8 Allen, 441; *Wheeler v. Wason Mfg. Co.* 135 Mass. 294; *Lawless v. Connecticut R. R. Co.* 136 Mass. 1; *Joyce v. Worcester*, 140 Mass. 245, 1 New Eng. Rep. 437; *Perren v. Old Colony R. R.* 143 Mass. 197, 3 New

Eng. Rep. 330; *Gilman v. Eastern R. R. Corp.* 10 Allen, 233, 236; *Same v. Same*, 18 Allen, 433.

Under this count the plaintiff was entitled to prove that the defendants were negligent in not furnishing a suitable and proper machine.

The obligation to furnish machines up to the ordinary standard of safety has never been weakened by any case decided in this Commonwealth.

Snow v. Housatonic R. R. Co. 8 Allen, 441, 445; *Gilman v. Eastern R. R. Corp.* 10 Allen, 233, 236; *Wheeler v. Wason Mfg. Co. and Shattuck v. Rand*, *supra*.

A manufacturer, to avoid liability in cases of accident, must show what amounts to a special bargain with each of his workmen, by which they, with their eyes open, take the exceptional risk of working at machines destitute of the ordinary safeguards. Such a bargain cannot be made save with a workman who practically knows as much about the machine and its use as does his employer.

Coombs v. New Bedford Cordage Co. 102 Mass. 572, 536; *Wheeler v. Wason Mfg. Co.* *supra*; *Williams v. Churchill*, 137 Mass. 243, 244; *Linch v. Sagamore Mfg. Co.* 143 Mass. 206, 3 New Eng. Rep. 322.

A question whether guards should be used on machines is distinctly one for an expert.

Mulcairns v. Janesville (Wis.), 29 N. W. Rep. 565.

As to expert evidence in general, we refer to *Whitell v. Chicago, R. I. & P. R. R.* 25 N. W. Rep. 104, where the opinion of a brakeman was admitted as to the shock produced by stopping a train suddenly.

Messrs. Geo. O. Shattuck and Wm. A. Munroe, for defendants:

The ruling must be presumed to be correct unless there is something in the bill of exceptions to show affirmatively that it is not.

Safford v. Grout, 120 Mass. 20, 26.

The defendants were entitled to a ruling that they were not bound in law to provide a guard for the knives. The machine was not peculiarly dangerous; in fact, when properly used, it was peculiarly safe.

Rock v. Indian Orchard Mills, 142 Mass. 522, 523, 3 New Eng. Rep. 69; *Sullivan v. India Mfg. Co.* 113 Mass. 396; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572, 538.

Plaintiff had been warned as to the knives. Under these circumstances he took any existing risk; and it would be immaterial, for that reason, whether other people had guards.

Pingree v. Leyland, 135 Mass. 398; *Taylor v. Carew Mfg. Co.* 140 Mass. 150, 1 New Eng. Rep. 210; *Russell v. Tillotson*, 140 Mass. 201, 1 New Eng. Rep. 444; *Joyce v. Worcester*, 149 Mass. 245, 1 New Eng. Rep. 437; *Leary v. Boston & A. R. R. Co.* 139 Mass. 580; *Moulton v. Gage*, 138 Mass. 390; *Linch v. Sagamore Mfg. Co.* 143 Mass. 206, 3 New Eng. Rep. 322.

Evidence as to the construction of other machinery was immaterial.

Sullivan v. India Mfg. Co. 113 Mass. 396, 400; *Hill Mfg. Co. v. Providence & N. Y. S. Co.* 125 Mass. 292, 303.

The question whether guards should have been used on the machines would have been for the jury, and not for an expert.

Amstein v. Gardner, 134 Mass. 5, 9; *Buxton* 2 Mass.

v. Somerset Potters Works, 131 Mass. 446, 448.

It was a question upon which the lay mind was capable of forming a judgment. It involved only matters of common knowledge.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 472, 473 (Bk. 24, L. ed. 258) and cases cited.

Witnesses are not receivable to state their views on matters of legal and moral obligations.

Campbell v. Rickards, 2 Barn. & Ad. 840, 846.

This court has rejected the evidence of superintendents of streets as to the duty of preventing inequalities in edgestones of sidewalks (*Raymond v. Lowell*, 6 Cush. 524, 531); draw-tenders, as to need of lanterns at open draw (*Nowell v. Wright*, 8 Allen, 166, 170); experts in land clearing, as to probability of fire spreading (*Higgins v. Dewey*, 107 Mass. 494); experts in dry-house, as to safety of putting wet staves over a brick arch in which a fire was kindled (*White v. Ballou*, 8 Allen, 408); insurance experts, as to increase of risk from not occupying buildings, or from prolonged nonoccupation, or from change of buildings (*Multry v. Mohawk Valley Ins. Co.* 5 Gray, 541, 545; *Luce v. Dorchester Mut. F. Ins. Co.* 105 Mass. 297, 302; *Lyman v. State Mut. F. Ins. Co.* 14 Allen, 329).

Ordinary witnesses are heard on questions of opinion only when the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared at the time of their observation.

Commonwealth v. Sturtevant, 117 Mass. 122; *Simmons v. New Bedford, V. & N. S. Co.* 97 Mass. 361, 371.

A few hours have been considered by this court as giving a mechanic ample experience of a machine which he operated.

Pingree v. Leyland, 135 Mass. 398.

W. Allen, J., delivered the opinion of the court:

The ground of the plaintiff's right of action was that he was injured in performing dangerous work that he was put to do by the defendants. The machine was dangerous only because there was danger in working upon it; and if it was in fact dangerous, it was immaterial that the danger might have been averted by appliances protecting against it. The defendants are not liable to the plaintiff because they used a dangerous machine but because they employed the plaintiff to use it in ignorance of the danger. If the plaintiff undertook the work knowing the danger, the defendants are not liable, although they might have prevented the danger by guarding against it; if the plaintiff did not know of the danger, proof that the defendants could not have guarded against it would be no defense. The verdict shows that the question whether the defendants were negligent in not having a guard upon the machine was not in the case. If it was founded upon the fact that the machine was not dangerous, or on the fact that the plaintiff had knowledge of the danger, it was equally immaterial that the defendant had not provided a guard. Want of due care by the plaintiff, or knowledge of the danger by him,—which the jury must have found, if they found the machine to be dangerous,—would have prevented a recovery, equally, whether the defend-

ants could or could not have guarded against the danger. See *Ladd v. New Bedford R. R. Co.* 119 Mass. 412, and cases cited; *Pingree v. Leyard*, 135 Mass. 398; *Coombs v. New Bedford Cordage Co.* 103 Mass. 572; *Taylor v. Carew Mfg. Co.* 140 Mass. 150, 1 New Eng. Rep. 210; *Linch v. Sagamore Mfg. Co.* 143 Mass. 206, 1 New Eng. Rep. 322.

The exceptions are to the exclusion of questions put to an expert. Three of the questions related to the use of a guard, an immaterial matter, and were properly excluded. The defendants were liable on account of the actual danger, and not from the fact that they might have prevented it.

The only other question the exclusion of which was excepted to related to the material matter of the knowledge by the plaintiff of the danger. The danger was from revolving knife-blades. The machine was used to cut the nap from woolen cloth. By the action of the machine the cloth was drawn between various rollers and then under the revolving blades; and the plaintiff's duty was to guide the cloth in passing through the machine, and to smooth out wrinkles and folds in it with his hands. The danger of using the hands near unguarded revolving blades was apparent. The plaintiff contends that he was exposed to a peculiar and hidden danger, from the effect of the tractile power of the cloth in drawing a hand resting upon it under the knives. The witness testified in regard to this, as an expert, that it would not be safe to put the hand upon the cloth in a certain position near the knife when the cloth was moving at a certain rate. He was then asked whether the danger of the operative's hand being drawn under the knives if placed upon the cloth would be obvious to an inexperienced operative, and the question was excluded. In learning what the danger was, the jury may have been aided by the opinion of those who had special knowledge in regard to it; but, having found that, the question whether it was obvious to the common mind, or required a special education and experience to see and appreciate it, was addressed to the common knowledge of the jury, and not to the special knowledge of an expert. We think the questions were all properly excluded.

Exceptions overruled.

John LOWELL *et al.*

v.

Thomas STRAHAN.

Augustus LOWELL *v. SAME.*

1. A lease of the first floor in a building includes the outside of the front wall as part of the premises demised; such words are equivalent to first story of the building, and include the whole outer walls of that part of the building. "Floor" means a section of the building between horizontal planes. The words "in a building" show that the section is of the whole building, and not of a part of it.

2. Such lease grants an interest in such

walls, not merely like the incidental right of support or shelter which it grants in the land and other parts of the house, but the right to use and enjoy as leased premises for the purposes of business. That right is exclusive, and the landlord has no right to lease or let such walls for such purposes.

3. An agreement by the tenant to allow the sign of a stranger, in consideration of an annual payment by him, to remain upon the outside wall demised, is not a breach of the covenant in the lease not to underlet any part of the premises; such agreement is a license only, and not a lease.
4. The tenant under such lease is not liable to his landlord for moneys received by him for such license to place such sign upon the wall.

(Suffolk—Filed June 30, 1887.)

OPN report. Judgment for defendant in both cases.

The first of these cases was an action for money had and received, brought against defendant by the owners of a building.

The second case was an action for the breach of covenant to keep in repair and not to underlet or make alterations and additions, contained in a lease "of the first floor and front part of the basement in" the same building, "being the same premises last occupied by John G. Calrow," which lease was annexed to the pleadings. The second action is brought by the lessor (one of the plaintiffs in the first action) against the same defendant as lessee, and it was agreed that the case shall be treated as if the lease had been executed by all the plaintiffs in the first action, and the parties are the same in both actions.

The two actions were tried together by Bacon, J., in the superior court, without a jury, and the execution of the lease and the plaintiffs' ownership of the building were duly proved or admitted. It appeared that Calrow, the previous tenant, had given permission to Jones, McDuffee, & Stratton to put a sign upon the outside of the walls of the building, between the level of the floor and that of the ceiling of the first floor, but had made no agreement for compensation; that lessor had no knowledge of the existence of the signs in question, and made no objection to them at the time of the lease to defendant, nor until a short time before the bringing of these actions; that when defendant took possession of the premises said sign was still there; and that he made a contract with the said Jones, McDuffee, & Stratton, by which he agreed to allow their sign to remain upon the wall in consideration of \$150, payable in advance, the sign to be removed February 1, 1886; that the defendant placed two signs for his own use upon the same part of the building, and agreed with certain other persons that they might paint over one of these with an inscription of their own in consideration of \$12.50 a month, payable in advance, so long as they should leave the same upon the building; that in pursuance of the first of these agreements the defendant received \$600, and in pursuance of the second \$75.

Upon these facts the plaintiffs requested the following rulings:

1. The lease put in evidence in this case, covering only certain rooms in a building, gave the tenant no rights in the outside of the outer walls of the building, except a right to place upon them such a sign as was customary and reasonable for the advertisement of his own business.

2. The placing of other signs upon the outside of these walls was a trespass upon the property of the plaintiffs.

3. The defendant having leased the right to place signs upon these walls and received rent therefor, he is liable to the plaintiffs for the sums so received, and the plaintiffs may recover such sums in this action.

4. The agreements between the defendant and the persons who placed signs upon the walls were leases; and, if the lease to the defendant covered the outside walls, they were violations of his covenant not to underlet, for which he is liable to the landlord.

5. Under the circumstances of this case, the measure of damages is the amount of money the defendant received from the persons to whom he leased the right to place signs upon the walls.

The court refused to give the rulings requested by the plaintiffs, and the plaintiffs excepted. The court then ruled, as a matter of law, that the outside of the walls in question was included in the lease, and that the agreements of the defendant with the persons whom he allowed to place or retain signs upon the building did not amount to an underletting, and ordered judgment for the defendant in both actions. At the request of the plaintiffs, the case is reported for the determination of the supreme judicial court.

Messrs. F. C. Lowell and A. L. Lowell, for plaintiffs:

Where the several rooms or stories of a building are let by separate leases, those parts of the building used in common by the tenants are not covered by the leases but remain in the possession and control of the landlord.

Larus v. Farren Hotel Co. 116 Mass. 67; *Readman v. Conway*, 126 Mass. 374; *Looney v. McLean*, 129 Mass. 33.

A tenant who has hired a whole building is the occupant of the outside walls, to the exclusion of the landlord.

Leonard v. Storer, 115 Mass. 86.

The owner of a building, who has let it in separate parts to different tenants, still retains the control of the exterior portions of the building, and is liable to anyone injured through his neglect to keep these portions in safe condition.

Kirby v. Boston Market Asso. 14 Gray, 249; *Milford v. Holbrook*, 9 Allen, 17; *Shipley v. Fifty Associates*, 101 Mass. 251, 106 Mass. 194; *Watkins v. Goodall*, 138 Mass. 533; *Donohue v. Kendall*, 60 N. Y. Super. Ct. 386; *Henkel v. Murr*, 31 Hun, 23.

The only case maintaining a contrary doctrine is *Riddle v. Littlefield*, 53 N. H. 503.

When a building is destroyed by fire, the lease of the whole of the building still attaches to the land.

Rogers v. Snow, 118 Mass. 118.

2 MASS.

The destruction of a building terminates the lease of a room therein.

Shawmut Nat. Bank v. Boston, 118 Mass. 125.

The destruction of a building terminates a lease of the cellar and basement, although the brick walls are left standing around the demised premises.

Stockwell v. Hunter, 11 Met. 448, 454; *Kerr v. Merchants Exch. Co.* 3 Edw. Ch. 315; *Winton v. Cornish*, 5 Ohio, 477; *McMillan v. Solomon*, 42 Ala. 356; *Harrington v. Watson*, 11 Oreg. 143.

The only case in this State in which the right of a tenant to place a sign upon the outside of a building was called in question, although not directly in point, yet sustains the contention of the plaintiffs in the case at bar.

Peevy v. Skinner, 116 Mass. 129.

The customary privilege of a tenant to place signs on the outside of the building, for the advertisement of his own business, is not a lease of the walls, and it gives the tenant no right therein, except that of displaying reasonable signs for his own use.

Martyr v. Lawrence, 2 De G. J. & S. 261; *Doe v. Galloway*, 5 Barn. & Ad. 43.

If one wrongfully sells the property of another, the owner, instead of suing the wrongdoer in trover, may elect to treat him as his agent, and may recover from him in an action for money had and received all sums paid to him by the purchaser of the property.

Gilmore v. Wilbur, 12 Pick. 120.

This form of action has often been sustained in cases where the defendant had received rents and profits from property belonging to the plaintiff.

Blunden v. Baugh, 4 Croke, 302; *Money Penny v. Bristow*, 2 Russ. & M. 117; *Nugent v. Riley*, 1 Met. 117; *Hills v. Bearse*, 9 Allen, 403; *Hallden v. Duche*, 2 Dall. 176 (2 U. S. bk. 1, L. ed. 338); *O'Conley v. Natchez*, 1 Sm. & Mar. 31; *Arris v. Stukeley*, 2 Mod. 260.

Defendant claims that his agreement with Jones, McDuffee & Stratton, was a license, not a lease.

Francis v. Hayward, L. R. 22 Ch. Div. 177; *Snyder v. Hersberg*, 11 Phila. 200, 33 Leg. Int. 158.

In the case at bar, all the elements which constitute a lease were present. The question whether a contract of this sort is a lease or a license has never arisen in the case of a sign; but it has arisen under the laws for the assessment of poor rates in England, in cases which bear a close resemblance to the case at bar.

Cory v. Bristow, L. R. 2 App. Cas. 262; *Electric Tel. Co. v. Salford*, 11 Exch. 181; *Lancashire & C. Tel. Exch. Co. v. Manchester*, L. R. 14 Q. B. Div. 267.

Messrs. Alfred Hemmenway and D. F. Kimball, for defendant:

An action for money had and received will not lie to try the title to property between two litigating parties.

Bigelow v. Jones, 10 Pick. 161; *Kittredge v. Peaslee*, 3 Allen, 237; 2 Greenl. Ev. § 120.

Defendant received the money as his own, and not for the purpose of paying it over to the plaintiff, or under any trust which makes it his duty to pay it over.

Butterworth v. Gould, 41 N. Y. 450; *Lawrence v. Batcheller*, 131 Mass. 504, 507; *Moore v. Moore*, 127 Mass. 22.

Parol evidence is admissible to apply the description in a deed.

Lovejoy v. Lovett, 124 Mass. 270, 274; *Houghton v. Moore*, 141 Mass. 437, 2 New Eng. Rep. 46; *Riddle v. Littlefield*, 53 N. H. 503.

"Any right of way, or other easement necessary to the enjoyment of premises granted, will pass as appurtenant, although there is no express mention of easements, privileges, or appurtenances."

Hooper v. Farnsworth, 128 Mass. 487; *Oliver v. Dickinson*, 100 Mass. 114, 117; *Sherman v. Williams*, 113 Mass. 481.

The original lessors have no right of action against the sublessees.

Patten v. Deshon, 1 Gray, 330.

Allowing the sign of Jones, McDuffee, & Stratton to remain for a pecuniary consideration was not an underletting to them; it was a mere license.

Pevey v. Skinner, 116 Mass. 129; *White v. Maynard*, 111 Mass. 250, 255; *McCreav. Marsh*, 12 Gray, 211; *Burton v. Scherpf*, 1 Allen, 133.

The placing of the sign by Jones, McDuffee, & Stratton on the building would not subject them to an action for use and occupation.

Bacon v. Parker, 138 Mass. 309, 312.

A covenant not to assign or underlet is always construed strictly.

O'Keefe v. Kennedy, 3 Cush. 325, 327.

But if the agreement with the sign owners was an underletting, it would have been valid until the plaintiffs had exercised their option to terminate it.

Bemis v. Wilder, 100 Mass. 446; *Shattuck v. Lovejoy*, 8 Gray, 204; Taylor, Land. & T. § 412.

W. Allen, J., delivered the opinion of the court:

We think that the outside of the front wall was part of the premises demised in the lease of the first floor in the building. If the language had been used in a conveyance in fee simple, no question could have been made that the walls of the building were included. Undoubtedly the owner of a building might, in conveying the lower and upper portions of it to different grantees, except the outside of the walls, as he might do in conveying the whole building to one grantee. In every case it is a question of intention found in the language used as applied to the subject-matter and construed in connection with the whole instrument. A lease for years by indenture differs from a deed in fee simple, not only in the nature of the estate created, but also in the fact that the instrument of demise is an agreement between the parties containing mutual covenants affecting their rights in the premises. The words of description used should be construed in view of these considerations, which might require a different meaning to be given to them than would be given to similar words in a conveyance in fee.

The words "first floor in" the building are equivalent to first story of the building, and naturally include the walls. The apparent intention is to separate a section of the building as a distinct tenement. The words "first floor" define the lower and upper boundaries of this, but there is nothing to fix the lateral boundaries except the boundaries of the building. In this respect the words differ somewhat from

the word "room." "Floor" means a section of the building between horizontal planes; the words "in a building" show that the section is of the whole building and not of a part of it. The word "room," includes a description of the perpendicular as well as of the horizontal planes which bound the parcel of the house described by it, and excludes the outside of lateral walls, at least when they constitute the walls of another room, as clearly as the words "first floor" exclude the flooring of the story above it. Under what circumstances a lease of a story of a building would include a space beyond the building, over land belonging to it, need not be considered. In this case the building adjoins the sidewalk; and the "lower floor in the building" in the lease must be held to include the entire front wall of that part of the building, unless there is something to control the natural meaning of the language.

That the outside of the front wall would be valuable to the lessee as part of the premises, and that the lease gives him the right to use it for some purposes, such as putting out signs and displaying goods, is not disputed; but it is contended that the right is a privilege or easement appurtenant to the leased premises in a part of the building, not parcel of them. The defendant contends, on the other hand, that the outside of the front wall is parcel of the leased premises. It often occurs in leases of part of a building that rights in other parts, or in land not parcel of the premises, as in entries, passageways, and yards, pass as appurtenant to them. The question in such cases generally is, not what is parcel of the demised premises, but what is incident to them. In general, a deed or lease of a house or store will include the land under it.

In *Stockwell v. Hunter*, 11 Met. 448, and *Shawmut Nat. Bank v. Boston*, 118 Mass. 135, it was held that the land under a building would not pass as parcel of the premises in a lease of the basement of a building, the upper stories of which were let to other tenants.

Mr. Justice Dewey says, in 11 Met. 456: "The proper construction of such a lease as the present, as it seems to us, is that the lessee's right of occupation of the land is an interest for the time being, defeasible by the destruction of the building by fire."

Mr. Justice Morton says, in 118 Mass. 139: "The real question is whether the intention of the parties, to be collected from the whole lease, was to grant to the lessees any estate in the land itself. As we have seen, the lease does not in terms grant any estate in the land. * * * In cases where different rooms in the same building are leased to separate tenants, the situation of the property and the nature of the tenures exclude the idea that each tenant takes an estate for years in the land. Such estates existing at the same time in different tenants are inconsistent and impossible. * * * The bank and Lawrence cannot both take an estate for years in the same land."

In the case at bar the words of description naturally include the premises in question, the outer wall. It is plain that the lease grants an interest in them, not merely like the incidental right of support or shelter which it grants in the land and other parts of the house, but the right to use and enjoy, as leased premises, for

the purposes of business. That right is exclusive. The landlord has no right to use or to let it for such purposes. From the mere demise, without regard to special provisions of the lease, there is no reason that the landlord should be regarded as having rights in the outside different from what he has in the inside of the wall. As owner of the upper tenement he has a right in the whole wall for support; but that right would not operate to except the walls by implication from a deed in fee of the lower tenement, or from a grant of it for years. The occasions that the reversioner would have to enter upon the wall of the demised tenement must be few and extraordinary, and it could not be inferred from the fact that the right was not expressly reserved in the lease that the wall was excepted from it. We can see nothing, therefore, in the nature of the estate granted, that should prevent the outer wall from being included as parcel of the demised premises. On the contrary, the fact that it is of value to the tenant for the use for which the premises may be occupied, and of no value for use to the landlord, would indicate that it was part of the premises, if the description was doubtful. If it did not pass by the lease in this case, it would seem that the right which the plaintiff claims could be maintained. The only right of the tenant would be to make such use of it as would be incident to his grant of the adjoining premises, and the right of the landlord would be to enter upon it, and make any use of it not inconsistent with the incidental rights to use it of the tenant. He might not have a right to take down the tenant's sign, but he would have the possession of the wall, and the right to enter upon it, and to use any of it not actually used by the tenant for any purpose not inconsistent with the use by the tenant of the leased premises. It is not reasonable to suppose that this was the intention of either party. The actual possession and use of the wall by the tenant, which the parties obviously intended, is substantially that of leased premises; and it would be very difficult to define or fix the respective rights of the parties in it, except on the assumption that it is a part of the demised premises.

There is nothing in the particular provisions of the lease that bears with much force upon the question. The covenant of the lessee to repair is what would be expected, whether the outside of the wall were included or not, unless the suggestion is entitled to some weight that if the outer surface of the wall was not included, the lessor would probably have insisted upon a special covenant by the lessee to keep it in repair. Perhaps the covenant by the lessee to save the lessor harmless from all damages arising from neglect in not removing snow and ice from the roof of the building or "from the sidewalk bordering on the premises so leased," may afford a slight inference that the wall, including the outer surface of it, was part of the premises. The covenants by the lessee not to underlet, and not to make any unlawful, improper, or offensive use of the premises, nor any alterations or additions, and that the lessor may enter upon the premises to examine the condition thereof, while proper to protect the interest of the reversioner in the surface of the wall, do not appear to have par-

ticular reference to that. We can find nothing in the lease which militates against the idea that the whole outer wall is included in the premises; and the description of the premises, as applied to the subject-matter, and the right in the outer surface of the wall which it is reasonable to suppose the parties intended that the lessee should have, and the entire reasonableness that the whole of the front wall of that part of the building should be included in the lease of a floor or story of it, in connection with the particular provisions of the lease, lead us to the conclusion that the outer surface of the wall was part of the demised premises.

We find no authority against this. *Peevy v. Skinner*, 116 Mass. 129, decided that, where different rooms in a building were let to different tenants, a license by the owner of the building to the tenant of a lower room to place his sign on the outer wall of the building extending fifteen inches higher than the floor of the room above, was not revoked by a lease of the room above, which contained the provision that "the lessee may have the right to place signs upon the outer wall of said rooms." The general right of the lessee of a single room in the outer wall was not considered. The court says "his right to use the outer surface of the wall was defined and thereby limited by the terms of the lease." The decision can have very little bearing upon the lease of a "floor," which does not define and limit the right to use the outer wall. *Riddle v. Littlefield*, 58 N. H. 508, and *Baldwin v. Morgan*, 43 Hun, 855, are directly in favor of the conclusion we have reached. *Loring v. Bacon*, 4 Mass. 75, and *Cheeseborough v. Green*, 10 Conn. 319, are cases where the respective rights of owners of lower and upper tenements in the same building are considered, but have no particular bearing upon the case at bar.

It is claimed that the agreement of the defendant to allow the sign of a stranger, in consideration of an annual payment by him, to remain upon the outside wall demised, was a breach of the covenant in the lease not to underlet any part of the premises. But this was a license and not a lease. It was permission to do a particular act, to affix a sign to the wall, and gave no authority to do any other act upon the premises. The facts that the permission was paid for, and that the act permitted was a continuing one, are ordinary elements of a license. Every license to do an act upon land involves the exclusive occupation of the land by the licensee, so far as is necessary to do the act and no farther; a lease gives the right of possession of the land, and the exclusive occupation of it for all purposes not prohibited by its terms. It is clear in this case that the intention was that the licensee should have no other right in the premises than to affix his sign to them, and that every other right should remain in the defendant. An agreement of this nature cannot be construed as a lease; it must create either a license or an easement. In *Peevy v. Skinner*, 116 Mass. 129, it was said that permitting a sign to be kept upon the wall for a long time would imply a license, but it was not intimated that it would imply a lease of the outer surface. We have not been referred to any case in

which the question here presented, or any closely resembling it, has arisen. Numerous cases have arisen in England where the question was whether persons occupying land under particular agreements were liable to be rated as occupiers. See *Cory v. Bristol*, L. R. 2 App. Cas. 262; *Electric Tel. Exch. Co. v. Salford*, 11 Exch. 181; *Lancashire & C. Tel. Co. v. Manchester*, L. R. 14 Q. B. D. 267; *Watkins v. Milton-next-Gravesend*, L. R. 3 Q. B. 350; *Forest v. Greenwich*, 8 El. & Bl. 890.

In *Selby v. Greaves*, L. R. 8 C. B. 594 the letting of a defined portion of a room in a factory with steam power for working lace machines was held to be a demise; and in *Hancock v. Austin*, 14 C. B. N. S. 634, permission to place lace machines in a room in a factory, and to work them with steam power furnished by the owner of the factory, was held to be a license, and to create no demise. The case last cited approaches nearest to the case at bar of any that we have seen, and in that, the reasons for regarding the transaction as a lease are obviously stronger than in this case. That was permission to occupy, with fixed machines, a portion of the floor and space above it; this is permission to insert fastenings in the outer wall from which to suspend a sign in proximity to but outside of the building.

Judgment for the defendant in both cases.

James MOORE

v.

Daniel STINSON.

1. Where the **money** of one is **wrongfully used** by another, in whose possession it is, so long as the **owner** can definitely trace it, he **may pursue it, and establish on the land** bought with it an **equitable lien** in the nature of a resulting trust.
2. Even when the **money thus used has paid for only a part of the land** bought, the land may still be compelled to be sold, that the money thus used may be realized.
3. Where land is purchased and the conveyance of the legal estate is taken by one person, and the consideration is paid by another, there is a **resulting trust** in the legal estate in favor of the **person who advanced the purchase money**. The party named in the conveyance as grantee becomes a trustee for him from whom the consideration proceeds.
4. This is also the case where it is shown that a **part of the purchase money was paid by one, and the deed was given to another**, if it were paid for some specific part or distinct interest in the land.
5. The admission of **parol evidence** in such cases does not come within the prohibition providing that **trusts concerning land**, except such as may arise or result by implication of law, shall not be created or declared unless by an instrument in writing signed by the party making or declaring the same, or by his attorney.
6. In cases of this nature, **oral or written testimony** showing the circumstances of the transaction and the intention of the parties, and the admissions or agreements of the parties, even if oral, are **admissible to prove or disprove the implied trust**.
7. Where the party seeking to establish an equitable lien in the nature of a resulting trust, or where the alleged *cestui que trust*, by virtue of a resulting trust, is **not a party to the deed**, he is **not estopped** by its recitals or covenants **from proving all the facts from which the equitable lien or trust may result**.
8. But the **grantee in such a deed**, which recites the consideration and declares the trusts upon which he shall hold the estate, **cannot be permitted, by parol proof, to change it**, or engraft a new and distinct trust in his own favor upon it. This would be, in effect, to contradict a deed to which he is a party, which he is estopped to do.

(Middlesex—Filed June 22, 1887.)

ON report. Decree for plaintiff.

Bill in equity to compel the conveyance by defendant of a certain piece of real estate devised to plaintiff by the will of his late wife, Jane Moore, alleged to have been held by defendant in trust for her, which trust is now terminated. Defendant, who was Jane Moore's brother, admitted such trust during Jane's life, but alleged that by her decease it became his property in fee.

On August 11, 1846, the land was conveyed to defendant "in trust for Jane Allen, * * * wife of Thomas Allen, and her heirs and assigns forever." Jane Allen subsequently became Mrs. Moore. The consideration was \$700—"to us paid by Daniel Stinson in trust for Jane Allen." At that time Mrs. Allen's first husband was confined in an insane asylum, where he died August 19, 1847.

Mrs. Allen occupied the premises from the time of the conveyance to her decease, as the wife of Thomas Allen, during her widowhood, and together with plaintiff after her marriage to him, which took place May 27, 1848. At the time of such marriage, or immediately thereafter, she and plaintiff demanded a deed of the premises to plaintiff from defendant, which he declined to make. Immediately after this refusal Mrs. Moore made a will, devising this parcel, together with all her other property, to plaintiff, which will has been duly proved and allowed.

At the trial defendant offered to prove, and if the evidence, which was received *de bene*, was competent, did prove, that at the time of the purchase he had in the hands of his sister, Mrs. Allen, about \$300, which he had deposited with her from time to time without special appropriation by him, which sum was devoted to this purchase by his assent; that she was to live on the place during life, and it was then to come to him; and that the deed was made to him in trust for that reason. This arrange-

ment or agreement was entirely oral, and the only evidence of it was the testimony of defendant.

The plaintiff paid the taxes on the premises during his occupation, and also put a barn of small value upon the place, and to some extent filled in the land.

Messrs. Causten Browne and J. H. Taylor, for plaintiff:

The legal effect of a deed in trust for a wife and her heirs and assigns forever is to create a trust for her during coverture, the use being executed upon the termination of the trust.

Richardson v. Stoddard, 100 Mass. 529.

An agreement operating to devise a part of the estate given by the terms of the deed can only be proved by writing.

Glass v. Hurlbert, 102 Mass. 24; *Browne*; Fr. 5111, and note; *White v. Carpenter*, 2 Paige, 237; *McGowan v. McGowan*, 14 Gray, 119; *Brenihan v. Sheehan*, 125 Mass. 13.

The rule in *Campbell v. Dearborn*, 109 Mass. 130, admitting parol evidence to show that a deed absolute on its face was really intended as a mortgage, does not apply. The part of the purchase money paid by him in whose favor the resulting trust is sought to be enforced must be shown to have been paid for some specific part or distinct interest in the estate; a general contribution of money toward the entire purchase is not sufficient.

McGowan v. McGowan, 14 Gray, 121, and cases cited; *Snow v. Paine*, 114 Mass. 526; *Brenihan v. Sheehan*, 125 Mass. 13.

Mr. H. H. Winslow, for defendant:

Parol evidence is competent to show the situation of the parties at the time of the execution of the deed, on question of intent.

Ayer v. Ayer, 16 Pick. 327; *Parker v. Converse*, 5 Gray, 836; *Richardson v. Stoddard*, 100 Mass. 528.

Parol evidence is competent to establish a resulting trust.

Peabody v. Tarbell, 2 Cush. 226; *Livermore v. Aldrich*, 5 Cush. 431; *Kendall v. Mann*, 11 Allen, 15; *Perkins v. Nichols*, 11 Allen, 542; *Chesman v. Cummings*, 142 Mass. 65, 70, 2 New Eng. Rep. 850.

As to fact that only evidence of agreement was oral testimony of defendant, see—

Williams v. Williams, 142 Mass. 515, 8 New Eng. Rep. 110.

Devens, J., delivered the opinion of the court:

As both parties have discussed fully the question whether it is competent for the defendant to show by evidence of a payment for the remainder of the estate, and of an oral agreement, that the parcel of land conveyed to him in trust for his sister, Mrs. Allen (afterwards Mrs. Moore), became his property at her decease, either by way of resulting trust or otherwise, we proceed to consider this without at this moment dealing with the form of the bill.

If the proposition of the defendant be conceded, namely, that the fact of Mrs. Allen's coverture and the then situation of the parties, with the fact that the conveyance was in terms made in trust to defendant Stinson, sufficiently show that the intention of the parties was not to create a mere use to be executed under the

statute, but a trust during coverture, the legal effect of the deed to Stinson, which was without any words of inheritance, "in trust for Jane Allen, * * * wife of Thomas Allen, and her heirs and assigns forever," was to create a trust for her during coverture and a legal estate afterwards, the use being executed upon the termination of the trust. *Ayer v. Ayer*, 16 Pick. 327; *Richardson v. Stodder*, 100 Mass. 529. By the death of Thomas Allen the coverture of Mrs. Allen terminated, and with it the trust. Her equitable estate during coverture had been changed into a legal interest. Nor can this have been affected or altered by her subsequent marriage.

The contention of the defendant is that even if such be the construction of the deed if its language alone be considered, it is competent for him to prove that his money was used by his sister, Mrs. Allen, for the purchase, together with her own, upon the agreement that she should have the occupation of the estate for life, without any authority to sell or give it away, and that it was then to be his property; and that upon these facts there is an implied or resulting trust in his favor. This is wholly to change the legal effect of a deed by parol evidence, and to prove that where one use is declared by a deed another use may result, and this in a case where the party seeking to establish the resulting trust is himself a party to the deed the legal construction of which he thus seeks to vary.

Where the money of one is wrongfully used by another, in whose possession it is, so long as the owner can definitely trace it, he may pursue it, and establish on the land bought with it an equitable lien in the nature of a resulting trust. And even when the money thus wrongfully used has paid for only a part of the land bought, the land may still be sold that the money thus used may be realized. *Brenihan v. Sheehan*, 125 Mass. 11; *McGivney v. McGivney*, 142 Mass. 156, 2 New Eng. Rep. 583. Where, also, land is purchased, and the conveyance of the legal estate is taken by one person and the consideration is paid by another, there is a resulting trust in the legal estate in favor of the person who advanced the purchase money. The party named in the conveyance as grantee becomes a trustee for him from whom the consideration proceeds. This is also the case where it is shown that a part of the purchase money was paid, if it were paid for some specific part or distinct interest in the land. The admission of parol evidence in such cases does not come within the prohibition, providing that trusts concerning land, except such as may arise or result by implication of law, shall not be created or declared, unless by an instrument in writing signed by the party making or declaring the same, or by his attorney. *Livermore v. Aldrich*, 5 Cush. 431; *Peabody v. Tarbell*, 2 Cush. 226; *Kendall v. Mann*, 11 Allen, 15; *Perkins v. Nichols*, Id. 542; *McGowan v. McGowan*, 14 Gray, 121; *Snow v. Paine*, 114 Mass. 526; *Gould v. Lynde*, Id. 366.

In cases of this nature the implication of a trust from the fact that the consideration for the purchase was paid by one while the land was conveyed to another may be overcome or disproved or may be corroborated by any oral

or written testimony showing the circumstances of the transaction and the expressed or probable intention of parties. The admissions or agreements of the parties, even if oral, may then be proved as tending to destroy or confirm the inference deducible from the facts of payment of consideration, and of the deed. *Blodgett v. Hildreth*, 108 Mass. 486.

But there is an obvious distinction between the cases of this class and the one at bar. Where the party seeking to establish an equitable lien in the nature of a resulting trust, or where the alleged *cestui que trust*, by virtue of a resulting trust, is not a party to the deed, he is not estopped by its recitals or covenants from proving all the facts from which the equitable lien or trust may result. *Livermore v. Aldrich*, 5 Cush. 431. The defendant in the case at bar was the grantee. The deed he received recited the consideration,—declared the trust upon which he should hold the estate. He cannot now be permitted by parol proof to change this, or engraft a new and distinct trust in his own favor upon it. This is in effect to contradict

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the deed to which he is a party. The distinction between such a case, and that of a conveyance to a third party where the money has been furnished by another to whom the trust results—who is in no way estopped by the recitals or covenants of the deed,—has been frequently pointed out. *Gould v. Lynde*, *supra*; *Gove v. Learoyd*, 140 Mass. 524, 1 New Eng. Rep. 913. The title to the real estate in dispute we must hold to be in the plaintiff. The use having been executed by the cessation of the coverture of Mrs. Allen, her title was complete, and he is her devisee. The title of the plaintiff is also perfect upon the public record, when this is supplemented by proof of the death of Mrs. Allen and her husband.

But in view of the fact that defendant has appeared, asserted a title which has been fully discussed and considered, and has rested his case upon that, we are of the opinion that the plaintiff may have a decree declaring her title.

Decree accordingly.

MAINE.

SUPREME JUDICIAL COURT.

BOSTON & MAINE R. R. CO.

v.

COUNTY COMMISSIONERS.

OLD ORCHARD BEACH R. R. CO.

v.

SAME.

1. The Legislature has constitutional power to provide by statute that a railroad company shall build and maintain so much of a highway as comes within its limits where such way crosses its track at grade.
2. Such a statute would not impair the obligation of any contract with a company, though its charter provide that it is not to be altered, amended, or repealed.
3. Police power of a State defined and illustrated. In estimating the land damages of a company when a way is laid across its track, the jury are not to take into account any damages for expenses in defending itself against claims for accidents at the crossing.

(York—Decided June 2, 1887.)

ON exceptions and motion for a new trial by plaintiffs. *Overruled.*

Appeals from the decision of the County Commissioners relating to the land damages of the two railroad companies for laying out a highway across their respective tracks.

The points presented by the exceptions are stated in the opinion.

Mr. G. C. Yeaton, for plaintiffs:

Instructions numbered 1 and 2 are quoted directly from *Massachusetts Central R. R. Co. v. Boston, Clinton & Fitchburg R. R. Co.* 121 Mass. 124, 126, and *Old Colony & Fall River R. R. Co. v. Plymouth County*, 14 Gray, 155, 163 (with such verbal changes as fit the language to the cases at bar); and we assume will be conceded sound and applicable to the cases at bar, except so far as they may be affected by so much of the provision of Rev. Stat. chap. 18, § 27, as embodies the provisions, originating in chap. 214 of 1874, and modified by chap. 43 of 1878, that "when such way crosses the track at grade, the expense of building and maintaining so much of such way as is within the limits of such railroad shall be borne by the railroad company whose track is so crossed."

It was claimed at *nisi prius*, and may be claimed here, that this statutory provision has received full and final construction by this court in the late case, *Portland & R. R. Co. v. Deering*, 78 Me. 61, 1 New Eng. Rep. 475, and that the opinion in that case entirely covers the ground taken by appellants in these cases. Whatever may be conceded, so far as the appeal of the Orchard Beach Railroad Company is concerned, it is not admitted that this statute applies to the Boston & Maine Railroad.

The statute was held valid, because that corporation (the Portland & Rochester Railroad) was admitted to be within the scope of the pro-

visions of Rev. Stat. chap. 46, § 23, originating March 17, 1881, subjecting all Acts of Incorporation subsequent to the last-mentioned date to legislative alteration and amendment, "unless they contain an express limitation," as also subsequent to the constitutional amendment above referred to.

Exactly this limitation the original charter of the Boston & Maine Railroad does contain. The Act of March 30, 1886, chap. 179, § 17, provides that an Act entitled 'An Act Concerning Corporations,' passed March 17, 1881, shall not extend or apply to the company hereby incorporated."

Webb, R. R. Laws of Me. p. 86.

The spirit, and, in part, the scope, of the protection afforded by this exemption, as well as the entire constitutionality of this and similar statutory provisions, this court has declared in *State v. Dexter & N. R. R. Co.* 69 Me. 44. Nor will it be claimed that this exemption was lost by the corporation, in any way, until the Act of 1871, chap. 630.

Webb, R. R. Laws of Me. pp. 90, 91.

Some of the marks of distinction between an Act of Incorporation and a grant of additional power to an existing corporation, are pointed out in *State v. Maine Cent. R. R. Co.* 66 Me. 488.

See *Tennessee v. Whitworth*, 117 U. S. 129 (Bk. 29, L. ed. 880), citing a line of twelve decisions of the same court, from *Philadelphia & W. R. R. Co. v. Maryland*, 10 How. 394 (51 U. S. bk. 18, L. ed. 469), to *Chesapeake & O. R. R. Co. v. Miller*, 114 U. S. 185 (Bk. 29, L. ed. 121).

As to the difficulties of any repeal of specific legislation by general, or of special provisions by general language, see *Webb v. Ridgley*, 38 Md. 364; *Fitzgerald v. Champneys*, 30 L. J. Ch. 782; Wilberf. Stat. 318, 330, 331, 334; Maxwell, Interp. of Stat. 66; Dwar. Stat. 530, 532.

The power of the Legislature to subsequently require a railroad corporation to construct any portion of a way not in existence at the date of its charter can only be supported as an exercise of what has been termed the police power, which, being inalienable in its nature, the Legislature must forever retain.

One of the plain limitations it can never transgress is the boundary line which surrounds vested property rights.

Cooley, Const. Lim. p. 572; Morawetz, Priv. Corp. p. 448; *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 528 (Bk. 24, L. ed. 734).

Illustrations of the rightful exercise of this power, and impliedly, if not of its exact limit, certainly of a field clear beyond this limit, *quoad* regulation of railroads at their intersection with public ways, may be found cited by Mr. Morawetz, in *Private Corporations*, § 443 *et seq.*, including two domestic decisions, viz.: *Norris v. Androscoggin R. R. Co.* 30 Me. 273; *Veazie v. Mayo*, 45 Me. 560.

A very full discussion of the nature and limits of the police power is found in *Philadelphia, W. & B. R. R. Co. v. Bowers*, 4 Houst. 506, 537. See also *State v. Taxation Comrs.* 37 N. J. L. 240.

Unless the landowner is paid such sum as leaves him in as good condition as he was before the taking, no sophistry can reconcile the process with the constitutional provision protecting private property against confiscation.

Atlantic & P. Tel. Co. v. Chicago, R. I. & P. R. R. Co. 6 Biss. 158, 161; Morawetz, Priv. Corp. 436.

Mr. R. P. Tapley, for defendants:

By a series of decisions in this State and Massachusetts, it has been determined that evidence of long-continued use is admissible to show the existence of a public way, and raise the presumption that it was once legally established. The cases are numerous in this State. They are fully considered in—

State v. Bunker, 59 Me. 366; *Browne v. Bowdoinham*, 71 Me. 144; *Bigelow v. Hillman*, 87 Me. 52.

There are at least ten other cases in this State recognizing the authority to thus prove the legal existence of a highway, and limiting the term of user to at least twenty years.

See *Estes v. Troy*, 5 Me. 368, decided in 1828.

The same doctrine prevails in Massachusetts.

Commonwealth v. Coupe, 128 Mass. 66; *Fitchburg R. R. Co. v. Page*, 181 Mass. 395.

In *Lawrence v. Mt. Vernon*, 35 Me. 100, the question arose whether the highway, which was proved by twenty years' user, included all between certain fences. The court says: "The existence of the road * * * was proved by user alone, and whether that was extended beyond the actual travel was a material fact upon the determination of which the rights of the parties might depend. The jury might find the user coextensive only with the actual travel, and if so the alleged cause of injury would not be within the road as found by them. They might upon the evidence have deemed the road to extend beyond the traveled path, so as to include the cause of injury within its limits. * * * The boundaries of the road, as established by user, were to be determined by them."

In *Sprague v. Waite*, 17 Pick. 309, the court says: "It is contended that whenever a public or private easement is proved by use only, the limitations and restrictions of the right, as well as the right itself, are established by such use, and of course no right can be established beyond what has been in fact used and enjoyed. This, as a general rule, is correct; but if it is intended to say, in regard to ancient highways, that the right of the public is limited to that portion of the highway usually called the traveled path,—that part actually used or worn by feet or wheels,—it is a misapplication of the rule."

In *Hannum v. Belchertown*, 19 Pick. 312, upon a question of this kind, the court says that our public roads generally are used for carriages, and that they must be wide enough for two carriages to pass each other; that the jury had a right to infer from the evidence that this road extended beyond the path marked by the feet of cattle, and wheels.

The grant of a way was held in Vermont to be the grant of a space reasonably convenient for the purpose for which it was granted.

Walker v. Pierce, 38 Vt. 98.

In *Richardson v. Pond*, 15 Gray, 390, the court says: "Where a right of way is proved to exist by adverse use and enjoyment only, the common and ordinary use which establishes the right also limits and qualifies it."

In *Curtis v. Kessler*, 14 Barb. 511, it is said:

"The public cannot acquire an easement by prescription. A prescription supposes a grant, and in the case of the public there can be no grantee."

The charter under which the appellant's road was built from Berwick to Portland was passed in February, 1871; that charter gave the Boston & Maine Railroad Corporation (a corporation declared by it to be in existence), authority to build through certain towns in Maine, "with all the rights, powers, privileges, and immunities in respect thereto, of similar railroad corporations under the laws of this State, and subject to like liabilities and duties."

Webb, R. R. Laws of Me. p. 90; Laws 1871, chap. 630.

In *Stetson v. Bangor*, 60 Me. 815, it was held that the location of a way over one existing by dedication would entitle to only nominal damages. See the discussion of the same case in 73 Me. 857.

The franchise to be a corporation is distinct from a franchise as a corporation to maintain separate a railroad.

Memphis & L. R. R. Co. v. Berry, 112 U. S. 609 (Bk. 28, L. ed. 837).

Grants of privileges and exemptions are strictly construed against corporations and in favor of the public.

10 How. 416 (51 U. S. bk. 18, L. ed. 478); 13 How. 71 (54 U. S. bk. 14, L. ed. 56); 1 Black, 360 (50 U. S. bk. 18, L. ed. 147); Id. 436 (Id. 173); 8 How. 569 (49 U. S. bk. 12, L. ed. 1201).

A corporation endowed with the capacities it possesses by the co-operative legislation of two States cannot have one and the same legal being in both States. It is really two corporations, deriving its powers from different sovereignties, and exercising them within distinct limits.

Ohio & M. R. R. Co. v. Wheeler, 1 Black, 396 (66 U. S. bk. 17, L. ed. 130); *Muller v. Dows*, 94 U. S. 444 (Bk. 24, L. ed. 207).

A State statute which declares that all charters of corporations granted after its passage may be altered, does not necessarily apply to supplements to an existing charter enacted subsequently to the statute.

New Jersey v. Yard, 95 U. S. 104 (Bk. 24, L. ed. 352).

So supplements may be charged with duties the originals were not, upon same principle. They are independent Acts. The Boston & Maine Railroad Corporation exists under charters granted in Maine, New Hampshire, and Massachusetts. Under the decisions of the Federal courts this makes three corporations, each having the same name, deriving its powers from distinct sovereignties. 1 Black, 396 (66 U. S. bk. 17, L. ed. 130); Acts 1843, chap. 108; Webb, R. R. Laws of Me. 87.

Emery, J., delivered the opinion of the court:

The County Commissioners of York County laid out and established a county road, crossing at grade the tracks of both the appellant railroad companies, and made an appraisal of the damages sustained by each company from the necessary appropriation of its land within the limits of its location. The railroad companies appealed, and the question of damages was tried before a jury in this court.

The bill of exceptions presents practically only two questions, one raised by the first three exceptions, and the other by the fourth exception. The solution of these two questions will dispose of all the exceptions.

The Legislature had ordered, by Rev. Stat. chap. 18, § 27, that in such cases the railroad company shall, at its own expense, build and maintain so much of said county road as is within the limits of the railroad. This court held in *Portland & R. R. Co. v. Deering*, 78 Me. 61, 1 New Eng. Rep. 475, that this statute duty of the railroad company did not entitle it to any extra compensation for the taking of its land,—that the expense thus put upon the railroad company was not to be considered in appraising their damages. The result in the case cited is decisive against the claim of the Orchard Beach Railroad Company on this point, as its charter is expressly subject to legislative control.

The Boston & Maine Railroad Company, however, claims that its charter is not subject to "amendment, alteration, or repeal," the State having therein stipulated against such action. We do not think it necessary to express any opinion on this claim.

The company further claims that, by reason of such stipulation in its charter, the Legislature cannot lawfully require this company to bear such burdens without providing pecuniary compensation, since such requirement would impair the obligation of the contract between the State and the company, contained in the charter. We do not think such a result necessarily follows from the assumed premises.

Perhaps the question of the legislative authority over the company in this particular cannot strictly arise until the company refuses to comply with the statute; but as the company intimate their wish to obey the statute, and only claim that the burden imposed by it is an important element in the appraisal of their damages, we may properly pass upon the question in this proceeding. We may properly do this, whatever be the result of a motion for a new trial, as upon another trial the same question will inevitably arise. The question can, perhaps, be more directly presented if stated in this way: Could the Legislature lawfully impose this burden on this company in the case of a pre-existing county road? Could the Legislature lawfully require this company to assume the care of county roads (within its location) existing and crossing its track before the enactment of the statute? If the Legislature could impose this duty as to pre-existing roads without compensation, it certainly could do so as to future roads. There must be the same answer to either statement of the question.

In determining whether a statute is within the powers of the Legislature, or whether it "amends, alters, or repeals" a charter contrary to stipulation, it is important to ascertain the intent or purpose of the statute. The purpose of this statute was evidently to promote the safety of travelers, both upon the railroad and the county way. In view of the nature of the ordinary steam railroad, and the dangers necessarily attending its operation (onerous liability of the railroad company to its patrons

and the public), it is clear that the company should have the whole control of all things necessary to be done within its location for any purpose, whether for the benefit of the company or that of the public. It must practically have the exclusive possession of the land within the lines of its location. *Hayden v. Skillings*, 78 Me. 413, 3 New Eng. Rep. 174. An independent and possibly antagonistic interest or authority should not be admitted within those lines.

Still, that part of the county way within the lines of the railroad location must be kept safe and convenient for travelers upon it. It must also be so constructed and maintained as not to endanger safety in operating the railroad. The one need combines with the other. The county way is as necessary as the railroad. To ensure such construction and maintenance, to ensure such safety upon both roads at the point of intersection,—to protect travelers upon both roads,—to provide for the better security of persons and property, the Legislature has put this whole matter of construction and maintenance of both roads within the railroad limits upon the railroad company. The company is required to do this for its own protection and that of citizens generally.

This power of the Legislature to impose uncompensated duties, and even burdens, upon individuals and corporations for the general safety is fundamental. It is the "police power." Its proper exercise is the highest duty of government. The State may in some cases forego the right to taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty, and consequent power, override all statute or contract exemptions. The State cannot free any person or corporation from subjection to this power. All personal as well as property rights must be held subject to the police power of the State. *Beer Co. v. Massachusetts*, 97 U. S. 25 [Bk. 24, L. ed. 989]; *Stone v. Mississippi*, 101 U. S. 814 [Bk. 25, L. ed. 1079]; *Butchers Union S. H. etc. Co. v. Crescent City, L. S. etc. Co.*, 111 U. S. 746 [Bk. 28, L. ed. 585].

This important power must be extensive enough to protect the most retiring citizen in the most obscure walks, and to control the greatest and wealthiest corporations. Its exercise must become wider, more varied, and frequent with the progress of society. "This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State." *Thorpe v. Rulland & R. B. R. Co.* 27 Vt. 150. "It extends to the protection of the lives, health, and property of the citizens, and the preservation of good order and public morals." *Beer Co. v. Massachusetts*, 97 U. S. 33 [Bk. 24, L. ed. 992]. Its wide extent can be illustrated by instances of its actual exercise without direct compensation. Many of these instances are too familiar to need citations of authorities.

The sale of provisions has been regulated and abridged. The sale of intoxicating liquors has been prohibited. Licenses to manufacture liquors have been recalled, and the manufacture prohibited, after much expenditure by the licensees. *Beer Co. v. Massachusetts*, *supra*. Lotteries chartered for a consideration paid

have been suppressed. *Stone v. Mississippi, supra*. Dealers in many articles of merchandise are required to submit them to inspection by a public officer, and pay the cost of inspection. Dealers using weights and measures must have them approved by a public officer and pay the expense. The builder of buildings is often compelled to use more expensive material, and adopt more expensive appliances, than he otherwise would. Safety for others may require it. The blameless sufferer from a contagious disease is often compelled to leave home and friends, and bear his pain in some place of quarantine. The infected places are disinfected, and the infected clothing destroyed,—all at the expense of the unfortunate owner. In the emergency of danger from fire, this power can tear down private buildings, and otherwise destroy private property, without compensation, to prevent a greater destruction from the conflagration. 2 Kent, Com. 839, notes. An instance something like the requirement of this statute is the compelling the owners or occupants of buildings to keep the public sidewalks in front of the building clear from snow. Dill. Mun. Corp. § 894.

When the party or property affected, though private in its character, yet has a public relation, the operation of the police power is still more extensive and frequent. The owners of theatres and halls are required to provide ample means of exit, though to do so may involve expensive changes in the building. Hotel proprietors are compelled to provide fire-alarms, fire-escapes, watchmen, etc. Carriers of passengers are peculiarly subject to the exercise of this power. Steamboats must submit to inspections, and pay the costs thereof. They must use such boilers and engines, and carry such boats, etc., as may be prescribed. They may be required from time to time to discard old appliances, and adopt and use new and more expensive appliances for safety. Railroads are constantly having imposed upon them additional duties with reference to safety to persons and property. The use of new inventions in brakes, platforms, switches, signals, heating, lighting, etc., is often commanded, even though former expenditure is thereby made useless. "The State, in the exercise of its police power, may require reports, the numbering of the cars, the fixing and posting of rates, a slow rate of movement, the disuse of steam in cities, the ringing of a bell and the blowing of a whistle on approaching highways, the stationing of a flagman at a highway crossing, lighting of the railroad in cities and villages." Pierce, R.R. 462. Although the charter may have prescribed one kind of fence to be built by the railroad company, the Legislature may afterward lawfully require another kind of fence. Id. 463.

Neither is this police power confined to saving life or limb. It may protect business interests by prohibiting discriminations, by regulating tariffs, by enforcing facilities for the public. *Munn v. People*, 94 U. S. 113 [Bk. 24, L. ed. 77]. The Interstate Commerce Act of Congress illustrates this proposition. The case of *State v. Noyes*, 47 Me. 189, decided in 1859, is now generally considered too narrow and strict an interpretation. Broader views have prevailed since then.

From the above instances of the application of the police power, the Maine statute requiring the railroad company to care for and maintain highway crossings within its location seems to be a moderate and ordinary exercise of a constitutional power.

Corporations derive their existence from the State, and hence are subject to the State even more completely than individuals. Corporations created for public purposes and invested with large powers, as railroad corporations are, can properly be required to do any reasonable thing, and to assume permanently any reasonable duty, which shall promise greater security from the dangers attendant upon the exercise of their powers. There must needs be a highway. The crossing at the railroad must be kept in repair. To permit any divided authority or responsibility as to the crossing would be dangerous. The railroad company would loudly remonstrate if the municipality were given the power to manage the crossing. The company needs the entire control for its own protection as well as that of its passengers. By operating its road it occasions the danger. It is not unreasonable that the railroad company should provide against the danger so occasioned. Such a requirement does not seem to be an "alteration, amendment, or repeal" of the charter of the Boston & Maine Railroad Company. The company exercises all the powers and privileges it had before the enactment of the statute requiring this duty of maintaining crossings. The statute simply requires more care and greater security in such exercise. However the statute may affect the company or its charter, we think the company is subject to it. It follows that the principles announced in the case of *Portland & R. R. Co. v. Deering*, 78 Me. 161, 1 New Eng. Rep. 475, above cited, govern the case of the Boston & Maine Railroad Company, as well as that of the Orchard Beach Railroad Company.

The fourth exception is not urged; we have found no authority for the requested instruction. Such an apprehension of expense which may never be incurred is too uncertain and indefinite to be an element in estimating the damage to the company's property. There may be no accidents. There may be no unfounded claims made. None can be certainly anticipated. If the company cannot have compensation for increased liability to accidents, it should not have it for mere apprehension of expense in defending against groundless claims.

It will be seen that our answer to the questions raised by the exceptions requires the exceptions to be overruled.

The motion to set aside the verdict, as against evidence, has also been fully considered. It may be that the special findings, particularly as to the width of the prescriptive way, are not according to the weight of evidence on those points. However that may be, the majority of the court is of the opinion that upon the whole evidence, there is no reason to expect a larger award of damages from another trial, and that the general verdict should stand.

Exceptions and motion overruled.

Peters, Ch. J., Walton, Virgin, Libbey, and Haskell, JJ., concurred.

Joseph B. BABSON

v.

Samuel W. TAINTER.

1. A deed of land bordering upon the sea, describing it as running "to the water and thence by the water," conveys to low-water mark.
2. An island consisted of about 2 acres of rocks and ledges, and was unfit for habitation. *Held*, that it was of extent and importance enough to admit of a title thereto by adverse possession.
3. The title to an island situated within 100 rods from the opposite upland does not extend to any portion of the flats between the island and mainland when the channel is dry at low water, unless by special grant. It is otherwise as to the flats between the island and receded sea.
4. The rule is not varied by proof that there had been anciently a channel at low water, between the mainland and the island, which had become filled up by the slow process of accretion.

(Hancock—Decided April 14, 1887.)

ON exceptions by the defendant. *Overruled*.

This was an action of trespass wherein the plaintiff claimed damages for the erection of a weir by defendant on the flats connecting defendant's island with plaintiff's land on the main. It was contended by the defendant, and there was evidence tending to show it, that at the time of the original conveyances of the mainland and the island under which plaintiff and defendant now hold, from a common grantor, there was a channel at low water next the mainland.

The presiding judge instructed the jury as follows: (1) that by the gradual filling up of the channel under the principle of accretion, the bar would belong to the owner of the shore of the mainland; (2) that the bar would belong to the mainland by accretion, and would extend as far as the bar extended if southerly of high-water mark at the southerly end of the island, and within 100 rods; (3) that if that bar is southerly of the island, so far as it may be material in this case, and is within the 100 rods adjacent to the upland, whether title to the island be acquired by deed or by possession, it would belong to the plaintiff; to all of which instructions defendant excepted.

Messrs. Charles A. Spofford and George P. Dutton, for defendant.

Messrs. Wiswell & King, for plaintiff:

The law is well settled that where, by natural causes, there is an accretion to the land, and the increase is so insensible and gradual as to render it impossible to perceive how much is added in each moment of time, such increase belongs to the owner of the land.

Ang. Tidewaters, p. 69; *King v. Yarborough*, 8 B. & C. 105.

One reason given by this rule is *de minimis non curat lex*; but another and more substantial reason is that, as the owner of land bordering upon the seashore is so liable to have his land wasted away by the action of the water and other natural causes, he should also be en-

titled to any advantage to be derived from the same causes.

It is, of course, useless to multiply citations in support of this doctrine, it having been recognized by the court in this State, and in the recent case of *King v. Young*, 76 Me. 79, where Judge Walton says: "It seems to be settled, both in England and this country, that the land of a riparian proprietor may be increased by accretion."

It is common learning that an island forming in a river upon one side of the thread of the stream belongs to the proprietor of the bank upon that side; if in such a position in the stream that the thread would run through the island, then that would be the dividing line between the proprietors on each side of the stream.

Ingraham v. Wilkinson, 4 Pick. 268; *Hopkins Academy v. Dickenson*, 9 Cush. 544.

Islands forming in the sea belong to the sovereign or State; but when within the limits of private ownership,—that is, on flats within 100 rods from the shore,—they belong to the owner of the shore.

Ang. Tidewaters, p. 80.

It is said in many authorities that it is not the ordinance of 1641 which gives ownership to low-water mark, because that ordinance was annulled with the charter; but that by long usage the principle of that ordinance has become the common law of the State.

See headnote, *Winslow v. Patten*, 84 Me. 25.

In the case of *Thornton v. Foss*, 26 Me. 404, Judge Shepley, in the last of the opinion, doubts, first, whether the plaintiff's title could be extended by the ordinance to low-water mark, but decides, however that may be, that "the ordinance would extend his title only over the flats lying between them and low-water mark. It would not extend the title to the islands up or down the river at all, over the adjoining flats."

Peters, Ch. J., delivered the opinion of the court:

The plaintiff owns a parcel of the main shore, while the defendant owns or possesses what he calls a small island opposite the shore, within 100 rods from the plaintiff's upland, and the mainland and island are connected at low water by flats extending from shore to shore. A dispute arises between the opposite proprietors over the ownership of the flats between their properties.

The questions presented involve the construction, as applicable to present facts, of that portion of the Massachusetts Colony Ordinance of 1641-47, wherein "it is declared that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor, or the land adjoining, shall have propriety to the low-water mark where the sea doth not ebb above 100 rods, and not more wheresoever it ebbs further." In the present case there is no water at low tide between the two ownerships.

The parties claim their holdings under the same grantor, who conveyed mainland to one and island to another. The plaintiff suggests that, as his deed was dated and recorded first, and "bounds him to the water" and "by the water," the island itself, or some part of it, comes within his boundaries. That description

no doubt carries the plaintiff's line to low-water mark, and includes whatever lies above it on the shore. The words "to the water" would have the same significance to carry a boundary to low-water mark that other words have been decided to have, such as "by the sea," "tide water," "salt water," "the harbor," "bay," "cove," "creek," "river," "stream," or other tantamount expressions. Gould, Waters, § 195, and cases. But the plaintiff is deprived of the benefit of this principle upon this bill of exceptions, because it does not appear that the jury may not have concluded that the defendant won his title by adverse possession.

To foil the effect of this answer to his proposition, the plaintiff resorts to the position that the defendant's territory is too insignificant in size to be regarded an island, or such an island as would be subject to the principle of adverse possession. It is generally conceded that it is not everything which rises above high-water mark that can be called an island. There may be reefs, and rocks, and accumulations that are not such in any essential sense. Thatch growths may not be. *Thornton v. Foss*, 26 Me. 402. Elevations of mussel bed have been declared not to be. *King v. Young*, 76 Me. 76. Sand heaps and bars may not be,—or it may be a question of fact whether they are or not, when separated from the mainland only by narrow channels or sloughs. *St. Paul & P. R. R. Co. v. Schurmeier*, 7 Wall. 273 [74 U. S. bk. 19, L. ed. 74]; *S. C.* 10 Minn. 82.

Here the parcel is described as containing about 2 acres; and, though it consists mostly of rocks and ledges, and is unfit for the habitation of man, it must be considered as having size and permanency enough to entitle it to the appellation of island, a right to which might be obtained upon the principles of adverse possession. It must be of some importance. The colonial ordinance applies to islands. *Hill v. Lord*, 48 Me. 83.

This decision of the previous questions brings up another, more essential inquiry, whether the flats between the mainland and island belong to the one or to the other, or to both.

What right in flats, islands situated within 100 rods from high-water mark at the shore shall have, when not regulated by the special terms of any grant, seems not to have been very much considered in the cases. The ordinance is in very general terms. The colonial government of the mother Commonwealth granted the great boon to landholders without much thought or intimation about the manner of dividing the flats among its grantees. No rule can compass all cases. The Massachusetts court has adopted different rules for different classes of cases, and has frequently had occasion to remark upon the difficulty and embarrassment attending a practical application of any construction of the ordinance. *Gray v. Deluce*, 5 Cush. 9; *Rust v. Boston Mill Corp.* 6 Pick. 158; *Commonwealth v. Alger*, 7 Cush. 53-69.

In our own State a rule was agreed upon, not as dominating all cases, but as fitting the early settlers' lots which extended comparatively long distances upon the rivers or shores. But our own rule has not received much com-

mendation from other courts. *Emerson v. Taylor*, 9 Me. 42; *S. C.* 23 Am. Dec. 531, 537, with note; *Stockham v. Browning*, 18 N. J. Eq. 896; *Treat v. Chipman*, 35 Me. 84; *Call v. Carroll*, 40 Me. 31.

The effort of the judicial department has evidently been to give to each upland proprietor a share of flats as nearly proportionate to his length of line on the river or sea as circumstances permit, meting out as just and equitable results in all cases as possible.

Our opinion is that the flats in dispute in the present case belong wholly to the plaintiff, and that the island takes no share in them. It would seem that they must go wholly to the island or wholly to the main. They are a continuous, unbroken embankment between the two "proprieties." If the island takes them, the mainland frontage has no flats for that extent. It is certain that the island cannot take the flats surrounding it on all sides. For, if it did, it would not only appropriate to itself those lying between itself and the shore (northerly of the island), but would take a great extent of flats along the shore, lying easterly and westerly of itself. In this way a diminutive island might be so situated as to absorb into its ownership an immense area of flats at the expense of the opposite uplands.

It was virtually held in *Thornton v. Foss*, 26 Me. 402, that an island within the 100 rods, owned separately from the ownership of the shore, did not include flats on its easterly and westerly sides along the shores in front of the mainland, nor flats extending northerly from itself to the mainland, but the title extended to such flats as were on its southerly side between itself and the receded sea. Judge Wilde says, in *Rust v. Boston Mill Corp.* 6 Pick. 158: "If the demandant were entitled to the flats, he could claim them only in the direction to low-water mark. This is the obvious meaning of the language of the ordinance." We think such a rule would be thoroughly equitable,—to give the island no collateral flats, when that would interfere with flats of proprietors on the main; to give to the owners on the main the flats, so far as continuous and unbroken, over to the island in the direction towards the ebbing sea; and to allow to the island all flats on its opposite side between itself and the sea. In such case the island has as much frontage of flats on its sea side as the main shore has for the same distance facing the sea. Of course this rule would not divest an island of property in flats entirely encircling the island, if it be wholly surrounded by water at low tide.

But the defendant relies upon another element of the case, as so far qualifying the application of the principles above stated that he, as he contends, may still be the lawful possessor of a portion of the sandbar or flats in dispute; and this presents another important question. It seems that many years ago there was, according to some of the evidence, a channel, even at the lowest tide, between the island and the main. In such case, the island would take the flats bordering about it down to the channel. The defendant contends that, once including such flats, the island must always include them, and that the then existing line of division would not be lost by the channel

gradually filling up from the process of accretion afterwards; that the natural annexation does not take away a right once obtained.

We do not concur with the defendant in this view; the doctrine of the authorities lead us to an opposite conclusion. It may seem odd that nature may, without any act of man, transfer one person's property to another. But she may do it, when her work is accomplished by movements so slowly and silently operating as not to be seen while they are going on. The true answer to this proposition of the defendant is that an owner of flats has no fixed and absolute title thereto. It is a shifting, ambulatory, dependent, or conditional ownership. The owner of the island might own flats appended to the island until those flats became affixed to the opposite shore. The elements might operate favorably to the one proprietor or the other. They might make and keep the channel near the mainland or near the island; or might from time to time change and remove it; or might fill it up, and might open it again. But wherever natural causes place the channel, they interpose a ruling boundary. If they altogether remove the channel, other principles settle the boundary.

In *Dunlap v. Stetson*, 4 Mason, 366, Judge Story says of a proprietorship of the kind: "He (owner) takes the title subject to those common incidents which may diminish or increase the extent of his boundaries." An owner may gain or lose. The consideration for the gain is that he might have lost—may in the future lose—by the operation of natural causes.

The doctrine of accretion, as applied to extending or lessening an area of flats, was recognized as early as the case of *Adams v. Frothingham*, 3 Mass. 353. The present case merely requires a new application of an old principle.

In a New Jersey case, touching a similar question (45 N. J. L. 405), it is said: "It (a shore ownership) cannot be taken as an absolute—a fixed—boundary. It must be treated as relative,—as having relation to the things as they are from time to time."

The general question is exhaustively examined and clearly illustrated in the late case of *Mulry v. Norton*, 100 N. Y. 426, 1 Cent. Rep. 748; and that case is reproduced in 53 Am. Rep. 206, with an instructive note citing all the principal pertinent cases. The following are pointed authorities upon the question: *Commonwealth v. Roxbury*, 9 Gray, 451, 503, and note; *Re Hull*, 5 Mees. & W. 327; *Re v. Lord Yarborough*, 8 B. & C. 91. See 4 B. & C. 485. See also 25 Alb. L. J. 90.

The conclusion arrived at by us does not clash with the principle, well settled, that, where the right to the soil under the water belongs to a subject, he is entitled to all increments coming thereon. 2 Bl. Com. 262. This applies to growths upon and above flats. Should the bar in this case come up above high-water mark, and become solid land, it would be an incident of—a part of—the island or of the main, according as it grew up from the shore to the island or *vice versa*. If an island increase itself by accretion, the increment—the enlargement—is a part of the island. If the main increase itself, the increase is a part of the main. The flats in question are a part of neither island or main, but between the

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two,—incident to the main and in a sense belonging to it. Nor does the rule which governs the present case apply to flats (circling an island) which have been reclaimed from the sea. It affects, not what may have been flats, but what are such at the time of their annexation to the main. A littoral proprietor takes flats which become by accretion attached to his shore, but he does not in the same way take upland, whether naturally or artificially created. Flats reclaimed by occupancy, and filling up, partake of the character of permanent property because integral parts of the adjoining land. It is the "unimproved" and "unclosed" flats that may be subject to transition of ownership. And the right of reclamation and of wharfage is general. One of the chief purposes of the ordinance was to confer such privileges. Every occupier of the shore was to be enabled to reach the sea at all periods of the tide. *Lockwood v. New York & N. H. R. R. Co.* 27 Conn. 387; *Storer v. Freeman*, 6 Mass. 435; *Commonwealth v. Alger*, 7 Cush. 53; *Montgomery v. Reed*, 69 Me. 510, 515; *Kean v. Stetson*, 5 Pick. 492, 495; Gould, Waters, § 169.

Of course, wharves and storehouses, and the filling of flats, must be such as not to materially impair the navigable right.

The rule of the present case, evidently, would not be fitting, as between opposite owners on a cove or creek, the channel of which has become filled up, where each is as equal and dominant an owner as the other in the interjacent flats. If it does not apply, however, to the flats involved in the present dispute, the plaintiff will be to a great extent cut off from access to the sea at low water, the result being that he is a loser instead of a gainer by the disappearance of the channel. And he will be thus restricted by oral proof that an ancient, uncertain, and indefinite intercepting track of water once existed somewhere at low water between the main shore and the island. That cannot be. The theory or fiction of the law is that flats brought into existence by the slow and imperceptible process of accretion are presumed to be a natural condition always existing, or as having the same effect as if they had always so existed. It matters not, in applying the doctrine, whether the nucleus of the flats which finally extend from the upland commences at the shore or at a distance in the sea from the shore, and separable from it. *King v. Young*, 76 Me. 76.

After retaining and considering the case a long time, we are unable to satisfy ourselves with any other determination of the questions presented.

Exceptions overruled.

Walton, Danforth, Virgin, Libbey, Foster, and Haskell, Jr., concurred.

Luther DAVIS

v.

Nancy A. SMITH.

1. A judgment rendered without fraud or collusion is conclusive against a person who, by operation of law or express contract, was responsible over to the defendant, if he had notice of the pen-

dency of the action and an opportunity to appear and defend the suit, whether he appeared or not.

2. The notice need not be in writing; it may be implied when he had knowledge of the suit and participated in its defense.
3. The docket entries are the only proper evidence of a judgment when the record has not been fully extended.
4. Where an express contract of indemnity is not under seal, and contains nothing more than the law would imply, it is optional with the plaintiff, in bringing suit for the indemnity, to declare in general *indebitatus assumpsit* for money paid, or upon special contract.
5. To sustain an action for money paid the plaintiff must show that the money was paid at the defendant's request, either express or implied.

(Somerset—Decided April 14, 1887.)

ON report. *Judgment for plaintiff.*

Action on a contract of indemnity.

The opinion states the case.

Messrs. Merrill & Coffin, for plaintiff:

A certificate from the law court, making a final disposition of a cause on its merits, is the final judgment of the court.

Cooley v. Patterson, 52 Me. 472.

Nancy A. Smith was not the lawful guardian of Rosetta Dorr, as decided by this court on a full hearing of all the evidence.

Dorr v. Davis, 76 Me. 301.

When a person is responsible over to another, either by operation of law or by express contract, a judgment will be conclusive.

Chamberlain v. Preble, 98 Mass. 373; *Boston v. Worthington*, 10 Gray, 498; *Train v. Gold*, 5 Pick. 380; *Littleton v. Richardson*, 34 N. H. 187; *Stone v. Hooker*, 9 Cow. 154; *Lowell v. Parker*, 10 Met. 315.

The docket is the record until fully extended. Every statement is the act of the court, and must be presumed to be made by its direction, either by a particular or a general order, and the effect cannot be controlled by the testimony of the clerk or judge.

Read v. Sutton, 2 Cush. 123; *Leathers v. Cooley*, 49 Me. 342; *Pruden v. Alden*, 23 Pick. 184; *Longley v. Voss*, 27 Me. 179.

By assuming the defense of the suit (*Dorr v. Davis*, *supra*) Nancy A. Smith became privy to the judgment (*Chamberlain v. Preble*, 98 Mass. 374); and notice to Nancy A. Smith of said suit, the fact that she defended the same, and that judgment was rendered therein against the defendant, are conclusive.

Miner v. Clark, 15 Wend. 426; *Rogers v. Kneeland*, 13 Wend. 123; *Stone v. Hooker*, 9 Cow. 154.

Where there is a notice of the suit, the obligor is bound by the judgment, whether a defense is made or not.

Hamilton v. Cutts, 4 Mass. 352.

The docket entries of judgments, having been entered of record *in extenso*, are admissible evidence.

Central Bridge Corp. v. Lowell, 15 Gray, 122; *Pruden v. Alden*, 23 Pick. 187; *Benedict v. Cut-*

ting, 13 Met. 186; *Read v. Sutton*, 2 Cush. 113; *Tillotson v. Warner*, 3 Gray, 577.

Mr. D. D. Stewart, for defendant:

In *Brattle Square Church v. Bullard*, 2 Met. 366, the court says: "The plaintiffs are bound to prove that such a title has been established, by legal evidence. To do this they must give in evidence the common proofs of title, or a judgment to which the defendant was party or privy. It comes back, therefore, to the same question, whether this was such a judgment."

In *Hall v. Thayer*, 12 Met. 136, the court says: "The defendants promised and agreed to indemnify and save harmless the said committee (the plaintiffs) in proportion to the number of shares for which they had respectively subscribed. Upon this contract no cause of action arose against the defendant, at least until an action was instituted and a judgment rendered thereon against the committee; and no substantial cause of action—that is, no right to recover the amount of such notes—would exist until those notes were actually paid."

Recovery of judgment, and execution, without actual payment, are no breach of a contract to indemnify and save harmless.

Hussey v. Collins, 30 Me. 190; *Wicker v. Hopkock*, 6 Wall. 99 (73 U. S. bk. 18, L. ed. 753.)

The only part of that count which could possibly have any application to the case at bar is that "for money paid by the plaintiff for the use of said defendant at her request." Can such a count be maintained upon a written contract of indemnity? We submit that it cannot. No money paid by the party holding a written indemnity from a third person can be considered as paid at the request of such third person. That is the very thing he does not want done; and the very thing he indemnifies the other for not doing. But if compelled to do it by an outstanding better title, then his indemnity comes in to protect him. The very word "indemnity" excludes, *ex vi termini*, the idea of an implied promise on the part of the party indemnifying. And the party indemnifying cannot recover upon a count for money paid, and rely upon an implied request, but must declare specially upon his written contract of indemnity. These questions are fully considered and so decided in *Brown v. Fales*, 139 Mass. 21; *Toussaint v. Martinant*, 2 T. R. 101.

But for want of the proper papers and vouchers which the plaintiff in that action should have filed in court, but never did, that court could not, and never did, enter any judgment whatever in the suit of *John Dorr v. Luther Davis*, referred to in this rescript.

Rockland Water Co. v. Pillsbury, 60 Me. 423; *Leathers v. Cooley*, 49 Me. 337.

"A record," said the court in *Sayles v. Briggs*, 4 Met. 423, "is a memorial or history of the judicial proceedings in a case, commencing with the writ or complaint, and terminating with the judgment; and it must therefore be precise and clear, containing proof within itself of every important fact on which the judgment rests, and it cannot exist partly in writing and partly in parol. Its allegations and facts are not the subject of contradiction."

"The record," said Shepley, *Ch. J.*, in delivering the opinion of this court in *Holmes v. Barrows*, 39 Me. 186, "is not liable to be ex-

plained or contradicted by parol testimony or by extraneous documents. And a copy of the record, regularly authenticated, is the legal and best evidence of it."

Same point in *Central Bridge Corp. v. Lowell*, 15 Gray, 107.

Excluding, therefore, under the stipulations of this report, all evidence offered not legally admissible, and the only proof of any alleged judgment against this plaintiff must be confined to the extended record. That not only fails to prove any judgment, but proves affirmatively that none was ever recovered.

Rockland Water Co. v. Pillsbury, 60 Me. 425, before cited; *Noyes v. Newmarch*, 1 Allen, 51.

There being no proof of any judgment against this plaintiff in favor of a third party having a better title than the defendant, and neither allegation nor proof that such third party had in fact a better title, this action cannot be maintained under any form of declaration (*Foster v. Pierson*, 4 D. & E. 617; *Hamilton v. Cutsis*, 4 Mass. 349; *Brattle Square Church v. Bullard*, 2 Met. 363; *Hall v. Thayer*, 12 Met. 131; *Kelly v. Dutch Church*, 2 Hill, 105); and it deserves consideration whether the defendant does not clearly show affirmatively the better title in herself (*Somerville v. Hamilton*, 4 Wheat. 280, 17 U. S. bk. 4, L. ed. 558; *Lathrop v. Grosvenor*, 10 Gray, 52).

Foster, J., delivered the opinion of the court:

This action, brought upon a contract of indemnity, comes to this court upon a full report of the evidence, with the stipulation that the court is authorized to draw such inferences therefrom as a jury might legally do.

It appears that the plaintiff, on January 24, 1871, gave his negotiable promissory note for \$209 to Harrison Dorr, guardian of Rosella Dorr, niece of the defendant, payable on the 1st day of January, 1874. The defendant had obtained letters of guardianship in an adjoining county, in which she resided,—and with whom Rosetta was at that time living,—and soon after the note became due represented to the plaintiff that she was the lawful guardian of Rosetta Dorr, and as such was legally authorized to collect said note. Whereupon the plaintiff paid the defendant the sum of \$231.21, the amount then estimated to be due upon the note. At the same time, and in consideration thereof, the defendant agreed in writing to fully indemnify and save the plaintiff harmless in consequence of his paying the note to her. Suit was afterwards commenced by the indorsee of the note; the case was tried and carried to the full court; finally judgment was rendered against this plaintiff for the amount of the note and interest thereon from date. *Dorr v. Davis*, 76 Me. 801.

After judgment was rendered against him, this plaintiff paid the amount of it, together with costs of suit, to the plaintiff in that action, and now seeks to recover the sum thus paid, amounting to \$479, from the defendant in this suit.

To entitle him to a recovery he must show that some other person has established a better title to the money upon that note than the defendant herself had, and that he has been compelled to pay it to such person. This he may

do in one of two ways: (1) by ordinary proof of an outstanding better title in such third person, to which he yielded and paid; or (2) by a judgment against him by such third person, to which the defendant was party or privy, and which judgment he has been compelled to pay. *Hall v. Thayer*, 12 Met. 136.

The plaintiff does not base his claim upon the ordinary proof of an outstanding superior title in some third person, to which he yielded and paid; but upon the recovery of a judgment against him, payment of the same, and for which the defendant was bound to indemnify and save him harmless.

The defendant was not a party to the action upon which that judgment was rendered. *Prima facie* she was not bound by the judgment; and to make it evidence against her and in favor of himself, the plaintiff must show that it was rendered against him, in favor of the indorsee of the note, upon a transaction against which the defendant was bound to indemnify him. If such was the fact, it would be legitimate and competent evidence; otherwise it would not. And evidence *aliunde* is admissible for such purpose. *Littleton v. Richardson*, 34 N. H. 189.

From an examination of the evidence it is apparent that the cause of action in the other suit was the identical note which this defendant had induced the plaintiff to pay over to her,—the amount of which she acknowledges she received from the plaintiff at the time of agreeing to indemnify him in consequence of such payment. With this connecting parol evidence, together with the copy of the declaration and of the note in question, as well as with what appears from the other evidence in the case, the identity of the cause of action in that suit with the subject-matter to which the indemnity relates is sufficiently established.

Was the judgment therein rendered against this plaintiff conclusive against the defendant in this action? It was, provided she had due notice of the pendency of the action in which that judgment was rendered, and had an opportunity to defend it. The rule seems to be established that when a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit, and he has been requested to take upon himself the defense of it, he is no longer regarded as a stranger to the judgment that may be recovered, because he has the right to appear and defend the action equally as if he were a party to the record. When notice is thus given, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not. *Veazie v. Penobscot R. R. Co.* 49 Me. 124; *Hardy v. Nelson*, 27 Me. 530; *Boston v. Worthington*, 10 Gray, 498; *Littleton v. Richardson*, 34 N. H. 187.

We are of the opinion, from the evidence before us, and with the inferences legitimately to be drawn from it, that the defendant had such notice of the pendency of the suit as renders the judgment recovered therein conclusive against her. She employed and paid the counsel who tried the case. She went in company with the plaintiff twice to Dover to have the case tried,—it being continued the first time because the other side was not ready. She

was present at the trial, testified in the case, and paid all the expenses of this plaintiff and his witnesses. If the evidence reported is to be taken as true, she appears to have regarded the case as her own until the decision rendered from the law court. The facts shown are sufficient to render the judgment conclusive against her, although the plaintiff had not in terms requested her to take upon herself the defense of that action. "This was not necessary," says the court in *Boston v. Worthington*, *supra*, "to render the judgment conclusive against them as to the facts thereby established." And this principle is established by the great weight of authority,—that, where one stands in the position of indemnitor to another who is liable over to a third party, his liability may be fixed and determined, in the action brought against such third party, by notice of the pendency of such action and an opportunity afforded him to defend it. *Aberdeen v. Blackmar*, 6 Hill, 324; *Chicago v. Robbins*, 2 Black, 428 [87 U. S. bk. 17, L. ed. 802]. In such case the authorities hold that notice in writing, or even express notice, is unnecessary, but that notice may be implied from his knowledge of the pendency of the action and a participation in its defense. *Chicago v. Robbins*, *supra*; *Robbins v. Chicago*, 4 Wall. 657 [71 U. S. bk. 18, L. ed. 427]; *Port Jervis v. First Nat. Bank*, 96 N. Y. 557; *Barney v. Dewey*, 13 Johns. 226; *Beers v. Pinney*, 12 Wend. 809; *Warner v. McGarry*, 4 Vt. 508; *Boston v. Worthington*, *supra*; *Chamberlain v. Preble*, 11 Allen, 874; *Veasey v. Penobscot R. R. Co.* 49 Me. 119, 120.

"It cannot be material to the person agreeing to indemnify, that he should have a formal notice served upon him. The law requires that he should have notice before the judgment can be used against him, because he is the real party in interest. But any notice which will enable him to present any defense which he may have, either in law or in fact, is all that can be useful to him; and the law requires no vain or useless ceremonies in such cases." *Holbrook v. Holbrook*, 15 Me. 12. In such case the judgment binds the party whose duty it is to indemnify, and becomes legitimate evidence in favor of the plaintiff and against the defendant. *Train v. Gold*, 5 Pick. 379; *Kip v. Brigham*, 6 Johns. 159; *Ryerson v. Chapman*, 66 Me. 568.

But the defendant contends that there is no sufficient legal evidence introduced of any judgment such as the plaintiff has alleged in the several counts of his writ,—that there is a fatal variance between the allegations and the proof,—and consequently the plaintiff is not entitled to recover.

At the time the order for judgment was sent down from the law court, an entry was made upon the docket of the county where the action was pending, for hearing in costs by the defendant. No vouchers have ever been filed by the plaintiff in that action, and no hearing had by the defendant therein in relation to costs. Consequently no extended record of the judgment has ever been made, as appears from the testimony of the clerk. True, a record was commenced, but it was never completed. That portion of the record which the clerk had commenced, a copy of which was introduced,

shows affirmatively that it is incomplete, never having been made up and attested by the clerk. When the record is once made up, however, it becomes conclusive upon all parties until altered or set aside by a court of competent jurisdiction, and the statements contained in it must be regarded as importing absolute verity, and not subject to explanation or contradiction by any evidence outside of such record. But until the record is in fact fully extended, it is well settled that the docket is the record, and the entries therein are the only proper evidence of the judgment. *Willard v. Whitney*, 49 Me. 238; *Leathers v. Cooley*, Id. 342.

The fact that there may be no fully-extended record does not affect the judgment. That is the principal thing,—the record is only evidence of it. Here the certified copies of the docket entries were introduced, and they show that judgment was rendered against this plaintiff for the sum of \$209, with interest from January 24, 1871,—the full amount of the note "as per certificate from clerk of law court received and filed June 10, 1884." By Rev. Stat. chap. 77, § 45, it became the duty of the clerk to "enter judgment as of the preceding term," and the judgment, when entered up, should have been as of the February Term preceding. "But for most purposes," remarks Barrows, J., in *Huntress v. Hurd*, 73 Me. 454, "the order of the law court to the clerk of the supreme judicial court to enter up judgment, or directing such a disposition of all pending questions as leaves nothing to be done but to make up the judgment, must be deemed a judgment. For all purposes, when it is necessary in order to sustain legal and equitable rights, the court so regards it."

Were this an action of debt brought upon the judgment itself, it would necessarily be against the party defendant therein named, and the plaintiff might therefore meet with serious difficulty in the introduction of a judgment in evidence, in support of his allegations, differing so widely as to the time of its rendition from the time alleged in the first three counts of the plaintiff's writ, viz., June 9, 1884.

But the basis of the plaintiff's claim is assumpsit, and not debt,—it is founded on a promise of indemnity, and not on a contract of record. His claim is to recover in assumpsit for the money which he has been compelled to pay by force of that judgment. In addition to the special counts in his writ, he has declared upon the general count for money paid,—and we think he is entitled to maintain this action under that count. The judgment therefore becomes admissible and competent evidence between these parties. *Hardy v. Nelson*, 27 Me. 580; *Holbrook v. Holbrook*, 15 Me. 11.

Nor do we think that the objection of the defendant is tenable,—that, there being a written contract of indemnity, the plaintiff must declare specially upon such contract, and will not be allowed to introduce proof in support of his claim under the general count for money paid. The objection is one of form, and does not touch the real merits of the case. Still, if it rests on sound legal principles, it is the duty of the court to give effect to it. It is undoubtedly the general rule of law that where the parties have made an express contract, the law

will not imply one. But this rule is not inflexible, and, like most general rules, is subject to exceptions. Thus it has been held that, where the special contract is not under seal, the plaintiff has his option, under some circumstances, either to declare on the implied promise, or to set out the special contract in his declaration. *Toussy v. Preston*, 1 Conn. 175.

An action for money had and received will lie on a promissory note or bill of exchange; and yet they are express contracts. *Pitkin v. Frink*, 8 Met. 12; *Henschel v. Mahler*, 8 Denio, 428.

It is also a reasonable and well-recognized principle of law, settled by numerous decided cases, that where there is an express contract of indemnity, and by its terms it contains nothing more than the law would imply, it is optional with the plaintiff to declare in general *indebitatus assumpsit* for money paid, or upon the special contract.

This question arose in *Gibbs v. Bryant*, 1 Pick. 118, where a written promise of indemnity had been given to the plaintiff by the defendant, and upon objection by the defendant that there was a special agreement which ought to have been declared on, the court says: "This objection cannot avail the defendant, because the written contract produced contained nothing more than what the law would imply. The right of action rests upon the payment of money for the use of the defendant. The law raises a promise, and the plaintiff may make use of his written contract or not, as he pleases. If there is anything in the written promise to contradict the implication of law, the defendant may show it."

Precisely the same doctrine was laid down in *Sanborn v. Emerson*, 12 N. H. 58, where the declaration contained a general count for money paid, laid out, and expended for the use of the defendant. There the plaintiff had receipted for the property of the defendant, attached in sundry suits commenced against him, and had the actual custody of it; and at the request of the defendant the plaintiff delivered the property to him, the defendant expressly agreeing that the plaintiff should be indemnified and saved harmless on account of the obligation resting upon him in consequence of his having receipted for the property attached. Judgments were afterwards recovered in the several suits, and the plaintiff, being unable to surrender the property, was compelled to pay the amount of the several judgments. The court there says that the case comes "directly within the principle of the decision in *Gibbs v. Bryant*,—the special contract, as it appears, containing nothing more than the law would imply. On this branch of the case, then, we hold that the action is well maintained, notwithstanding the existence of the special contract of indemnity, and the omission to set it out in the declaration; and the objection that the action should have been brought on the express contract is therefore overruled." The following cases sustain the same principle: *Colburn v. Pomeroy*, 44 N. H. 23; *Rushworth v. Moore*, 86 N. H. 195; *White v. Leroux*, 1 M. & M. 847; *S. C.* 23 E. C. L. 331; *Williamson v. Henley*, 6 Bing. 299; *S. C.* 19 E. C. L. 89; *Poneral v. Ferrand*, 6 B. & C. 439; *S. C.* 13 E. C. L. 232, 233; *Keyes v. Stone*, 5 Mass. 394.

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The relation of the present parties in reference to the note upon which the indemnity was given was such as would in law raise an implied duty or obligation of indemnity as strong as where a receptor, upon request, had delivered up property to the owner against whom suits had been commenced. The defendant, in the one case, had no right to the property; in the other, no right to the money or note; and the contract of indemnity in both cases contained no more than the law would imply.

The plaintiff alleges that he has paid so much money for the use of the defendant. To sustain this allegation it is necessary for him to show that the money was paid at the defendant's request, either express or implied. "The request to pay and the payment according to it, constitute the debt; and whether the request be direct,—as where the party is expressly desired by the defendant to pay,—or indirect,—where he is placed by him under a liability to pay, and does pay,—makes no difference. * * * In every case, therefore, in which there has been a payment of money by the plaintiff to a third party, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount, this form of action is maintainable." *Brittain v. Lloyd*, 14 Mees. & W. 773. And the doctrine of the courts is that where the plaintiff shows that he, either by compulsion of law or to relieve himself from liability, has paid money which the defendant ought to have paid, this count will be sustained. 2 Greenl. Ev. § 114; *Nichols v. Bucknam*, 117 Mass. 491. "In such case," said Lord Tenterden, *Ch. J.*, "I am of the opinion that he is entitled to recover upon the general principle that one man who is compelled to pay money which another is bound by law to pay is entitled to be reimbursed by the latter; and I think that money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it." *Poneral v. Ferrand*, 6 B. & C. 439; *S. C.* 13 E. C. L. 231.

The only remaining question relates to the measure of damages under the particular facts and circumstances of this case. What is the defendant's liability under this branch of the case? She was notified of the pendency of the action against this plaintiff in which the title to the note in question and the validity of the payment to her were put in issue. She appeared and participated in the defense, and has paid the counsel fees. It was her duty thus to appear, and if possible save this plaintiff harmless on account of his paying, upon her representations, the note to her, when in fact she had neither the legal title to it, nor the lawful right to the money upon it. Judgment being rendered against this plaintiff, the defendant was called upon and requested by him to settle the same, and this she refused to do. After such refusal, the plaintiff was not obliged to wait until his property was seized on execution issued upon that judgment before being authorized in law to pay the same.

The amount he paid to relieve himself from the judgment against him, as appears by the evidence, was no more than the judgment rendered and costs legally taxable against him in that suit and incident to that judgment. This the plaintiff has paid in good faith. He is en-

titled to recover it as the measure of his damages. *Coolidge v. Brigham*, 5 Met. 72; *Boston & A. R. R. Co. v. Richardson*, 135 Mass. 477; *Ryerson v. Chapman*, 66 Me. 562; *Kingsbury v. Smith*, 18 N. H. 125; *Veasie v. Penobscot R. R. Co.* 49 Me. 127.

Judgment for plaintiff for \$479, and interest thereon from the date of the writ.

Peters, Ch. J., Walton, Danforth, Emery, and Haskell, JJ., concurred.

Seth WEBB

v.

Joanna H. GROSS et al.

1. An action may be maintained on the bond of an administrator of an insolvent estate, who fails to file and settle an account within six months after the return of the commissioners, if the estate is more than sufficient to pay the expenses and privileged claims. The damages in such an action are nominal if no actual injury is proved.
2. The rule that there has been no breach of the bond until the administrator has been cited to account does not apply to insolvent estates.

(Hancock—Decided March 3, 1887.)

ON report. Action by the judge of probate, for the plaintiff, on the bond of an administratrix of an insolvent estate. *Defendants defaulted.*

The case is stated in the opinion.

Messrs. Hale & Hamlin, for plaintiff:

Failure to render an account within six months after the commissioners' report was made was a breach of defendant's bond.

Rev. Stat. chap. 66, § 21.

Judgment should be for the penalty of the bond, and execution should issue for the amount of debt and costs. This was squarely decided in *Dickinson v. Bean*, 11 Me. 51, and never overruled.

See also *Coney v. Williams*, 9 Mass. 114.

Mr. George M. Warren, for defendants:

The representation of insolvency and appointment of commissioners was unnecessary, as there were no assets to pay creditors of the fifth class. It was mere surplusage in the administration. The plaintiff was not injured by it, and the administratrix is not liable on her bond.

Rev. Stat. chap. 66, § 2; 4 Mass. 625.

The whole estate consisted of real property, and that being so the administratrix was not liable for not settling or filing an account within six months from acceptance of report of commissioners. That liability pertains to personal estate only.

Butler v. Ricker, 6 Me. 269; *Eaton v. Brown*, 8 Me. 22.

The administration bond does not cover real estate, and real estate is all there is in this case. The action cannot be maintained.

See form of bond, *Waterman*, Prob. Prac. p. 50.

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Peters, Ch. J., delivered the opinion of the court:

The principal defendant is an administratrix on an insolvent estate, which had not personal property enough to pay the expenses of administration. The inventory showed no personal assets, but returned real estate valued at \$125. The inquiry is whether an action can be maintained on the bond of the administratrix for her failure to settle an account within six months after a report was made by the commissioners of insolvency.

The administratrix pretends that she is protected from liability by the statute (Rev. Stat. chap. 66, § 2) which provides that, where an estate is not sufficient to pay more than the expenses of administration and claims of the privileged classes, an administrator is exonerated from making a representation of insolvency. The statute relied on is not quite applicable to the facts of the present case. It was necessary to render an account or report of some kind, from which to ascertain whether the real estate should or not be sold for the payment of debts. The case does not disclose that there would be nothing for the common creditors after converting the real estate into assets.

The next ground taken in defense is that no action can be maintained on the bond until the administratrix had been cited by the probate court to render an account; the defendants, in support of this position, relying on Rev. Stat. chap. 72, § 16, and on several reported cases, among which is that of *Gilbert v. Duncan*, 65 Me. 469. An examination of the cases referred to discloses that all of them involved the settlement of solvent estates,—not insolvent estates. It may not be easy to appreciate any reasons for the distinction; but it was one of the rigors of the old common law, and finds a survival in Rev. Stat. chap. 66, § 21, which declares that it shall be a breach of his bond for an administrator to neglect to settle his account for more than six months after the report on claims is made. The terms of the statute are absolute. *Dickinson v. Bean*, 11 Me. 50.

What must the damages be? The plaintiff contends that his whole debt is recoverable, about \$1,200, and cites the case of *Dickinson v. Bean*, *supra*, in support of his contention. Such would, no doubt, be the result if the doctrine of that case held good at this late day. But that case was determined under the statute of 1821, which is worded very differently from the statute of to-day. That statute, founded on the older Massachusetts enactments, relentlessly demanded payment of a creditor's whole debt for what might be no more than a technical shortcoming of the administrator. This terrible penalty was, however, abolished by an Act passed on February 26, 1833. The present statute merely prescribes the duty, but affixes no penalties for a breach.

In the present instance the damages must be nominal. No one sustains any real injury. It is a technical default only. The judgment must be for the amount of the penalty of the bond; execution to issue for \$1 damages.

Defendants defaulted.

Walton, Danforth, Emery, Foster, and Haskell, JJ., concurred.

Albert H. THAXTER *et al.*

v.

Melville JOHNSON.

1. A **discharge** under the insolvent law, upon complying with the conditions pertaining to **composition proceedings**, is **not valid if any material statement** in the affidavit or schedule required of the insolvent is known by him to be false.
2. **Such a discharge is no bar to an action** by any creditor, within two years thereafter, to **recover the balance** of his claim.

(Penobscot—Decided April 14, 1887.)

ON report. *Judgment for plaintiffs.*

The case and material facts are stated in the opinion.

Messrs. Wilson & Woodard, for plaintiffs:

The discharge having been obtained under Rev. Stat. chap. 70, § 62, the affidavit named therein must have been taken; and the law provides that the discharge shall not be valid if any material statement in said affidavit is false to the knowledge of the debtor making the same.

A plain act of bankruptcy cannot be purged by subsequent conduct.

Hopkins v. Ellis, 1 Salk. 110; *Colkett v. Freeman*, 2 T. R. 59.

"Once a bankrupt, always a bankrupt. A clear act of bankruptcy cannot be purged or canceled."

Hill, Bankr. p. 24.

"An act of bankruptcy, when once committed, cannot be canceled or purged."

Robson, Bankr. p. 95.

Under the insolvent law of Massachusetts, the giving of security for a pre-existing debt invalidated the discharge; and if the creditor who had received the preference surrendered the property received, this did not purge the wrongful act on the part of the debtor; and a discharge granted was held invalid.

Blodgett v. Hildreth, 11 Cush. 311.

The phrase "in anticipation of insolvency" has a meaning derived from the time when the insolvent law was passed—which was just in season that it might go into effect upon the repeal of the national bankrupt law—and, from the construction which had been given to the kindred phrase in that law, "in contemplation of bankruptcy." As "contemplation" was not used in the sense of meditation, so "anticipation" is not so used. Either refers to the condition of a debtor who knows that he will not be able to pay his debts as they become due, or who does not expect or intend to do so.

Puig v. Loring, 1 Holmes, 275.

One was in contemplation of bankruptcy when he contemplated the committing an act of bankruptcy.

Re Goldschmidt, 3 Nat. Bankr. Reg. 164.

It is not necessary that, in order that he should have contemplated becoming a bankrupt, he should have contemplated having a petition filed against him and being adjudged a bankrupt thereon, provided he contemplated

committing an act which is defined to be an act of bankruptcy."

Ibid.

Messrs. Barker, Vose, & Barker, for defendant:

The oath required of the debtor before he can receive his discharge under composition proceedings is as follows, viz.: "I solemnly swear that I have not removed, concealed, or secreted any money, paper, securities, effects, or property, real or personal, with intent, purpose, or expectation of receiving, directly or indirectly, any benefit or advantage to myself; and that I have not changed or falsified any of my books of account, deeds, or papers relating to my estate; and that I have not sold, pledged, conveyed, or transferred any of my property or estate in anticipation of insolvency, or made any conveyance, mortgage, pledge, transfer, or payment to any creditor, or caused or procured any attachment of my property, for preferring any of my creditors; and that I have not, directly or indirectly, given to any creditor or other person any compensation or promise of reward, except reasonable counsel fees for services or influence in effecting a compromise with my creditors; and that my assets and liabilities are correctly stated in the schedule hereto annexed and signed by me."

Rev. Stat. chap. 70, § 62.

Upon taking this oath, the debtor, if he produce the composition paper required by the same section, receives his discharge; but, "such discharge is not valid if the signature of any creditor has been obtained by fraud, or if any material statement contained in such affidavit or schedule is false to the knowledge of the debtor making the same; and any creditor may, within two years, sue for and recover the balance of his claim or debt against such debtor."

Id.

We claim that the reasons which might be applicable to a discharge obtained in the regular course of insolvency, as set forth in chap. 70, § 46, are not applicable to this case, as the method of proceeding to get the discharge annulled is entirely different.

Ex parte Haines, 76 Me. 394; *Re Hoyt*, *Id.*

There was no secretion or concealment. The legal title remains in the insolvent until the assignment is made.

Hampton v. Rouse, 22 Wall. 263 (89 U. S. bk. 23, L. ed. 755).

The term "concealment" in the insolvent law implies something willfully intentional.

Re Wilson, 6 L. R. 272; *Dresser v. Brooks*, 3 Barb. 429.

Foster, J., delivered the opinion of the court:

It was the evident design of the insolvent law of this State that all creditors of the same class should fare alike in the distribution of the debtor's property, and that no secret arrangement should be made whereby one creditor should obtain advantage over another.

Fraud, in its various forms and under its different guises, appears to have been carefully guarded against by express enactment. And while by § 62, relating to composition proceedings, the process is one specially provided by

statute, and essentially different from ordinary proceedings, nevertheless the object of these provisions is to guard the rights of creditors in matters of composition, and to see that there is a full and fair settlement, that nobody is deceived or defrauded, and that all fare equally. The affidavit which is required of the debtor before he can receive his discharge under these proceedings, among other stringent provisions against fraudulent transactions or preferences, prohibits the making of any payment to any creditor for the purpose of preference, or the giving, directly or indirectly, to any creditor or other person any compensation or promise of reward, except reasonable counsel fees for services or influence in effecting a compromise with his creditors. For such services reasonable counsel fees alone are excepted, and payments for other services or to other persons are forbidden; the intent of the law being that the remainder of the insolvent's property shall be distributed among his creditors, and that no inducements shall be offered to some of the creditors to sign away the rights of the others. Upon complying with the conditions pertaining to composition proceedings, the debtor may receive his discharge; but it is expressly provided that "such discharge is not valid if the signature of any creditor has been obtained by fraud, or if any material statement contained in such affidavit or schedule is false to the knowledge of the debtor making the same; and any creditor may, within two years, sue for and recover the balance of his claim or debt against such debtor."

This suit is brought by a creditor, within the two years named, to recover the balance of his claim. However stringent this remedy may appear, it is one provided by the special provisions of the insolvent law pertaining to composition proceedings, and is allowed to any creditor who deems himself defrauded (*Ex parte Haines*, 76 Me. 394), or who may be able to show that any material statement contained in the affidavit or schedule of the debtor is false and known by him to be so. In such case the discharge is not valid. It is no bar to a recovery of any balance which the creditor may show to be due him from the debtor.

In this case a full report of the evidence is before us. The creditors were each to receive 35 per cent of their demands, provided for by the composition. The evidence is plenary that, instead of that, one creditor actually received the sum of \$300, and another the promise of \$168, in addition to the 35 per cent, as a compromise settlement, and that this was known by the debtor and acquiesced in by him. Nor were these the only parties who had or were to receive sums additional to the amount named in the composition agreement, as the testimony discloses.

Here was a preference as well as a promise of reward, prohibited by the special provisions of the law invoked in behalf of the debtor. The statement under oath of the debtor, in his affidavit, was that he had not, directly or indirectly, given to any creditor or other person any compensation or promise of reward, except reasonable counsel fees for services or influence in effecting a compromise with his creditors. This statement was material, and

false to the knowledge of the debtor himself.

Judgment for plaintiffs for the sum of \$911.91, together with interest thereon from the date of the writ.

Peters, Ch. J., Walton, Danforth, Emery, and Haskell, JJ., concurred.

Albert P. GOULD

Nathaniel P. WHITMORE, Admr.

1. Under the statutes of Maine an action may be maintained against an administrator, on a claim against the estate, if commenced within two years, and six months after notice of the appointment of the administrator is given.
2. Such action is continued, at the cost of the plaintiff, to the next term of court, and for such further time and on such other terms as the court orders, if the plaintiff did not, within two years after the notice of the appointment and thirty days before the commencement of the action, present his claim in writing to the administrator, and demand payment thereof.
3. A tender of payment, or offer thereof filed in the case during the time of the continuance of such action, will bar the same, and the defendant will recover costs.
4. An action does not appear, "on the face of the papers," to be barred by the general limitation of six years, where some of the items in the account annexed to the writ are alleged to be term fees within six years of the date of the writ.

(Knox—Decided May 28, 1887.)

ON exceptions by the defendant. *Overruled.* Assumpsit for professional services rendered Jason M. Carlton, in his lifetime, against the administrator.

The points are stated in the opinion.

Mr. S. C. Whitmore, for defendant:

By Rev. Stat. chap. 87, § 12, and Stat. 1886 chap. 248, a demand must be made on the administrator, in writing, within two years after notice of his appointment, in order to bring and maintain an action within the six months next following.

In Laws 1872, chap. 85, the words, "within the six months next following," are found in our statutes; and the purpose of the Legislature had in first enacting the same made clear.

The maintenance of an action, before the date of 1883, was absolutely contingent upon demand being made within the two years.

Those words cannot be construed as extending the time of making a demand; but to extend the time only of bringing an action, and making the maintenance of it, so long as contingent upon a demand being made, within the two years, in writing.

This court so held in *Finch v. Trus*, 1883, 48.

In the Laws of 1883 nothing is said about a penalty if plaintiff does not prove a demand within the two years, showing that the Legislature only amended the law of 1872 so far as it referred to the thirty days' notice.

Two years is the limit in other sections of the statute, and, reasoning from analogy, it is the limit in § 12 of chap. 87.

Rev. Stat. chap. 87, §§ 13, 14, 16.

His honor Judge Weston says, in *Davis v. Smith*, 4 Greenl. 337: "When mutual promises are relied upon to repel the operation of the Statute of Limitations, it is upon the principle of a new promise, of which the acknowledgment of an unsettled account, implied from new items of credit within six years, is evidence."

The receipts,—showing that the payments were made for specific services, are not on the general account,—do away with the element of mutual dealings. In *Benjamin v. Webster*, 65 Me. 170, his honor Chief Justice Peters says that, "where an item of credit is intended as a specific payment of only a particular charge in a plaintiff's account, in cases where there are several items, and not as a payment upon the account generally, such payments would not have the effect to take the whole account out of the operation of the statute."

See also *Perry v. Chesley*, 77 Me. 393.

Mr. A. P. Gould, for plaintiff:

Defendant asserts that this court has held that, under the Law of 1883, the maintenance of an action is "contingent upon a demand made within the two years in writing;" and to support this assertion he refers to a remark of Judge Symonds in *Fowler v. Trus*, 76 Me. 46. He entirely misconceives that case. Fowler's action was commenced, as well as the others that were tried with it, before the Act of 1883 went into effect. It was passed March 15, and went into effect April 4, 1883,—thirty days after its passage. The writs in *Fowler v. Trus*, *Fiske v. Trus*, and *Moocom v. Trus*, were all commenced either March 28 or March 30, 1883; and the Act of 1883 could have no effect upon these cases, and was not under construction by the court.

Libbey, J., delivered the opinion of the court:

This is an action of assumpsit to recover for professional services and disbursements according to the account annexed to the writ. Two grounds of defense were pleaded by the defendant: (1) that the action was barred by Rev. Stat. chap. 87, § 12; (2) that it was barred by the general limitation of six years; and it was claimed that these limitations were apparent upon the face of the papers; but this contention was not sustained by the justice presiding.

We think the ruling correct. By the Act of 1872, chap. 85, no action could be maintained against an administrator on a claim against the estate, unless such claim was first presented in writing and payment demanded at least thirty days before the action was commenced, and within two years after notice was given by him of his appointment; and the right to commence such action was limited to two years and six months from the time such notice was given.

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This Act was amended by Act of 1883, chap. 243, incorporated into the Revised Statutes of 1883, chap. 87, § 12. By this statute the plaintiff is not required to present his claim in writing and demand payment at least thirty days before commencing his action, and within two years after notice of his appointment is given; but if he commences his action without so presenting his claim and demanding payment, he takes upon himself the burden of having his action continued, at his cost, to the next term of court, and such further time and on such other terms as the court shall order; and "a tender of payment, or offer thereof, filed in the case during the time of such continuance, shall bar the same, and the defendant shall recover his costs." The same limitation of the right to commence the action, to two years and six months, is retained. The language used is not felicitous, but its meaning is plain. The fact that the plaintiff did not present his claim in writing, and demand payment before commencing his action, is no defense to its maintenance. The statute treats the commencement of the action as a presentation of the plaintiff's claim and a sufficient demand of payment; and gives the administrator sufficient time to investigate the validity of the claim, and tender or offer payment of it as a defense. Nor is it barred by not having been commenced within two years from the giving of notice.

Upon the second point it is sufficient to say that the action is not barred "on the face of the papers," as a portion of the items in the account appear to be for services performed within six years before the action was commenced.

By the agreement of the parties, the case must go to the assessor agreed upon to assess the damages; and he must determine, upon the evidence submitted, how much is due, and what items in the account, if any, are barred by limitation.

Exceptions overruled.

Peters, Ch. J., Walton, Virgin, Emery, and Haskell, JJ., concurred.

Alden C. GRIMES

v.

Daniel GOUD.

The obligee in a real-estate bond **cannot recover what he has voluntarily paid under the terms of the bond**, upon his failure to complete the required payments. It makes no difference that the obligor may have believed the obligee would not be able to complete the required payments, at the time of making the contract, and at the time of receiving the money.

(Kennebec—Decided June 6, 1887.)

ON report. *Plaintiff nonsuit.*

Assumpsit on an account annexed for money paid, for hay and farm produce sold, and for labor performed, amounting to \$467.91. On cross-examination plaintiff admitted that all the items in his account annexed were paid under the terms of a bond, from the defendant

to him, to convey a farm in Whitefield, and in part payment of what was due from him under it. After the testimony for the plaintiff was closed, the case was withdrawn from the jury, and reported to the law court, with the stipulation that if the action was maintainable the case should stand for trial, otherwise a nonsuit should be entered.

Messrs. Spaulding & Baker, for plaintiff.

Messrs. Baker, Baker, & Cornish, for defendant.

Per Curiam :

The evidence for the plaintiff disclosed the following facts: The plaintiff had the bond of the defendant for the conveyance of a farm upon specified terms. All the items now sued for in assumpsit were rendered in part performance of the conditions of that bond. The plaintiff failed to complete the performance of the conditions, and by his own act forfeited his rights under the bond. He then brought this action to recover back what he had thus voluntarily paid on a contract afterward forfeited by himself. It is evident he cannot recover.

It is urged that the defendant, at the time of making the contract and receiving the part payment, believed that the plaintiff would not be able to complete the required payments. Such a belief, however, if established by the evidence, does not enlarge the plaintiff's rights. He was his own judge of his ability.

Plaintiff nonsuit.

Napoleon LAVIGNE

v.
LEWISTON MILLS CO.

The finding of a jury upon the question of negligence and due care, in case of a lack of proper appliances to check a mill elevator in the event of an accident, will not be disturbed by the court, when there was some evidence in support of it, and the jury by a view had an opportunity to examine the elevator in question, as well as to hear and see the witnesses.

(Androscooggin—Decided April 20, 1887.)

ON motion of the defendant to set aside the verdict and for new trial. *Overruled.*

Messrs. Savage & Oakes, and *A. A. Strout*, for plaintiff.

Messrs. Frye, Cotton, & White, for defendant.

Per Curiam :

The plaintiff was in the employ of the defendant company, and was operating a goods elevator in their cotton-mill. The elevator cage was raised and lowered by a rope passing over a drum near the top of the building, and supporting, at the other end, a weight to counterbalance the weight of the cage. The drum was about an iron shaft, and the whole was made to revolve by an iron bevel gear on the shaft, which gear fitted into the propelling machinery. On one occasion the plaintiff had ascended with a loaded cage to the upper floor. As he was stepping off the cage to the floor, the gear suddenly broke, and left the shaft and

drum free to revolve under the weight of the load. As a consequence, the cage instantly fell to the lower floor; and the plaintiff, not having gained a footing, also fell, and was severely injured.

Three matters were alleged against the defendant company at the trial, as constituting negligence on their part, and as causing the plaintiff's injury: 1. An imperfect gear, from an old break, which would have become known to the defendant company upon such careful inspection as they were bound to make. 2. An imperfect arrangement at the upper floor, by reason of which the iron material of the gear was weakened by repeated blows from the trap-door during the operation of the elevator. 3. The absence of all appliances whatsoever for checking the descent of the cage in case of the breaking of the machinery.

There was some little evidence in support of the first two matters named, and also much evidence the other way.

The third-named matter was fully proved, and practically admitted.

The defendant company made, at the trial, two answers to this third specification of negligence.

1. That none of the appliances in use in goods elevators like this will check a fall caused by the breaking of the gear, and consequently their absence did not contribute to this fall.

2. That the plaintiff knew of such absence of appliances, and consequently assumed that risk.

There was evidence tending to show that there were well-known appliances, which would probably have prevented at least the sudden fall of the cage from the breaking of the gear. It is true there was more evidence the other way. The plaintiff testified that his attention was not called to any defects nor to any want of appliances; that he did not know of any trouble, and supposed it was a suitable and safe elevator.

The jury were the tribunal to ascertain the truth about all these matters. Under proper and very clear instructions, they have found the defendant company deficient in care; and that such want of care caused the plaintiff's injury without fault of his. They saw the elevator and the machinery and the surroundings. They were presumably practical men, acquainted with the ordinary simple principles of mechanics, and could probably judge of their operation as well as we could. Whatever our own views may be, we hesitate to array them against those of the twelve who have seen the things and heard the witnesses, and who are the legal triers of the facts. There is some evidence to support the verdict. After much deliberation we have concluded the verdict ought to stand.

Motion overruled. Judgment on the verdict.

Lizzie M. WATSON

v.

Daniel CRESSEY.

1. A grantor may in his deed lawfully reserve to himself and wife a life estate in the premises.

2. The grantee takes a vested remainder by such a deed, though it provide, "this deed is to take effect and go into operation on the decease of me and my wife, and not before."
3. The owner of a vested remainder may convey the same, even before the termination of the life estate.

(Cumberland—Decided April 20, 1887.)

ON report of facts agreed. *Judgment for defendant.*

Mr. George F. McQuillan, for plaintiff.

Mr. F. M. Ray, for defendant.

Walton, J., delivered the opinion of the court:

The facts agreed upon and reported to the law court do not sustain the plaintiff's title. They show title in the defendant.

A grantor may lawfully convey his real estate, reserving to himself, or to himself and wife, a life estate in the premises. Such a conveyance vests an estate in remainder in the grantee immediately. His estate is not postponed till the termination of the life estate. His right of possession or enjoyment is postponed, but his estate, such as it is, vests immediately. In other words, he takes a vested remainder. Such an estate is transferable. The owner may convey or mortgage it; and he can do this before as well as after the termination of the life estate. Of course the estate of the grantee or mortgagee will be no greater than that of the grantor or mortgagor. He will hold subject to the life estate. But, with this limitation upon it, a vested remainder may be conveyed or mortgaged as well as any other interest in real estate.

These principles are decisive of the case now before us. James McIntosh conveyed his real estate to his two sons, Stephen and George, reserving to himself and wife a life estate. The language of the deed is this: "Said Stephen and George to come into possession of said property after the decease of me and my wife Margaret, and not before,"—and again: "This deed is to take effect and go into operation on the decease of me and my wife, and not before. * * * My wife is to have the place while she lives, after my death." The intention of the grantor was to reserve an estate for the life of himself and wife, and to convey the remainder to his two sons. Of this there can be no doubt. And the law will give effect to this intention. The demanded premises are a portion of what was conveyed to George. James McIntosh and his wife are now both dead, and the life estate ended. The demandant claims title through the heirs of James McIntosh. Her title can be maintained only upon the ground that the deed above referred to was inoperative and void; or, in other words, that it did not convey a vested remainder to the grantees. We think it did convey a vested remainder to the grantees. The conveyance was conditional, but the conditions were all subsequent, not precedent; they would not prevent the vesting of the estate; and it is agreed that the conditions have all been performed, and can never, therefore, divest it.

The plaintiff claims through the heirs of James McIntosh, the father and grantor of George, and the defendant through the grantees of George. The defendant has the better title. *Wyman v. Brown*, 50 Me. 189; *Drown v. Smith*, 53 Me. 141.

Judgment for defendant.

Peters, Ch. J., Virgin, Libbey, Emery, and Haskell, JJ., concurred.

CASCO NATIONAL BANK

v.

Fayette SHAW et al.*

1. Notice of the dishonor of a note was sent to the former place of business of the indorsers,—an insolvent firm,—where it was received by the trustee to whom the property of the firm had been assigned for the benefit of creditors. *Held, sufficient.*
2. Where the notice of protest of a note is to be sent by mail, it may be deposited in a street letter-box put up by the postoffice department.
3. The indorser of a note cannot have applied, as partial payments, money received by the indorsee under a contract to assign the note to the person from whom the money was received.
4. The continuance of an action until the termination of the insolvency proceedings, when the defendant is in insolvency, is a matter of discretion with the court; and it will only be granted when the court is satisfied that justice will thereby be promoted.

(Cumberland—Decided April 19, 1887.)

ON report. *Judgment for plaintiff.*

There were four actions between the same parties submitted by the report. The actions were assumpt against the defendants, as indorsers of twenty-eight different promissory notes of different individuals and firms, aggregating in amount \$154,879.83.

The opinion states the points raised.

Mr. William L. Putnam, for plaintiff:

Our statute providing that the protest of a notary of a promissory note shall be evidence of demand and notice, extends to foreign notaries.

Pattie v. McOrillis, 58 Me. 410.

It must have been the intention of our statute to conform the law relating to promissory notes to the law of merchants relating to bills of exchange, and by virtue of the latter foreign protests were always evidence; and in the case of *Pattie v. McOrillis*, *supra*, the protest was by notary in Massachusetts. The court says, at the close of page 413, "The protest makes out a *prima facie* case for the plaintiff." The language of the statute is general, and embraces notaries without any exception.

The report shows that the plaintiff put in evidence the Public Statutes of Massachusetts of 1882, chap. 77, §§ 8-22. These regu-

*See Importers & Traders National Bank v. Shaw (Mass.), *ante*, p. 344.

late within that State demand, notice, and protest, to a certain extent.

Dan. Neg. Inst. § 1017, says: "Notice left with a clerk at the party's place of business in his absence, or at his place of business, without proof as to the person with whom it was left, is sufficient; and proof that such person was not the party's agent has been held irrelevant, notice being left at the right place."

Where notes are payable at any bank in Boston, demand at any bank in that city is sufficient.

Malden Bank v. Baldwin, 13 Gray, 154; *Allen v. Avery*, 47 Me. 287.

As to the forms of demand of the notes in suit, thus payable at any bank, they comply fully with all which is required in *Allen v. Avery*, *supra*; *Magoun v. Walker*, 49 Me. 419.

A notary is presumed to be authorized to demand payment.

Bradley v. Davis, 26 Me. 51.

An actual production of the notes at the time of demand is not required.

King v. Crowell, 61 Me. 244; *Gilbert v. Denia*, 8 Met. 495.

When a bill is left in a bank for collection, though the bank has no interest in it, yet, for the purpose of demand, and receiving and presenting notice, the bank is to be considered the real holder. A notary employed by the cashier of the bank in such case has sufficient authority to make demand and give notice.

Warren v. Gilman, 17 Me. 360; *Freeman's Bank v. Perkins*, 18 Me. 292.

It is not essential to the validity of a notice that it should be stated therein who was the owner of the bill or note, or at whose request the notice was given. When a notice is signed by a notary public, he is to be presumed to have been duly authorized by the holder of the bill or note, whoever he may be.

Bradley v. Davis, 26 Me. 45.

A presentment of a draft payable at a particular bank to the cashier, at the bank, the day it became payable, after business hours, who refused payment because the acceptors had provided no funds, was held sufficient.

Flint v. Rogers, 15 Me. 67.

A notice left at the office and usual place of business of the indorser of a bill, with the person in charge of the office, is sufficient.

Lord v. Appleton, 15 Me. 270.

Where notice of nonpayment is left at an improper place, but nevertheless is in fact received by indorser in due time, the indorser will be charged.

Bradley v. Davis, 26 Me. 45.

Without explaining the inquiries made of persons on the premises, we will refer to *Lambert v. Ghiselin*, 9 How. 552 (50 U. S. bk. 18, L. ed. 255), and *Saco Nat. Bank v. Sanborn*, 63 Me. 340.

In *Grafton Bank v. Cox*, 13 Gray, 508, it seems to have been held that, under similar circumstances, it was sufficient to make a demand at the maker's last place of business, although his family remained a few months at his former residence; and this without any inquiry at his last residence, or of the indorser for the maker's present residence.

Daniel on Negotiable Instruments has a section on these questions, and says, § 1032: "If, when the note is drawn or indorsed, the party

resides at a certain place, the holder may, as a general rule, presume that he resides there at its maturity, and send the notice accordingly."

The citations already made by us from *Saco Nat. Bank v. Sanborn* sustain this proposition.

Also *Regua v. Collins*, 51 N. Y. 144, fully illustrates and sustains it. On p. 147 the court quotes *Bank of Utica v. Phillips*, 3 Wend. 408, where Judge Marcy says: "It appears to me that the question of diligence cannot arise except in cases where the party knows or ought to know there is occasion for its exercise. Ought the holders of this note when it fell due to have known that, intermediate its discount and maturity, the indorser had changed his residence? They had no reason to expect such an event, and of course no considerations of diligence could have prompted them to institute any inquiry in relation to it."

"If a letter is sent by the post, it is presumed, from the usual course in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed, if living at the place and usually receiving letters there."

1 Greenl. Ev. § 40.

In the Albany Law Journal, vol. 33, p. 478, appears the following: "Street letter-boxes are a legal part of the postoffice system, and the deposit of a letter in one of them is equivalent to a deposit at the postoffice."

Abb. Tr. Ev. 433, 434; *Greenwich Bank v. De Groot*, 7 Hun, 210; *Pearce v. Langfit*, 101 Pa. 507; *Wood v. Callaghan*, 28 N. W. Rep. 162.

In *Pearce v. Langfit*, *supra*, the court goes even further than we claim, and holds the delivery of a letter to an official letter-carrier is the full equivalent for depositing it in the receiving box or at the postoffice.

In the eyes of the law, defendants actually and seasonably received notice of protest.

We suppose it will not be questioned, if it is proved that the defendants, being themselves out of the country, designated a certain person or place as the person or place to whom these notices were to be given, or at which to be left, that giving the notices according to such designation is in law giving a notice to the defendants.

Also, we suppose, it will not be denied that such designation may be inferred from the undisputed facts, with the same effect and force as if there had been an express designation, or designation expressly admitted by the defendants.

We do not deem it necessary to cite authorities to establish these principles, but for the purpose of illustrating them we refer to *Beridge v. Fitzgerald*, L. R. 4 C. P. 639.

If a person direct a messenger of a bank to leave his notices at a certain place, a notice to him as indorser of a bill, left at that place, will be deemed sufficient.

Eastern Bank v. Brown, 17 Me. 356.

On waiver of notice and admission of the defendants by their acts that they had received notice, the cases are almost innumerable; and it is not necessary for us to state them at great length. They are well summed up in *Oxnard v. Varnum*, 2 Cent. Rep. 53.

Throughout the numerous cases in Maine

and Massachusetts, a subsequent promise is spoken of in both ways; sometimes as evidence of payment, and sometimes as waiver of demand and notice.

In *Harrison v. Bailey*, 99 Mass. 620, Judge Hoar, in citing from Prof. Greenleaf, describes it as "proof of a qualified presentment and demand;" and in his own language, as "evidence of a waiver."

In *Keyes v. Winter*, 54 Me. 401, the court says: "It is now too well settled to be questioned that a waiver of demand and notice may be proved by parol, or may be inferred from acts and circumstances."

And the same phraseology is found in the late case of *Corner v. Pratt*, 138 Mass. 446.

In Byles on Bills, 7th Am. ed. p. 304, the two expressions come close together. The author says: "The consequence of neglect of notice will be waived by a subsequent promise to pay; and payment of part, or acknowledgment of liability, though after an action brought, will be evidence of notice."

Mr. Parsons, in his work on Promissory Notes, holds that a new promise to pay is not a waiver, but he says it renders demand and notice immaterial, and it is difficult to see on what principle they can become immaterial, unless by a waiver.

It was held in *Hyde v. Stone*, 20 How. 170 (61 U. S. bk. 15, L. ed. 874), that the insertion of a bill among the debts of the insolvent is evidence of waiver of notice of default. Notice was not necessary, because defendants were the real promisors.

Defendants claim that the Public Statutes of Massachusetts, chap. 77, § 15, apply to this case. That says: "Every person becoming a party to a promissory note payable on time, by a signature in blank on the back thereof, shall be entitled to notice of nonpayment the same as an indorser."

The words "the same as an indorser" settle the meaning of this provision. It is very evident that it was intended to reach, and is limited to, notes in such form that, by the common law of this State and Massachusetts, signature on the back renders the signer a promisor.

We find only one case in Massachusetts on this statute, namely, *Commonwealth National Bank v. Law*, 127 Mass. 72. The note considered there was a note in the form which we have spoken of.

The principle is precisely laid down in *Fulmer v. Hooper*, 3 Gray, 384, where the court says: "Notice of the nonacceptance and nonpayment of a bill of exchange drawn by a partner upon his partnership, need not be given to the drawer after all the partners have gone into insolvency."

This principle is fully stated in Daniel on Negotiable Instruments, § 1086 *et seq.* Of course there may be such an arrangement of partners on different firms, that a demand or notice, and perhaps both, would be required; but such is not the case here.

In *Blenn v. Lyford*, 70 Me. 149, 151, the court says: "The note being for the accommodation of Rice, the indorser, it was his duty to pay it, assuming the note to have been paid by Rice, it was the same as if paid by the maker. It

was paid by the party whose duty it was to pay it."

Defendants claim that, on an equitable adjustment of all these notes, indorsements, and accounts, the balance would have been in favor of F. Shaw & Bros., against some of the makers. This would not apply, of course, to Plummer and Mills, with whom F. Shaw & Bros. were jointly interested, but may be the fact so far as Ward is concerned.

This proposition, however, seems to be entirely disposed of by the case of *Torrey v. Foss*, 40 Me. 74, where this precise question was before the court, and where it was held that an indorsee may maintain an action against the payee of a promissory note without notice of its dishonor, when the note was made for the accommodation of the payee, and he agreed to take care of it, although, at the time it was made and fell due, the maker was indebted to the payee.

Rev. Stat. chap. 70, § 51, provides that no action shall be commenced on a claim which has been proved, and that no debtor shall be arrested pending insolvency proceedings, subject to the condition that the debtor must proceed with diligence.

Rev. Stat. chap. 83, § 54, provides for the cases under the bankrupt law, where the defendant has filed a petition or has been adjudged a bankrupt; but even there, after notice in writing, the court may refuse delay, if the defendant does not use diligence in prosecution of the proceedings.

Schwartz v. Drinkwater, 70 Me. 409, seems to cover the whole matter, holding that whether or not an insolvent shall have a stay of proceedings is a matter of discretion with the judge before whom the action is pending, whose ruling is not reviewable by the law term. It distinctly holds that the Insolvency Act contains no provision entitling the insolvent to delay as a matter of law.

See *Barker v. Haskell*, 9 Cush. 223.

Messrs. **George W. Morse, and N. & H. B. Cleaves**, for defendants:

Notice mailed to the defendants at 268 Purchase Street, Boston, after they had made an assignment of all their property to F. A. Wyman and abandoned the premises to him, was an insufficient notice to charge the defendants as indorsers of the plaintiff's notes, because it is held that notice to the voluntary assignee of an indorser is insufficient to charge the indorser with liability.

House v. Vinton County Nat. Bank, 1 West. Rep. 155.

The above case was one of an assignment by the indorser for the benefit of creditors, although the judge speaks of an assignee in insolvency.

It was likewise held that demand made at the maker's place of business, then occupied by his assignee, was insufficient in—*Armstrong v. Thruston*, 11 Md. 148, and *Benedict v. Caffee*, 5 Duer, 226.

In *Benedict v. Caffee*, *supra*, the makers failed in business and made a general assignment for the benefit of creditors. The sign on the outside of the building was not removed. One of the firm continued to resort to the place of business for two or three weeks after the fail-

ure, but the testimony tended to show that he ceased to go there about a month before the note matured. The demand was made there, and the court held it was insufficient.

In *Armstrong v. Thruston*, *supra*, the makers made a voluntary assignment and afterwards applied for the benefit of the insolvent laws, and one Horwitz was appointed their permanent trustee. Demand was made at the office of the trustee, which was the former place of business of the maker of the note. The court held that the demand was insufficient, and said that insolvency "does not excuse the holder from a compliance with the statutes."

In *Granite Bank v. Ayers*, 16 Pick. 392, the court nonsuited the plaintiffs on the ground that no proper demand had been made upon the makers, and intimated that no proper notice had been given to the indorsers.

In the case of *Bank of America v. Shaw*, 142 Mass. 290, 2 New Eng. Rep. 572, the decision in the appellate court was upon the facts as already found, and they differed materially from the facts in the case at bar.

The filing of the debtors' schedules in insolvency, the agreement of F. A. Wyman, and the payments made thereunder, do not, any or all of them, constitute either an admission or a waiver of demand and notice.

If relied upon as a waiver, they do not amount to one, because not constituting a promise to pay in full, and because not made with knowledge of indorser's discharge by holder's laches.

Story, Prom. N. § 863; 2 Dan. Neg. Inst. §§ 1158, 1149; 2 Phil. Ev. p. 24; Chitty, Jr., Bills, 1619, note a; *Thornton v. Wynn*, 12 Wheat. 188, 188 (25 U. S. bk. 6, L. ed. 595); *Standage v. Creighton*, 5 Car. & P. 406; *Chapman v. Annett*, 1 Car. & K. 552; *Taydy v. Boyd's Admr.* 26 Gratt. 637.

"If the offer be conditional or qualified, it must be accepted as made, otherwise it will not be obligatory."

Story, Prom. N. § 863.

"A conditional promise to pay, or an offer to pay in a certain manner, is not binding as a waiver * * * if the terms be not accepted."

Christian, J., in *Taydy v. Boyd's Admr.* 26 Gratt. 637.

A promise to pay or secure a part does not dispense with proof of notice.

2 Dan. Neg. Inst. § 1158.

Knowledge of laches is indispensable to waiver.

Story, Prom. N. § 861.

"Knowledge of this fact formed an indispensable part of the plaintiff's case."

Washington, J., in *Thornton v. Wynn*, 12 Wheat. 188, 188 (25 U. S. bk. 6, L. ed. 595).

Even a written promise to pay, without knowledge of laches, is insufficient.

Farrington v. Brown, 7 N. H. 271.

And payments made in ignorance of laches may be recovered back.

Story, Prom. N. § 861; *Crutches v. Wolf*, 2 Mon. 88.

The filing of the insolvency schedules falls likewise, because the schedules do not admit the validity of the claims, because they were made without knowledge of laches, and because not amounting to a promise.

Schedules were rejected, because not amounting to a promise, in—

Re Kingsley, 1 Nat. Bankr. Reg. 329; S. C. 1 Low. 216; *Re Harden*, 1 Nat. Bankr. Reg. 395; *Roscoe v. Hale*, 7 Gray, 274; *Soddard v. Doane*, 7 Gray, 387; *Richardson v. Thomas*, 13 Gray, 381; *Hidden v. Cozens*, 2 R. I. 401; *Christy v. Flemington*, 10 Barr (Pa.), 129; *Brown v. Bridges*, 2 Miles (Pa.), 424.

The plaintiffs in the above cases offered the schedules to remove the bar of the Statute of Limitations. The schedules were rejected as not constituting a new promise.

"It is so upon principle, because the debtor does not make out his schedule with any view to the payment, but to the discharge of his debts."

"Lowell, J., in *Re Kingsley*, 1 Nat. Bankr. Reg. 329; Bigelow, J., in *Roscoe v. Hale*, 7 Gray, 274; Blatchford, J., in *Re Ray*, 1 Nat. Bankr. Reg. 208; Fox, J., in *Re Harden*, 1 Nat. Bankr. Reg. 395; the Court in *Brown v. Bridges*, 2 Miles (Pa.), 424; Shaw, Ch. J., in *Richardson v. Thomas*, 13 Gray, 382.

The defendants were not accommodation indorsers, and are entitled to demand and notice whether they indorsed prior or subsequently to the inception of the notes.

Mass. Pub. Stat. chap. 77, § 15.

The defendants, having taken the notes for value, although indorsing them before delivery to the plaintiff for discount, were not indorsers at inception, within the meaning of the local law of Maine, and they are entitled to demand and notice, whether their indorsements are Maine or Massachusetts contracts. For, under the laws of Maine, indorsers for value or for accommodation, are entitled to demand and notice.

Davis v. Gowen, 19 Me. 447.

"The defendants might have agreed to pay the note at maturity, and the plaintiff may have apprised him when he received the note that he relied altogether upon him; yet, the agreement of the defendant must be understood to have been made with implied reservation that, if the maker paid, he was not to be liable."

The court in *Davis v. Gowen*, *supra*.

This is the rule everywhere.

2 Dan. Neg. Inst. § 1085.

If it be held that the defendants were indorsers at the inception of the notes, their indorsements being Massachusetts contracts, they are entitled to demand and notice according to the statute above cited.

"§ 15. Every person becoming a party to a promissory note, payable on time, by a signature in blank upon the back thereof, shall be entitled to notice of nonpayment the same as an indorser."

The above statute was passed in 1874, and was designed to change the law, which was then similar in Massachusetts to the law still prevailing in Maine,—that indorsers, at the inception of the note are held as makers, and are not entitled to notice.

Sumner v. Parsons, 1 Dane, Abr. 416; Howard, J., in *Union Bank v. Willis*, 8 Met. 504, 505.

Howard, J., in *Colburn v. Acerrill*, 30 Me. 313, thus states the law as it then prevailed in both

States: "It has been a familiar law in this State before and since the separation * * * that when a person, * * * not the payee of a promissory note, writes his name upon the back of it, at its inception, in blank, he is to be regarded as a surety and original promisor."

Holders for value, indorsing notes to be discounted, are not accommodation indorsers. Reception of the proceeds of the notes, or promising the makers to pay the notes at maturity, does not transform holders for value into accommodation indorsers, nor deprive them of the right to demand and notice.

2 Dan. Neg. Inst. § 1085; *Davis v. Gowen*, 19 Me. 447.

Holders of promissory notes are holders for value, whether the notes were given for past or for future advances.

Story, Prom. N. § 195.

"An accommodation bill or note, then, is one to which the accommodating party has put his name, without consideration, for the purpose of accommodating some other party who is to use it, and who is expected to pay it."

1 Dan. Neg. Inst. 8d ed. § 189; Byles, Bills, Sharswood's ed. p. 181.

"But it is well settled that exchange notes, though made for the accommodation of the parties, are not what is known and recognized as accommodation paper."

Hubbard, J., in *Higginson v. Gray*, 6 Met. 218.

"Nothing is better settled than a promissory note given by the maker in exchange for a note given him by the payee, is for a good consideration, and is in no proper sense an accommodation note, although made for the mutual convenience of the parties."

Bigelow, Ch. J., in *Whittier v. Elger*, 1 Allen, 500.

In speaking of exchange notes, the court, in *Eaton v. Cary*, 10 Pick. 210, 213, says: "Each, therefore, was a good consideration for the other, and each might negotiate the note of the other, or hold and collect it in his own name, as he thought fit."

Daniel says: "And cross-acceptances or cross-notes, bills, or checks, for the mutual accommodation of the parties, are respectively considerations for each other."

1 Dan. Neg. Inst. § 187.

The defendants' indorsements are Massachusetts contracts, and within the provisions of Mass. Pub. Stat. chap. 77, § 15.

The law of the place of making and performance governs the "validity, nature, interpretation, and effect" of a contract.

Story, Prom. N. § 49.

The "nature, validity, interpretation, and effect" of a contract are determined more by the place of performance than by the place of making.

1 Dan. Neg. Inst. §§ 865, 868.

The effect of writing a name on the back of notes payable in Massachusetts, at their inception, will be determined by Massachusetts law.

Thus, in *Lawrence v. Bassett*, 5 Allen, 140, the indorsement in New York by a party there of a note made and payable generally before its delivery by the Massachusetts maker to the Massachusetts payee, was held a Massachusetts contract. As it was made prior to Pub. Stat. chap. 77, § 15, the indorser was held as a co-promisor. Had it been held subsequent to

that statute, he would have been a simple indorser.

Though it is the ordinary rule that an indorser's contract is regulated as to its nature and effect by the law of his domicile (1 Dan. Neg. Inst. § 890), because that is the *lex loci contractus*, yet, if the note be delivered in another State, under a contract with parties there, it might be construed by the law of such other State (*Bell v. Packard*, 69 Me. 105, and *Lawrence v. Bassett*, *supra*); yet if the note be expressly made payable at the domicile of the indorser, it will be governed by the law of his domicile, because the place of performance more than the place of making governs in its construction.

Dan. Neg. Inst. §§ 865, 868.

Deposit in street letter-boxes was, under the circumstances, insufficient notice to the charge the defendants as indorsers.

The ordinary rule is that, where personal notice is given at an indorser's place of business, it must be given in business hours; and, "if left after those hours, it will not be deemed sufficient."

Story, Prom. N. § 815.

It follows that, where personal service is by statute dispensed with, and notices are allowable by "the usual course of delivery by postal carriers," such notices must be seasonably deposited to be delivered by carriers within business hours on the day of protest.

The plaintiffs are not entitled to a general judgment, nor to any judgment pending insolvency proceedings.

The rule in the United States courts to stay all suits, whether such as would be barred or not by discharge (unless in cases of the inexcusable laches of the debtors), is imperative.

U. S. Rev. Stat. § 5106; *Re Rosenberg*, 8 Benedict, 14; *Re Ghirardelli*, 1 Sawy. 843; *Ray v. Wight*, 119 Mass. 428.

At the conclusion of the bankruptcy proceedings, if the claim was secured by a prior attachment or other lien, the courts under the United States practice render, in case the debtor was discharged, only a special judgment to be satisfied out of the debtor's estate.

Doe v. Childress, 21 Wall. 642, 646 (88 U. S. bk. 22, L. ed. 549); *Peck v. Jenness*, 7 How. 612; (48 U. S. bk. 12, L. ed. 841); *Bowman v. Harding*, 56 Me. 559; *Leighton v. Kelsey*, 57 Me. 85; *Franklin Bank v. Bacheider*, 28 Me. 60; *Kittredge v. Warren*, 14 N. H. 509; *Re Rowell*, 21 Vt. 620; *Johnson v. Collins*, 116 Mass. 392; *Stockwell v. Silloway*, 113 Mass. 382; *Davenport v. Tilton*, 10 Met. 320; *Bates v. Tappan*, 99 Mass. 376.

In the State Insolvency Courts of Maine, although customary to stay suits pending insolvency, the rule is not imperative, but discretionary; hence, in case of a claim which would not be barred, the supreme court rightfully refused to stay proceedings, because no damage could ensue to any parties thereby.

Schwartz v. Drinkwater, 70 Me. 409.

In those cases, under the insolvency laws, where plaintiff's claims are such as would not be barred by the debtor's discharge, it is held that his person is exempt from arrest, the court rendering a special judgment only.

Choteau v. Richardson, 12 Allen, 865.

The reason why special judgments are al-

lowed after the debtor's discharge, is thus stated by Tenney, J., in *Franklin Bank v. Bachelder*, 23 Me. 65: "If the bankrupt should obtain his discharge, it would be no bar or defense to the due execution and satisfaction of that judgment."

If judgment is rendered in this case pending the insolvency proceedings, it will create a new debt, which will not be barred by the defendant's discharge therein.

Woodbury v. Perkins, 5 Cush. 86; *Faxon v. Baxter*, 11 Cush. 35.

Defendants (if they are liable at all to the plaintiffs) are entitled to be credited with the payments actually made by Wyman.

The contract by Wyman for the purchase of these notes, made without the consent of the defendants, with condition for forfeiture both of agreement and of payments, was not within the purview of his powers as general assignee.

Contracts by parties having limited powers in excess thereof are void.

Williams v. Evans, L. R. 1 Q. B. 352.

In *Sneed v. Wiggins*, 3 Ga. 94, which was a case of an agreement by plaintiff providing for payment in certain installments, the second installment not being made at the stipulated time, the court held the agreement forfeited (time being of the essence of the contract), but the plaintiff credited the payments upon his judgment.

Walton, J., delivered the opinion of the court:

We think the defendants had due notice of the dishonor of the notes declared on. Notices were addressed to them at their former place of business, where their affairs were being settled up by a trustee, to whom they had made an assignment for the benefit of their creditors; and we have no doubt that the notices were received by the trustee. Notices so sent and received are sufficient. *Bank of America v. Shaw*, 142 Mass. 290, better reported in 2 New Eng. Rep. 572. In the case cited, the notice was to the same firm and under substantially the same circumstances as in the cases now before us, and the notice was held good, "because it was sent to what had been the place of business of the firm, where its affairs were actually in process of settlement under the trust."

It is objected that the notices were not properly mailed, because they were dropped into a street letter-box. We think this is not a valid objection. Street letter-boxes are authorized by an Act of Congress (U. S. Rev. Stat. § 3868), and are as completely and as exclusively under the care and control of the postoffice department as boxes provided for the reception of letters within the postoffice buildings themselves; and we think a letter deposited in a street letter-box, which has been put up by the postoffice department, is as truly mailed, within the meaning of the law, as if it were deposited in a letter-box within the postoffice building itself. It has been held that delivery to a letter carrier is sufficient. *Pearce v. Langfit*, 101 Pa. 507.

Payments are claimed. Since the commencement of these actions the bank has received \$44,398.17 from F. A. Wyman, which the defendants claim should be credited to them.

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The credit cannot be allowed. The money was not delivered or received as payments on the notes in suit. It was received on a contract by which the bank agreed to assign to Wyman the notes in suit, and the actions thereon, "with all benefit of attachments, if any, made in said suits;" and this contract has been assigned by Wyman to a third party. It is clear therefore that the defendants are not entitled to the benefit of these payments. So far as appears, they have neither a legal nor an equitable right to benefit of them.

Payments to the amount of \$11,720.52 have been made by C. W. Clement and C. H. Ward, on such of the notes in suit as are signed by them, which will of course be allowed, and the defendants will have the benefit of them.

The court is asked to continue these actions to await the result of insolvency proceedings, which they aver are pending against them in this State. We are not satisfied that this request ought to be granted.

The petitions have been pending since November, 1883, and yet no adjudication has been had upon them; and we doubt if there is any intention to prosecute them further; for the petitioning creditors appear to have been settled with, and their claims assigned to the defendants' trustee, Wyman. Continuances for such a cause are discretionary with the court; they cannot be claimed as a matter of right; and they will only be granted when the court is satisfied that justice will be thereby promoted. *Schwartz v. Drinkwater*, 70 Me. 400. We are not satisfied that justice would be thereby promoted in these actions. The request is therefore denied.

Four actions between the same parties have been submitted to the law court upon one report of the evidence; and the parties have agreed that the court shall render such judgment in each case as the legal rights of the parties may require.

It is the opinion of the court that the plaintiff is entitled to judgment in each of the four actions, and such judgments will accordingly be entered.

Peters, Ch. J., Virgin, Libbey, and Emery, JJ., concurred.

Haskell, J., having been of counsel, did not sit.

Charles A. HENKEL *et al.*

v.

Joseph W. BURKE *et al.*

1. In **assumpsit for goods sold**, when the defense is that the goods were of poor quality, the plaintiff cannot show that goods of the same grade which he sold other parties turned out good.
2. In such an action it is not error to instruct the jury to find what damage the defendants have suffered by reason of the breach of the warranty,—how much of the goods have been proved worthless and bad,—and deduct that from the contract price.

(Penobscot—Decided June 6, 1887.)

ON exceptions by plaintiff. **Overruled.**

EXCEPTIONS.

Assumpsit to recover 16 dozen 1 lb. Henkel baking-powders at \$4.50 per dozen, and 16 dozen $\frac{1}{2}$ lb. at \$2.50 per dozen, ordered of plaintiffs for defendants. The verdict was for the plaintiffs for \$37.50. The price and delivery of the goods to defendants, and that they were put up and sealed pound and half pound tin cans, were admitted.

1. The defendants contended that the plaintiffs represented to them that their baking-powders were good baking-powders, and that, relying on such representations, they purchased the goods of the plaintiffs; that the powders were not good powders, and that, by reason of the plaintiffs' breach of warranty, both express and implied, they have suffered damage. To this end they introduced testimony tending to prove that the powders were of poor quality. To establish the contrary, and in rebuttal of this evidence, the plaintiffs introduced evidence tending to prove that the baking-powders were all of one grade; that, at the time they sold to the defendants, they sold their powders to other parties in Maine; and offered to prove their good quality by persons who, at that time, had bought of such other parties, powders so sold to them, and who had tested them; to the admission of which testimony the defendants objected, and it was excluded by the court.

2. The defendants introduced evidence tending to prove that, of the 32 dozen cans of powders, 4 or 5 cans had been tested and found of poor quality, and that defendants sold 25 or 30 cans of the baking-powder within three or four days after they received it, and since then have had the powder in the store for sale; have not, however, recommended or offered it for sale, and have not since sold any; and they contend that the jury might infer therefrom that all the untested cans of powder were of poor quality. Upon this question the court instructed the jury as follows:

"Now, gentlemen, in order to condemn this powder, you must be satisfied that it has been used skillfully, according to the directions, with other proper materials; and if you are satisfied that any part of it that has been sold will not produce the results, and is not of the quality warranted, then, gentlemen, so much of the powder as you find has been proved to be unfit, you must deduct from the agreed price, and only give a verdict for the balance. But the defendants say that they have proved a certain number of cans to have been bad, and you must infer that all the rest were of like quality. Now, gentlemen, that is wholly a question for you."

3. The court further instructed the jury as follows:

"The baking-powder that remains on hand is the defendant's property; and when you assess, in the first instance, the price, when you find out when they agreed to pay for it,—there is no dispute about that,—that makes it their property. But the defendants say, 'You warranted it to be good, and it is not good.' You will determine, after you find there was a warranty,—after you find what the baking-powders were warranted to be,—you will find what damage the defendants have suffered by

ME.

reason of the breach of warranty,—how much of the powder was worthless or bad, and has proved to be so, and deduct that from the contract price."

Foreman. And the remaining part of the baking-powders could not be returned?

The Court. No. The defendants have elected to keep the baking-powder as their property, and they must pay whatever you assess as due, after giving them damages for any breach of warranty they have proved.

Foreman. Anything they may have suffered from the sale of this powder?

The Court. Yes.

Mr. Hutchings. Your honors' instruction of the last moment seems to exclude the idea of an implied warranty?

The Court. (To Mr. Hutchings.) That is all the same; that is for the jury to find, if they were represented. I think they won't misunderstand. That last question might mislead. (To the jury.) What damage the defendants have suffered to their own business by any sale, that you will exclude.

Foreman. What he has suffered any way?

The Court. Yes.

4. The defendants offered in evidence a letter from them to the plaintiffs, dated November 7, 1885,—which was seasonably objected to by the plaintiffs, and admitted by the court,—a copy of which is contained in the report of the evidence which is made a part of these exceptions.

To the exclusion of the evidence offered and the foregoing instructions to the jury the plaintiffs except, and pray that their exceptions may be allowed. The judge's charge in full, and also the report of the evidence in full, is made a part of these exceptions, so far as the same are pertinent, and can be referred to by either party.

By their attorneys,

F. H. Appleton & C. A. Cushman.

Exceptions allowed.

Mr. F. H. Appleton, for plaintiffs.

Mr. Jasper Hutchings, for defendants.

Per Curiam:

The court is of the opinion that the exceptions as allowed should be overruled, and that there be judgment on the verdict.

Exceptions overruled. Motion overruled.

ELLSWORTH WOOLEN MANUFACTURING CO.

v.

William H. FAUNCE et al.

1. Where the by-laws of a corporation provide that the capital stock shall be divided into 400 shares, and that "no business shall be transacted at any meeting of the stockholders, unless a majority of the stock is represented, except to organize the meeting and adjourn to some future time," it will take 201 shares to constitute a quorum for the transaction of business, although but 243 shares of the stock were ever subscribed for.

2. A board of directors elected at a meeting where only 138 shares were represented would not be legally elected, and could not be regarded as officers *de facto*, as against another board of directors holding over, under a provision of the by-laws, from a previous election at a legal meeting.
3. A court of equity will grant relief to a corporation against the fraudulent acts of its directors.

(Hancock—Decided June 10, 1887.)

ON report of a bill to redeem. *Bill dismissed.*
The opinion states the case.

Messrs. Wiswell & King, for plaintiff:

"Capital stock" is defined as follows in the books. *Rapalje & Lawrence's Law Dictionary* gives it in this way: "Capital stock—the aggregate sum represented by the shares of stock in a company or corporation; the amount subscribed to the stock by the promoters and members, upon which assessments or calls may be made and dividends paid; the corporate fund as distinguished from other property of the corporation."

Bouvier's Law Dictionary defines it in this way: "Capital stock—the sum divided into shares, which is raised by mutual subscription of the members of the corporation."

In *Boone on the Law of Corporations* it is said at page 105: "In reference to a corporation, the word 'capital,' for most purposes, signifies the aggregate of the sums subscribed and paid in, or secured to be paid in, by the shareholders. * * * The term 'stock,' when not employed to denote the same thing as 'capital,' has reference to the interests of the shareholders or individuals."

Field, on Corporations, at § 123, says, in defining stock: "It is the money or capital invested in the business," etc.

The Revised Statutes of the State, chap. 48, § 17, in giving the powers of persons who associate themselves together, provides, among other things, that they may "fix the amount of the capital stock." This does not mean that they may create it, but fix the amount of the limits,—just as was done in this case.

The power of a corporation to make by-laws is always subject to the restriction that such by-laws must be reasonable, and not oppressive, vexatious, or unequal.

Boone, Corp. § 58.

Under the circumstances of this case, the directors are certainly officers *de facto* under the rule laid down in the books; and the rule holds good as to officers of a corporation as much as to public officers.

Hooper v. Goodwin, 48 Me. 80; *Boone, Corp.* § 135, and cases cited; *Bliss v. Day*, 68 Me. 201; *Simpson v. Garland*, 76 Me. 208.

Messrs. Wilson & Woodard, for defendants.

The only question which there is in this case is, whether or not there was a quorum present at the meeting of the stockholders on June 8, 1885, so that any business could be validly done at said meeting.

The question is fairly presented, for a motion to dismiss is the proper way to raise objection of want of authority to begin or prosecute a suit.

Bangor, O. & M. R. R. Co. v. Smith, 47 Me. 84; *Adams Bank v. Jones*, 16 Pick. 574; *Ashuelot Mfg. Co. v. Marsh*, 1 Cush. 507; *Craig v. Toomey*, 14 Gray, 486.

The question of what should constitute a quorum for the transaction of business at their meetings was a question to be settled by the stockholders, through the adoption of a by-law, if they chose to settle it.

Rev. Stat. chap. 46, § 6.

The appropriate remedy to be pursued in a case of this kind, where the facts warrant it, is for any stockholder or number of stockholders, who may wish to bring a suit in equity in his or their own name or names, making the individuals whose acts are complained of, and the corporation itself, parties respondent.

Dodge v. Woolsey, 18 How. 381 (59 U. S. bk. 15, L. ed. 401); *Hersey v. Veazie*, 24 Me. 9.

In *Haves v. Oakland*, 104 U. S. 450 (Bk. 26, L. ed. 827), the doctrine and the cases upon it are reviewed at length, and its limitations stated. In the conclusion reached it is stated that such a suit may be maintained for this, among other reasons stated, viz.: "Where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders."

The doctrine of *de facto* officers is applicable only to public officers, and not to officers of a private corporation, as this is.

Brown v. Lunt, 37 Me. 423.

And if the doctrine could apply to the officers of such a corporation as this is, the limitations of the doctrine are such that it could not affect the question under discussion here. For it is only as to the public and third parties that the acts of *de facto* officers are held valid, upon the ground of public policy,—that those innocently assuming that an officer is what he holds himself out to be, under color of right, may not be thereby injured.

Woodside v. Wagg, 71 Me. 207.

Foster, J., delivered the opinion of the court:

Bill in equity for the redemption of a mortgage given by the plaintiff corporation upon its real estate to one Lewis Friend, and by him assigned to the defendants, who were, at the date of the assignment, and still claim to be, a majority of the board of directors of said corporation. Fourteen days after the assignment, the defendants commenced foreclosure proceedings by publication, the mortgage containing the ordinary one-year foreclosure clause. Before the time for redemption had expired, an annual meeting of the company was held, and as it is claimed, a new board of directors was elected. The defendants being in possession, an account under the statute was demanded, which the defendants refused to render, on the ground that no authority existed in the board, or either of its members to demand an account. Whereupon, four days before the expiration of the year for redemption, this suit was begun. On the first day of the return term the defendants duly filed a motion to dismiss the bill, on the want of authority to commence or prosecute the same. The motion being seasonably brought, the question properly before the court is, *Bangor, O. & M. R. R. Co. v. Smith*, 47 Me.

44. The president of a manufacturing corporation, as such, has no authority to commence an action in the name of the corporation. *Ashuelot Mfg. Co. v. Marsh*, 1 Cush. 507; *Mathone v. Manchester & L. R. R. Corp.* 111 Mass. 75, and cases cited.

Here are two sets of officers, each claiming to be the legal board of directors—the defendants, as the board elected at a prior annual meeting of the company, and as such authorized by its by-laws to hold their office for one year or until their successors should be chosen; the other board, as that elected at the subsequent annual meeting in 1885.

The question presented for our consideration, then, is whether the board of directors claiming an election at the annual meeting in 1835, and commencing this suit, was legally authorized to act so far as this proceeding is concerned.

The answer to this depends upon the validity of their election.

It is admitted that the company was legally organized, and its by-laws duly adopted. The second by-law provides that "the capital stock of the company shall be \$10,000, divided into 400 shares of \$25 each;" and, by the thirteenth by-law, "no business shall be transacted at any meeting of the stockholders unless a majority of the stock is represented, except to organize the meeting and adjourn to some future time."

At the organization of the company 248 out of the 400 shares of the capital stock were subscribed for, and this number has remained substantially without change during the time involved in this case,—no more than that number ever having been subscribed for.

What should constitute a quorum for the transaction of business at their meetings was a question which the stockholders had a right to determine (Rev. Stat. chap. 46, § 6), and this they did by the adoption of the foregoing by-law, providing that, unless a majority of the stock was represented, no business should be transacted at any meeting, except to organize and adjourn to some future time.

At the annual meeting of June 8, 1885, at which it is claimed the new board was elected, 138 shares of the capital stock were represented, and no more. Was there a majority of the stock represented at that meeting? If not, there could be no legal election of officers at that meeting.

We think a fair and reasonable, as well as proper, construction of the by-laws leaves no room for doubt as to what was intended by a "majority" of the stock. It was divided into 400 shares, and it would take 201 shares to constitute a majority of that stock. The language of the by-law is plain, and susceptible of no ambiguity. If we turn from the language of the by-law to the action of the stockholders themselves, who were the authors of it, we shall find that such seems to have been their understanding from the time when the company was first organized, and the by-laws adopted.

The first annual meeting was held June 12, 1881, at which meeting only 133 shares were represented, and, the question being raised at that time whether the meeting was one at which business could be legally transacted, the records show that another meeting was called.

At that meeting a majority of all the stock was represented, and the stockholders proceeded to the transaction of business. Moreover, in the call for that meeting, was the following: "Second: To see if the corporation will amend by-law 13 by adding the word 'subscribed' after the word 'stock' in the second line." The records do not show that any action was taken in reference to that article in the call. The question being thus brought squarely before the stockholders at a meeting at which a majority of the whole stock was represented, they chose to take no action upon it, and left the by-law as it was.

Furthermore, the report shows that annual meetings were regularly called each year thereafter, but at every meeting less than 201 shares of the capital stock were represented; and at every meeting, until that of June 8, 1885, no business was done except to adjourn. At that meeting, however, a resolution was adopted and recorded, declaring 138 shares to be represented, and that the same constituted a legal quorum for the transaction of business.

But inasmuch as there was not, in fact, a majority of stock represented at that meeting, there could be no legal business transacted, except to organize and adjourn to some future time. Such was the language as well as the evident intent and meaning of the by-law duly adopted for the government of the corporation. Consequently it was not in the power of a minority to do that which only a majority could legally accomplish. Hence, it cannot be held that the board which now represents this plaintiff corporation, and which claims the right to commence and prosecute this action, was legally elected.

The consequence is that the old board of directors, about whose election no question is raised, continued in office by virtue of the by-laws of the company, and were the only legal board of directors at the time this suit was commenced.

Nor do we think that the other position of the plaintiff can be sustained,—that the new board of directors were officers *de facto*, if not *de jure*, and thereby authorized to commence and maintain this suit for redemption. Here were two boards of directors claiming title to the same offices. Were there no other persons claiming to hold these offices, and to have been legally elected to them, then it might be that, acting under color of an election, the acts of such new board might be valid as to the public or third persons affected thereby or interested therein. But we do not understand that the principle applies in a case like the present, where other individuals—the defendants themselves—are claiming to hold the offices and the right to act in that capacity, and to have been legally elected to such offices. *Charitable Asso. v. Baldwin*, 1 Met. 359; *Cooper v. Curtis*, 30 Me. 488; *Ang. & A. Corp. § 286; Woodside v. Wagg*, 71 Me. 210.

The case comes before this court on report. From the stipulations therein contained we are only to determine whether, from the facts as stated, the bill can be maintained. If it cannot, then it is agreed that it is to be dismissed. The plaintiff corporation, acting through a board of directors elected not in accordance with the by-laws of the corporation, and conse-

quently, as against the defendants, having no authority to act, seek to maintain this bill as a bill for the redemption of a mortgage held by the defendants. There is no allegation of fraud, nor is there sufficient to warrant the court in assuming that the defendants are acting in violation of their trust. The court will not assume that there was fraud when none is alleged. It does not appear that the defendants have refused or neglected to do and act for the interest of the corporation, or that they have not, in doing what they have, acted according to their best judgment for the corporation. Whenever the contrary may appear, and it can be shown that the defendants have been acting in violation of their trust; or have combined to injure the property of the corporation; or have fraudulently misappropriated the corporate property for their own benefit or for the benefit of third persons; or have attained undue advantage, benefit, or profit for themselves, by purchase, sale, or other dealings with the same,—then, undoubtedly, upon proper proceedings, this court, as a court of equity, has power to grant relief, and the rights of the corporation, when violated, may be enforced by equitable remedies. Pom. Eq. § 1094. But in this suit, which is in its nature a statutory proceeding for redemption of mortgaged premises, no authority is shown whereby the plaintiff can maintain this bill.

Bill dismissed.

Peters, Ch. J., Walton, Danforth, and Haskell, JJ., concurred; Emery, J., did not sit.

John FRENCH, *Petitioner,*

v.

David COWAN *et al.*

1. In the construction of statutes, not only the whole Act is to be considered, but the statute in force, and relating to the same matter, before the passage of the Act, in order to reach the true intent and meaning of the Legislature, and the purposes sought to be accomplished.
2. By Special Stat. 1880, chap. 298, the terms of office of the city marshal of Lewiston were made to consist of consecutive periods of two years each,—each commencing when the preceding period ends.
3. The title to an office, as against one actually in possession under color of law, cannot be tried by mandamus. The proper remedy is by quo warranto.

(Androscoggin—Decided June 9, 1887.)

ON report. Petition for mandamus. *Writ denied.*

The case is stated in the opinion.

Messrs. William L. Putnam and George C. Wing, for petitioner:

The parties agreed that, if the writ issues, it shall be a peremptory writ. This is justified by the practice in *Smyth v. Tilcomb*, 31 Me. 272.

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The statute says: "The city marshal shall hold his office for the term of two years."

We regard this case as fully covered by the *Opinion of the Justices*, 61 Me. 601. On p. 603 the court says: "So far as concerns the office of register of probate, there would seem to be no more necessity for fixing any different limitation to the term of office when filled by an election made necessary by the decease of an incumbent, than one resulting from the expiration of time."

Although with reference to policemen the rule established in *Opinion of Justices*, 50 Me. 607, would apply from necessity, there is no reason why it should apply to the office of city marshal.

There is no question as to any officer of the United States holding for a term of years, whether his term commences at the expiration of a previous term, or at the death of a previous incumbent, or on his removal. In either case the successor holds for the full term named in the statute. This is the settled practice; and the law was so expressed in the case of the navy agent, 2 Op. Atty-Gen. p. 333.

On turning to the statute under which these navy agents were appointed, namely, the Act of January 15, 1820, chap. 103 (8 Stat. at L. p. 582), it is found it uses the words, "appointed for the 'term' of four years."

The salary could not be recovered on the theory of a stipulation between the city marshal and the city extending the term of office, and can be sued for in assumpsit only on the ground of an implied assumpsit.

Farnell v. Rockland, 62 Me. 296.

It is said in *Andrews v. King*, 77 Me. 290, that the city marshal "has other than municipal duties. He is to preserve the public peace,—the peace of the State. He is to enforce the laws of the State. He is essentially a State officer; and the people of the whole State are interested to have such legislation and judicial interpretation as to his appointment, tenure, and removal, as will secure the most efficient administration of his office. The court therefore, in passing on the question presented, must regard the rights and interests of the people as well as those of the parties. It is a question of public as well as private right."

In *Commonwealth v. Swasey*, 133 Mass. 538, the court says, as the tenure is defined by statute, "it was unnecessary that the term of office should be expressed, either in the nomination of the mayor, or the approval of the board of aldermen."

In *Shaw v. Macon*, 21 Ga. 283, the bond of the city marshal recited that he had been elected marshal for the year 1853, subject to be removed from office at any time by vote of the city council; yet the court held he was entitled to the year, and refused to allow the bond to be read in evidence against his claim to the year, on the ground that the statute fixed the term of office.

In *Philadelphia v. Rink*, 2 Cent. Rep. 269,—an action for salary, brought by an officer who had been "counted out,"—the court said: "It is no answer to say that he did not then take the oath or give the bond. He was denied the privilege of doing either."

Dillon on Municipal Corporations, § 317.

says: "Since all the powers of a corporation are derived from the law and its charter, it is evident that no ordinance or by-law of a corporation can enlarge, diminish, or vary its powers."

Mandamus is the only form by which the question involved in this case could be reached speedily.

It is stated that *mandamus* will not lie except where there is a clear legal right (*Townes v. Nichols*, 73 Me. 517); but such expressions were not necessary to the decision of the cases in which they were used.

Under the practice of the United States courts, where the statutes expressly provide that the courts may issue writs of *mandamus* and allow error to the supreme court in the proceedings relative to such writs, it was long ago determined in *Commonwealth v. Dennison*, 24 How. 66, 97 (65 U. S. bk. 16, L. ed. 717), as follows: "It is equally well settled that a *mandamus* in modern practice is nothing more than an action at law between the parties; and it is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power; and it is now regarded as an ordinary process in cases to which it is applicable."

Hartman v. Greenhow, 102 U. S. 875 (Bk. 26, L. ed. 273).

This ought emphatically to be the law in this State under Rev. Stat. chap. 77, § 42, and specially Rev. Stat. chap. 102, §§ 16-19.

Under that statute the expression of the court in *Williams v. Lincoln County*, 85 Me. 446, can be taken without any qualification, — namely, "that *mandamus* lies to all inferior tribunals, magistrates, and officers, and extends to all cases of neglect to perform a legal duty, where there is no other adequate remedy."

Independently of these special suggestions, we are still unable to understand the full applicability and force in Maine and Massachusetts of the language so commonly used, that *mandamus* lies only where there is a clear legal right, in view of the fact of the elaborate and difficult questions of law which were settled in *Strong, Petitioner*, 20 Pick. 484; *Pulnam v. Langley*, 123 Mass. 204; *Williams v. Lincoln County*, 86 Me. 845; *Baker v. Johnson*, 11 Me. 15; and *Smyth v. Titcomb*, 81 Me. 272.

In view of the decision of this court in *Pooler v. Reed*, 78 Me. 129, to the effect that a police officer *de facto*, while his acts may be valid as between other parties, can, nevertheless, not justify himself for an arrest made, even when he has a legal *mittimus*, public interests would seem to require that the court should exercise its discretion to settle the question here involved, in the speediest manner possible.

In *Strong, Petitioner*, 20 Pick. 497, and likewise in *Prince v. Skellin*, 71 Me. 366, the question seems to have been left undecided whether *mandamus* would lie without the previous writ of *quo warranto*.

In *Pulnam v. Langley*, 123 Mass. 204, proceeding by *mandamus* was sustained.

Moreover, while it is doubted whether *man-*

damus is the proper remedy for a person claiming office who never has been in office, it is held that it is the proper remedy, under circumstances like those at bar, in *High on Extraordinary Remedies*, §§ 49 and 67, and *Dillon on Municipal Corporations*, § 847; and the latter authority says: "Where a municipal officer or member of a municipal council has been illegally suspended, or illegally removed, he is, in general, entitled to a *mandamus* to be restored."

It seems not improper, in closing, to cite the following from the expressions of *Lord Mansfield*, in *Rez v. Barker*, 8 Burr. 1267: "*Mandamus* ought to be used on all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one. Within the last century it has been liberally interposed for the benefit of the subject and advancement of justice."

The following extract from *Dillon on Municipal Corporations*, § 825, expresses well our views with reference to the point of judicial discretion, if made by the respondents, namely: "It is to the public advantage that municipal corporations and their officers shall be made to perform the duties enjoined upon them by law; and the necessity which has been felt for affording easy remedies against them has led the legislatures and the courts in modern times to improve and liberalize the proceedings by *mandamus*, by relieving them of much of their former artificial and technical character."

Mr. William H. Jenkins, City Solicitor, for respondents:

The precise question at issue is one of statutory construction.

In an opinion reported in 1 New Eng. Rep. 896, in the case of *Landers v. Smith*, by Emery, J., are enunciated the general principles applicable in the construction of new statutes. The language is: "Courts will always endeavor to ascertain the real meaning and purpose of the Legislature in enacting a new statute. In such endeavor they are not confined to the words of the particular statute in question. The general policy of previous legislation, and the general principles of law and equity, are to be considered; for there is a presumption—overcomable, of course, by sufficient words—that the Legislature did not intend any marked departure from such policy and principles."

Holmes v. Paris, 75 Me. 561.

The Act of 1880 does not fix any definite point of time from which the terms of the several offices therein established shall begin. Yet the scope and purpose of the Act require, for the police force, at least, that a time in the year be fixed from which the several terms shall begin to run, and when so fixed that the individuality of the several terms be adhered to, and that they follow each other in consecutive order.

Baker v. Kirk, 33 Ind. 521.

We regard it as true that a city charter bears the same relation to ordinances passed under its authority, as a constitution bears to the legislative enactments authorized by it.

Erie Academy v. Erie, 31 Pa. 516, 517, cited in *Dill. Mun. Corp.* § 85, note 1.

Is it within the scope of the power of a municipal corporation authorized to pass ordinances, under the general "good order" clause, for it

to pass an ordinance regulating the beginning, ending, and filling of vacancies in a term of office, when the length of the term has been fixed in a general way by the charter? Is such an ordinance inconsistent with the charter? We submit it is not.

State v. Thoman, *supra*; *People v. Weller*, 11 Cal. 87; *State v. Neibling*, 6 Ohio St. 43.

See *State v. Cook*, 20 Ohio St. 253, as a discussion of kindred matters having a bearing on this point. The language of the court in *State v. Thoman*, 10 Kan. 191, is direct. "The Constitution does not fix the day of the year for the commencement of a judicial term, but the statute does; and where the Constitution is silent we conceive the Legislature has power."

We pass to note the meaning of the phrase, "term of years" as applied to an office. Does the word "term" relate to the office or to the incumbent? It relates to the office. This is the natural, usual, and reasonable application of the word.

Baker v. Kirk, 38 Ind. 521.

In 16 Fla. 842, is reported the opinion of the supreme court on the construction of the following statute: "There shall be seven circuit judges appointed by the governor and confirmed by the Senate, who shall hold their office for eight years." The court says: "There is nothing here establishing a term of office to exist between fixed dates of months and years, nor is there anything having the most remote reference to an unexpired term, or to a vacancy in an office, as distinct from the office itself." It was construed as providing that each incumbent was entitled to the office for eight years, even if his predecessor had held the office for only a part of that time. And it is remarkable that the word "term" was not used in any of the provisions of statute whose construction was cited as authority by the Florida Supreme Court.

See cases there cited, viz.—2 Wend. 266; 9 Wend. 58; 11 Wend. 182; 5 Md. 480; 11 Md. 296; 4 Tex. 400; 4 Sm. & M. (Miss.) 642.

The statute construed in *Opinion of the Justices*, 61 Me. 601, did not contain the word "term." More in point is *Opinion of the Justices*, 50 Me. 607.

The case of *People v. McCluve*, 99 N. Y. 83, is directly in point and decisive of this case.

But the writ of *mandamus* prayed for is issuable only in the discretion of the court. It is one of the great prerogative writs, to be used only when there is a wrong without a remedy and where equity demands it.

Belcher v. Treat, 61 Me. 577; *Davis v. York County*, 63 Me. 396; *People v. Booth*, 49 Barb. 81.

The writ has been denied where the petitioner had an admitted legal right, but no equity.

Ex parte Paine, 1 Hill, 665.

The custom has been for a new administration to begin its term with all the officers in harmony with its head, so far as they could be under the limitations of a yearly term for the mayor and city council. Usage is to be considered in the interpretation of charters. The English decisions abound in authorities to this point. The reasoning is equally applicable here. A settled, harmonious, and satisfac-

tory condition of municipal affairs should not be interfered with.

Blankley v. Winstanley, 3 T. R. 279; *Gape v. Handley*, Id. 288; *Reg. v. Osborne*, 4 East, 387; *Mayor of London v. Long*, 1 Camp. 32; *Re v. Bellringer*, 4 T. R. 810; *Re v. Headley*, 7 B. & C. 496; 1 M. & R. 345.

The remarks of Redfield, J., in *Sherwin v. Bugbee*, 16 Vt. 439, 444, are in point: "In construing statutes applicable to public corporations, courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable period of time."

"Vacant" means "empty; unoccupied," as applied to an office without an incumbent. An existing office without an incumbent is vacant whether it be a new or an old one.

Stocking v. State, 7 Ind. 826; *State v. Boecker*, 56 Mo. 21; 11 Md. 312; *Walsh v. Commonwealth*, 33 Am. Rep. 777.

Mr. John B. Cotton, also for respondents:

Dillon on Municipal Corporations, vol. 1, § 87, says: "So, particular provisions of charters should be read and construed in the light of the whole instrument, of all preceding charters, of the general legislation of the State, and of the object of the Legislature in the erection of municipalities."

In *People v. McCluve*, 99 N. Y. 89, Andrews, J., says: "In determining the question now before us, the court is to be guided by the established rules of interpretation of written instruments. It is not compelled, indeed it is not permitted, to give absolute and unqualified effect to a single section or clause of a statute, however direct, plain, and unambiguous, considered by itself alone, the language may be, if there are other provisions inconsistent with a literal and unrestricted interpretation of such clause or section."

"The powers of these corporations (municipal corporations) are either expressed or implied. The former are those which the legislative Act under which they exist, confers in express terms; the latter are such as are necessary in order to carry into effect those expressly granted, which must therefore be presumed to have been within the intention of the legislative grant."

Cooley, Const. Lim. p. 194.

"When a statute which creates an office fixes the time when the first election shall be held, and merely provides that the person elected at such election shall hold his office for two years, and until his successor is elected and qualified, without making any further provision as to the term of office, it will be presumed that the Legislature intended that the term of office should be two years, and that the election should be biennial."

State v. Pearey, 44 Mo. 159.

The respondents claim that the opinion of this court in *Re Hall*, 50 Me. 607, and especially the reasons stated for that opinion in the opinion concerning the register of probate, 61 Me. 60, applies to the case at bar. This becomes clearly so when, as we have already argued, the evident policy of the Act of 1826 is best promoted by considering the terms of the marshal and police together.

The respondents rely upon the case of *People v. McClave*, 99 N. Y. 88.

In this case the court held that the "word 'term,' in the provision of the New York Charter of 1873, fixing the terms of heads of departments and commissioners, is to be construed as designating consecutive periods of six years, following each other in regular order, the one commencing when the other ends; and the incumbent appointed in any such period is to be treated as the incumbent of the term or period to which his appointment relates, his office expiring with the expiration of the term."

The case of *State v. Cook*, 20 Ohio St. 252, sustains the respondents' view.

Foster, J., delivered the opinion of the court:

The controversy in this case arises in relation to the title to office of city marshal of the city of Lewiston; and a petition for *mandamus* is instituted against the mayor and aldermen and Daniel Guptil, the present incumbent of said office. The petitioner claims under an appointment made by the mayor, by and with the advice and consent of the aldermen, March 12, 1885. The defendant Guptil claims under a similar appointment made April 1, 1886. It being conceded that both appointments were made by the proper authorities, the controversy arises by reason of the contention of the petitioner that his appointment, although expressly purporting to extend only to April 1, 1886, was by operation of law for the term of two years from the date of such appointment, and would not expire till March 12, 1887, and that consequently the appointment of Guptil during that time was unauthorized and void. Guptil at the time of his appointment took possession of the office and was recognized as the lawful city marshal, and has ever since been acting as such.

Inasmuch as the question presented, if we are to decide it upon its merits, becomes one of statutory construction, it will be necessary briefly to examine the Act of incorporation of the city, as well as the subsequent enactment of 1880, entitled "An Act to Promote the Efficiency of the Police Force of the City of Lewiston."

By an examination of § 4 of the city charter, it will be found that all subordinate officers were to be elected and appointed annually by the city council for the ensuing year, on the third Monday of March, or as soon thereafter as might be convenient; that all officers should be chosen and vacancies supplied for the current year, except as therein otherwise provided; and that all the subordinate officers and agents of the city should hold their offices during the ensuing year, and till others should be elected and qualified in their stead, unless sooner removed by the city council. Thus the tenure of office provided by this section was for the current year.

Section 18 authorized the appointment of a city marshal by the mayor and aldermen in the manner provided in the section before named, constituted such marshal chief of police, and specified his duties.

It is also provided by said charter that the city may ordain and publish such Acts, laws, ME.

and regulations, not inconsistent with the Constitution and laws of this State, as shall be needful to the good order of the city.

In accordance with the express authority with which the city was thus invested, certain ordinances were duly ordained and published—the twenty-first section of which provided that all police officers should hold their office until the last day of March next succeeding their appointment.

And here it may be stated as a fact, about which there is no dispute, that, since the incorporation of the city, it has been the custom pertaining to the administration of police for the term of office of city marshal to expire on the last day of March, and to begin on the first day of April, in the respective years in which terms of said office expire and begin, not only under the original Act of incorporation but also since the special Act in relation to promoting the efficiency of the police went into operation in the spring of 1880.

Inasmuch, therefore, as that Act provided that the city marshal should hold his office for the term of two years, the subsequent appointments were made on April 1, 1880, 1882, and 1884. Although several appointments were made from April 1, 1884, to the time when the petitioner was appointed, none of them received the advice and consent of the aldermen till the appointment of the petitioner March 12, 1885.

It is at this point that the present controversy arises. It is insisted by the petitioner that a city marshal duly appointed, in accordance with said Act, to succeed one whose term has fully expired, has by the express provisions of the Act, a definite and individual term of office of two full years from such appointment, which cannot be abridged either by the act of the mayor or of the aldermen, and whether made at the commencement of the municipal year or any time thereafter.

On the other hand, it is claimed in defense that, by a proper legal interpretation of the Act when read along with the Act of incorporation, as necessarily it must be, the term of a city marshal appointed to succeed one whose term has expired, is to be reckoned, for the purpose of ascertaining its duration, from the first day of April next succeeding the prior term; and that the person thus appointed is entitled to hold his office only to the expiration of two years from that date, notwithstanding there may have been an interval of time of greater or less extent between the expiration of the prior term and the date of his appointment.

In arriving at a correct conclusion in determining which of the foregoing positions is correct, we must be guided by the established rules pertaining to the construction of statutes, that, like a will or contract, it is to be read and construed as a whole,—recourse being had to all its parts rather than to any particular clause, where the meaning is doubtful, or where by giving a particular clause full effect, it would conflict with other clauses. And in the construction of statutes it is held to be the duty of courts to execute all laws according to their true intent and meaning; that intent, when collected from the whole and every part of a statute, must prevail, even over the literal

import of terms, and control the strict letter of the law, when the latter would lead to possible injustice and contradictions. *State v. Mayor*, 28 Ind. 248; *Holmes v. Paris*, 75 Me. 561, and cases there cited. Hence, the Act of 1880 is to be read and construed not as standing alone, but in the light of the instrument which it sought to amend. That instrument is the Act of Incorporation; and only so much thereof is altered or repealed as is inconsistent with the Act in question. This Act in express terms changes the manner of appointment of the city marshal, deputy marshal, and policemen. Formerly the appointment was the joint act of the mayor and aldermen; by the amendment these appointments are vested in the mayor, the confirmation in the aldermen. The tenure of certain offices is changed. The Act provides that "the city marshal shall hold his office for the term of two years, and the remainder of the police force shall hold their office for the term of three years; providing, however, that the first year after this Act shall take effect, one third in number, as near as may be, of said police force shall be appointed for the term of one year; one third in number, as near as may be, shall be appointed for the term of two years; and one third in number, as near as may be, shall be appointed for the term of three years; and there shall be appointed each year thereafter one third in number, as near as may be, of said police force."

It is evident, when we consider the language of the amendment in connection with the Act of incorporation, that one of the objects to be attained, besides a modification in the manner of appointment, was that the terms of office of city marshal were to consist of consecutive periods of two years, following each other in regular order, the one commencing where the other ends, instead of annual terms of one year each as before the passage of the Act.

The purport of the statute in question is to promote the efficiency of the police force of the city. That force consists of the marshal, deputy marshal, and policemen. It was also the design of the statute that the terms of the policemen should consist of periods of three years following each other in like consecutive order as those of the city marshal. The tenure of their office was so arranged that one third of their number, as near as may be, were to be appointed each year, thus preserving the efficiency of the force. It is admitted that the police year in practice, ever since the adoption of the city charter, has begun on the first day of April, and that since the passage of this statute the office of city marshal has been filled in separate and distinct terms of two years each, these terms commencing on the same day in April as the police year. The same paragraph which designates the terms of office of the remainder of the police also specifies the tenure of the office of the city marshal. That office is intimately associated with and forms a part of the police department, the marshal being chief of police and possessing all the powers and exercising all the duties appertaining to constables of towns. It partakes more of the character of a municipal office commencing at the beginning of the municipal year, than of those offices which, like judges and registers of probate, and judicial officers,

are entirely independent of municipal affairs. In the latter class the terms are fixed and positive to be sure, when no vacancy occurs, but, in case of any vacancy, the Constitution provides otherwise for the commencement of such terms. The Constitution in express terms provides that all judicial officers shall hold their respective offices for a definite term "from the time of their respective appointments." The rule applicable in such cases cannot properly be applied in the construction of a statute the provisions of which may be controlled by the true intent and meaning of the law-makers as evidence from all its parts and the object sought to be attained. *Opinion of the Justices*, 61 Me. 602; 50 Me. 608; *Hale v. Brown*, 59 N. H. 555; *People v. McClave*, 99 N. Y. 89.

If we were to give any other construction to this statute, in relation to the commencement and duration of the terms of office of the marshal and the policemen, the terms of service of the appointees might soon become such as to entirely destroy the force of the provision that one third, as near as may be, should be appointed each year. The results of any other construction may properly be anticipated; and, if those results should be found to be anomalous, unjust, or even inconvenient, it is a legitimate and strong argument against such construction, and it might well be presumed that the Legislature did not intend any such results.

Landers v. Smith, 78 Me. 218, 1 New Eng. Rep. 896.

Thus the case of *State v. Mayor*, 28 Ind. 248, was a proceeding to determine the right to an office. The city charter provided that only one councilman, of the two from each ward, should be elected every two years, for a term of four years. It was contended that the terms were four years, whether from a general election or a special election, and that they were not necessarily distinct and consecutive with periods of two years intervening. But the court held otherwise, saying: "If the provision 'that all officers elected at any special election shall hold their offices until the next general election on the first Tuesday in May,' is held to include councilmen, it must result that, from special elections to fill vacancies occurring in that office, the two councilmen from the same ward will often be elected at the same general election, for the full term of four years, and regularly thereafter at the same date, thus defeating the object of the Legislature, which was to avoid an entire change in the representation of any ward at any regular election."

In the case before us the statute, it is true, does not designate any definite point of time from which the terms of the several offices therein mentioned shall commence. Yet the evident purpose of the statute requires, for the police force at least, that a definite time be fixed from which the several terms shall begin to run, and, when so fixed, the individuality of such terms be adhered to; and that, as in the case last cited, they follow each other in consecutive order. The Act of incorporation expressly provides when the terms in relation to all subordinate officers shall begin. It provides that the city council shall annually, on the third Monday in March, or as soon thereafter as convenient, elect and appoint for "the ensuing year." It provides that "all officers

shall be chosen and vacancies supplied, for the current year." And may not this be fairly understood as meaning the year commencing with the "third Monday in March or as soon thereafter as convenient?" Here, then, is a time designated for the commencement of the municipal year. The statute of 1880 does not, either expressly or by implication, change the commencement of that year. An ordinance, moreover, was existing at the date of the passage of the statute, providing that all police officers should hold their office until the last day of March next succeeding their appointment.

We cannot presume that the Legislature intended to disturb, further than was necessary, the existing order of things, or to change the already existing provisions in regard to the beginning of the terms of service, in force when this Act was passed, and in no way repealed by it. Not only the ordinances ordained and published prior as well as subsequent to this enactment recognize the commencement of the municipal year as we have stated, and definitely fix the 1st day of April as such commencement. These ordinances do not appear to be inconsistent with the Constitution and laws of the State, or with the charter, which contains a general grant of power to pass all such by-laws as may be necessary to the well-being and good order of the city. Cooley, Const. Lim. 194; Dill. Mun. Corp. 2d ed. § 250.

The construction we have here given in relation to the commencement and duration of the terms of these offices has been received and acted on by all parties interested, from the adoption of this statute to the time when this controversy arose. Such also appears to have been the understanding of the petitioner as well as those who made and confirmed the appointment, as is shown, not only by the records of the board of mayor and aldermen, wherein his nomination and confirmation are stated to be "for two years from April 1, 1884, to April 1, 1886," but also from the language of the petitioner in his official bond in which he states that he "has been appointed and elected city marshal of the city of Lewiston for the term of two years beginning on the 1st day of April, 1884, and ending April 1, 1886."

While such understanding or custom can have no room for operation, where the language of the enactment is plain and the legislative intent is clear upon the face of it; yet it may not be without its importance in aid of a proper construction of a charter or statute, if the language be uncertain or doubtful.

"In construing statutes applicable to public corporations," remarks Redfield, *J.*, in *Sherwin v. Bugbee*, 16 Vt. 444, "courts will attach no slight weight to the uniform practice under them, if this practice has continued for a considerable period of time." It was upon this principle that the court in *State v. Severance*, 49 Mo. 401, held "that the contemporaneous construction of a city ordinance adopted by all parties interested in its enforcement, although not controlling, is, in doubtful cases, entitled to great weight." *State v. Cook*, 20 Ohio St. 259.

In the examination of the question before us we have looked directly to the legal merits of the case. But there is another ground which

is decisive against the petitioner and brings us to the same conclusion.

The office to which the petitioner seeks to be restored is actually filled by another, claiming under a legal appointment, admitted and sworn and exercising the functions of the office under color of right. In such case the appropriate remedy of the petitioner in the first instance, if entitled to any, is by *quo warranto* and not by *mandamus* alone. In this case the petitioner is virtually attempting to oust an actual incumbent, and to place himself in an office the title to which is in controversy, and which cannot be tried in a proceeding of this kind. The general and well-nigh universal rule is that *mandamus* is not an appropriate remedy to try the title to an office as against one actually in possession under color of law. The decided weight of authority, both in English and American courts, is in support of this doctrine.

In Dane's Abridgment the rule is thus stated: "But if the office be already full by the possession of an officer *de facto*, no writ will be granted to proceed to, a new election until the person in possession has been ousted on proceedings in *quo warranto*."

Judge Dillon in his work on Municipal Corporations, after stating the English rule as above given, and that the same is generally recognized to be the law in this country, says: "We have before seen that it is the doctrine of the English law, quite generally adopted in this country, that, where a person is in the actual possession of an office under an election or a commission, and is thus exercising its duties under color of right, that the validity of his election or commission cannot, in general, be tried or tested on a *mandamus* to admit another, but only by an information in the nature of a *quo warranto*." §§ 674, 678—680, 716. The same doctrine is more emphatically laid down in High on Extraordinary Legal Remedies, § 49; and he asserts that the rule is established by an overwhelming current of authority that *mandamus* will not lie to compel the admission of another claimant, or to determine the disputed question of title to an office, where it is already filled by an actual incumbent who is exercising the functions of the office *de facto* and under color of right. In such cases the party complaining, and desirous of an adjudication upon his alleged title and right of possession, must assert his rights by the only proper, efficacious, and speedy remedy,—and that is an information in the nature of a *quo warranto*.

A careful examination of the decisions, both of the English and American courts, will not fail to convince the most doubtful mind that the general current of authority runs in the same direction, and that the exceptions to the rule are rare, and not well founded. A few of the very many authorities bearing directly upon this rule are given,—enough, when examined, to authenticate the assertion that the rule is too well settled to be denied. *King v. Mayor of Winchester*, 7 A. & E. 215; 34 E. C. L. 81; *Queen v. Councilors of Borough of Derby*, 7 A. & E. 419; 34 E. C. L. 135; *King v. Mayor of Oxford*, 6 A. & E. 849; 33 E. C. L. 89; *Frost v. Mayor of Chester*, 5 E. & B. 588; 85 E. C. L. 536; Coleridge, *J.*: "A *mandamus* goes

only on the supposition that there is no one in office, for the purpose of restoring a party to office or to cause an election to be held,—*King v. Mayor of Colchester*, 2 T. R. 259; *Queen v. Phippen*, 7 A. & E. 966; 34 E. C. L. 263; *People v. New York*, 8 Johns. 79. In this case the court holds: "When the office is already filled by a person who has been admitted and sworn and is in by color of right, a *mandamus* is never issued to admit another person;" and it is there laid down that the proper remedy, in the first instance, is by information in the nature of a *quo warranto* by which the rights of the parties may be tried. *People v. Stevens*, 5 Hill (N. Y.), 629; *People v. Lane*, 55 N. Y. 219; *Re Gardner*, 68 N. Y. 467; *Duane v. McDonald*, 41 Conn. 517; *Wood v. Fitzgerald*, 3 Oreg. 568; *Underwood v. Wylie*, 5 Ark. 248; *Bonner v. State*, 7 Ga. 473; *People v. Detroit*, 18 Mich. 388; *Brown v. Turner*, 70 N. C. 93; *Denver v. Hobart*, 10 Nev. 28; *Meredith v. Sacramento County*, 50 Cal. 438.

"*Mandamus* will not be issued to admit a person to an office while another is in under color of right." *State v. Thompson*, 36 Me. 70; "*Mandamus* will not lie to turn out one officer, and to admit another in his place." *People v. Matteson*, 17 Ill. 167; *People v. Head*, 25 Ill. 325; *Hill v. Goodwin*, 56 N. H. 456; *Ex parte Harris*, 14 Am. L. Reg. N. S. 646; *McGee v. State*, 1 West. Rep. 467; *Ellison v. Raleigh*, 59 N. C. 125.

"By *quo warranto* the intruder is ejected; by *mandamus* the legal officer is put in his place." *Prince v. Skellin*, 71 Me. 866.

That there have been exceptions to the rule is true. But upon what principle the exceptions have been founded, where there has been an actual incumbent exercising the functions of the office and being in under color of right, the decisions themselves fail to afford any satisfactory answer. In Maryland and Virginia the courts have held that in such cases *mandamus* would lie. Thus in *Dev v. Judges*, 3 Hen. & Munf. 1, it was held that *mandamus* was the best remedy. So in *Harwood v. Marshall*, 9 Md. 83, the Court of Appeals of Maryland came to the conclusion that resort to *quo warranto* as preliminary to *mandamus* was not necessary on the grounds of delay growing out of the use of the process, citing in support of its decision the case of *Strong, Petitioner*, 20 Pick. 484, a case more generally referred to as an exception to the rule than any other authority. But an examination of that case shows the fact that it was *mandamus* to the board of examiners to issue a certificate of apparent election to the petitioner, although, as the court there says, he might then be obliged to resort to *quo warranto* to test the title to the office. A distinction is there made between the cases where application had been made to be admitted to an office by proceedings on *mandamus*, and the case there decided, where the petitioner only sought for a certificate of his election, like the case of *Marbury v. Madison*, 1 Cranch, 168, 169 [18 U. S. bk. 3, L. ed. 70], and *King v. Mayor of Oxford*, 6 A. & E. 349; 33 E. C. L. 89, where it was said that the certificate was only one step towards the completion of the title. The court also in *Strong's Case* admitted that the two processes might be necessary to enable the petitioner to get possession

of the office,—the one to establish the legality of his election, the other to set aside that of the incumbent,—and that, although they were independent of each other, they might have been applied for at the same time and proceeded *pari passu*. The court *arguendo* claimed that there are authorities in support of the doctrine that *mandamus* is the appropriate remedy where there is an actual incumbent acting *de facto*; but the decision of the court is not based upon that ground, and is not authority to the extent claimed in *Conlin v. Aldrich*, 98 Mass. 558, where it is referred to. The general tenor of the decisions from Massachusetts recognizes and adopts the rule rather than the exception to it. *Attorney-General v. Simonds*, 111 Mass. 256.

It is a fundamental principle that *mandamus* can be used only to compel the respondent to perform some duty which he owes to the petitioner, and can be maintained only on the ground that the petitioner has a present, clear, legal right to the thing claimed, and that there is a corresponding duty on the part of the respondent to render it to him. If, therefore, as in the case at bar, the two persons are claiming the title to office adversely to each other, the respondent being in possession and exercising the duties pertaining to that office, *de facto*, under color of right, *mandamus* will not lie to compel the admission of the petitioner, or to determine the disputed question of title.

It is the opinion of the court upon the best reflection we have been able to give to the questions presented in this case, that upon neither branch is the petitioner entitled to prevail.

Writ denied, with only one bill of costs for respondents.

Peters, Ch. J., Walton, Danforth, and Libbey, JJ., concurred.

Haskell, J.: I dissent from the reasoning of the opinion. The Act of March 16, 1880, provides that the city marshal of Lewiston shall be appointed by the mayor, by and with the advice and consent of the aldermen, and "shall hold his office for the term of two years," and that "all Acts and parts of Acts inconsistent with this Act are hereby repealed."

The language of this Act touching the tenure of the marshal is substantially the same as that in the Constitution, declaring the tenure of various State officers. Section 4 provides that "all judicial officers shall hold their respective offices for the term of seven years from the time of their respective appointments." Section 5, "Justices of the peace and notaries public shall hold their offices during seven years, if they so long behave themselves well." Section 7, "Judges and registers of probate shall hold their offices for four years commencing on the first day of January next after their election." Section 8, "Judges of police and municipal courts shall hold their offices for the term of four years."

In case of vacancy in any of these offices, it has been the custom for the new officer to hold for a full term. This court declared that a person elected to the office of register of probate made vacant during the term should hold for the full term of four years. *Opinion of the Justices*, 61 Me. 602.

The Act of 1880 is "clear and unambiguous," and provides that "the marshal shall hold his office for the term of two years." No good reason exists for departing from the plain meaning of the statute, especially when it expressly repeals all Acts inconsistent with its provisions, and inasmuch as its title purports "to promote the efficiency of the police force," which is not likely to flow from short terms and frequent changes. The marshal neither appoints his deputies nor any part of the police force, and, when appointed, should hold the full term of two years.

I concur in the result upon the ground that *mandamus* does not lie to eject an officer *de facto*, performing his duties under color of right.

Ellen D. JONES

v.

Elijah SMITH.

1. **Trespass cannot be maintained against a mortgagee in possession for acts done after the mortgagor had paid the sum found due on a bill to redeem, and before the mortgagee had executed the release required by the decree of the court, and surrendered the premises, when the release was executed and the premises surrendered at the time and in the manner prescribed by the decree of court.**
2. **To sustain an action of trespass to personal property, the plaintiff must prove title or possession or the right to immediate possession.**

(Penobscot—Decided June 10, 1887.)

ON report of an action of trespass. *Judgment for defendant.*

The case and material facts are fully stated in the opinion.

Mr. Jasper Hutchings, for plaintiff:

Upon the payment into court of the amount decreed to be due upon the Bowler mortgages, the legal title reverted at once in plaintiff.

Rev. Stat. chap. 90, § 80.

The statute enacted in 1870 was intended to do away wholly with the distinction that had existed before that time (according to *Stewart v. Crosby*, 50 Me. 180, decided by a divided court), between payment of a mortgage debt before, and payment after, a breach of the condition of the mortgage, in its effect upon the legal title.

Says Jones on Mortgages, § 690: "The mortgagee has no right of action after payment. If the mortgagee purchase the mortgaged premises at the foreclosure sale for the full amount then due on the mortgage, he has no claim to logs previously cut upon the premises. When he has been paid his debt, his right of action is gone, although the trespass upon the property was committed before the payment."

The cases of *Davis v. Nash*, 32 Me. 411, and *Seavey v. Preble*, 64 Me. 121, are authorities in support of trespass *quare clausum* without actual possession by plaintiffs.

Furthermore, as soon as the vegetables, ap-

ples, etc., were severed from the soil and buildings, they at once became personal property,—the personal property of the plaintiff,—and upon familiar principles of law, she is entitled to recover for them, under her counts of trespass *de bonis*, without having had possession.

Freeman v. Rankins, 21 Me. 446; *Staples v. Smith*, 48 Me. 470.

Between mortgagor and mortgagee and their tenants there is no right to emblements.

Washb. Real Prop. *Emblements*; Jones, Mort. §§ 697, 780.

Messrs. Davis & Bailey, for defendant:

The relation of landlord and tenant did not exist between young Smith and plaintiff; and defendant had a right through his son, under the mortgage, to the manure.

Chase v. Wingate, 68 Me. 204.

By Rev. Stat. chap. 90, § 81, the mortgagor or person claiming under him may, after condition broken, and before foreclosure perfected, maintain a writ of entry against the mortgagee or person claiming under him in possession.

"Payment of the debt after condition broken does not divest the mortgagee of his legal title, but the mortgagor must resort to equity for release or reconveyance."

Stewart v. Crosby, 50 Me. 183.

As to emblements, the mortgage covers them; and the mortgagee, being in possession, has a right to them; and Jones on Mortgages, §§ 697, 780, cited by plaintiff, sustains this view rather than otherwise.

See *Gilman v. Wills*, 66 Me. 273.

The mortgagee has a right to immediate possession if there is no contract to the contrary, even before condition broken; and may enter and harvest the crops growing on the land; and an action of trespass cannot be maintained against him by the mortgagor.

Gilman v. Wills, *supra*. See also *Farrar v. Smith*, 64 Me. 74, as bearing on this point.

In *Burges v. Souther*, 1 New Eng. Rep. 819, the court says: "The decree consists of two parts. The first part orders the defendant to pay. * * * The second orders, in default of such payment, that the mortgaged premises be sold. * * * The second order does not come into operation if the first part is performed."

Foster, J., delivered the opinion of the court:

The plaintiff was the owner of the premises in question, and mortgaged the same to Lorenzo A. Bowler. The interest of the mortgagee passed by sundry conveyances to Sanford C. Smith, son of this defendant, and under whose authority the defendant claims to have been acting.

The plaintiff had yielded possession to the mortgagee in 1881, and afterwards brought a bill in equity (*Jones v. Bowler*, 74 Me. 310) and obtained a decree authorizing her to redeem upon payment of the amount found to be due within three months from the 16th day of June, 1884. Thereupon the premises were to be surrendered, and a deed was to be executed and delivered to the plaintiff, within five days from the time of such payment, "conforming to this decree, and therein reciting the decree, and in proper terms discharging said mort-

gages, and releasing and freeing said mortgaged premises from any and all incumbrances created or made by said mortgages," etc.

Within the three months named in the decree, viz., September 6, the money was paid in accordance therewith; and whatever acts were done by this defendant, of which the plaintiff complains, were done between that date and September 10, the time when the plaintiff received the deed of release mentioned in the decree, and possession of the premises.

During that time the premises remained in the possession of the assignee or those acting under his authority.

The defendant, therefore, can be holden for no acts which, if done by the mortgagee in possession, or his assignee, they would not have been legally answerable for in an action like the one before us.

There is no evidence connecting the defendant with several of the acts alleged to have been committed by him, and no further mention need be made of them. The remaining acts are such as indicate that the plaintiff is looking more to the gratification of her will than for any pecuniary gain in the prosecution of this suit, and relate to the gathering of a few beets, cabbages, tomatoes, and cucumbers planted by the assignee, that season, to the gathering of about a dozen bushels of apples from the orchard, and to hauling a small load of manure from the premises.

The plaintiff, by her learned counsel, admits the settled doctrine of the common law, that payment of the mortgage debt after condition broken would not divest the mortgagee of his legal title; and that the legal estate would remain in the mortgagee until it was released. *Stewart v. Crosby*, 50 Me. 180. But she claims that, since the provisions of Rev. Stat. chap. 90, § 81, such payment operates as an extinguishment of the mortgage, and at once reverts the legal title in the mortgagor, who may forthwith treat the mortgagee in possession, or anyone claiming under him, as wrongfully in possession and liable, not only in an action of ejectment, but also in trespass.

However this may be in a case where the principle can be properly applied, it must certainly be received with some modification in the case now before us. In this case there was a decree from the court of equity, to which the plaintiff had seen fit to resort by praying for an account of the rents and profits, and for redemption. By that decree, introduced in evidence, the rights of both parties in this action are, to a certain extent, to be determined. It affects parties and privies. True, by that decree, the plaintiff, upon payment of the amount due upon the mortgage debt, was to have possession of the premises. But that decree also provided that the mortgagee in possession, or the party claiming under him, was to have five days from the time of such payment in which to execute and deliver a suitable deed conforming to that decree, therein reciting the same, and in proper terms discharging said mortgages, and releasing and freeing the mortgaged premises from any and all incumbrances created or made by them. Within the time named the deed was executed and delivered. We cannot say that the party who was lawfully in possession of the premises had no rights there

during the time specified in which a deed was to be executed. We think his possession was such as it was contemplated might lawfully continue until the delivery of the deed within the time named. Otherwise we should be doing violence to the language of the decree upon which the plaintiff's rights in this action, to a great extent, are based. By that the plaintiff was authorized, within such time as the court in its discretion saw fit to grant, to make tender or payment of the mortgage debt. The court, as it undoubtedly had the right to do, gave the other party a reasonable time in which to execute a release of such incumbrances as may have existed upon the property and been discharged by such payment. It would not be reasonable to suppose that one should be entitled to the whole time thus allowed by the court for the performance of that which it was optional with her whether she would perform or not, and that the other should have none.

When the acts complained of were done, the mortgagee had not executed the release. Possession had not been surrendered to or taken by the plaintiff. That possession, to the time the deed was executed and delivered in accordance with the decree, must be held to be a legal possession. *Taylor v. Townsend*, 8 Mass. 415. The case to which we have referred was where an action of trespass was brought by the mortgagor against the assignee of the mortgagee in possession; and the trespass complained of was the taking down and removal of a barn and shed erected by him. The plaintiff there had, by a bill in equity, previously obtained a decree for possession,—the mortgage having been redeemed,—and for a deed of release of the mortgaged premises. *Taylor v. Weld*, 5 Mass. 124. "Now, in the case at bar," says Parker, J., "Townsend was not only in possession, but was lawfully so, and that under the plaintiff himself, until the judgment of the court against him. And when the act complained of was done, he had not been removed, nor had he released, or otherwise surrendered, his possession. It is impossible, therefore, to consider him a trespasser; and if the act done by him was wrongful, the proper remedy is by action in the nature of waste, considering him a tenant at will after the rendition of the judgment, for an injury done to the reversion."

While thus in the lawful possession, the mortgagee or his assignee, is not liable in trespass for the occupancy of the premises. He is entitled by his possession to the rents and profits, and is accountable for them to the mortgagor if the premises are redeemed.

As between mortgagor and mortgagee, the mortgage vests the legal title and seisin of the estate in the mortgagee immediately upon the delivery of the mortgage; and the mortgagee is regarded as having all the rights of a grantee in fee, subject to defeasance. *Gilman v. Wells*, 66 Me. 275.

Consequently, it has been held that an action of trespass *quare clausum* will not lie in favor of the mortgagor against the mortgagee or his assignee, for entering peaceably upon the mortgaged premises and digging up and carrying away and converting to his own use portions of the soil (*Furbush v. Goodwin*, 20 N. H. 321); nor for removing fixtures belonging to the real estate (*Chellis v. Stearns*, 22 N. H. 252).

The defendant's acts upon the premises, as the evidence shows, were by authority of the son, who was the assignee of the mortgages, and who carried on the place that season. With the exception of the removal of the manure which belonged to the farm (*Chase v. Wingate*, 68 Me. 204; *Vahus v. Mosher*, 76 Me. 470), the evidence is not sufficient to warrant the court in saying that anything was done by him which could be considered as an injury to the freehold.

It is plain that this action cannot be maintained upon the count in the plaintiff's writ for the breaking and entering. The right of entry and possession at the time was in the son, and in law the defendant stands in his place in reference to any acts done by him.

Nor can the plaintiff prevail upon the other counts, of *de bonis asportatis*. At the time of the alleged taking the title and possession were rightfully in the defendant or those under whom he claims. There was neither title, nor possession, nor the right to immediate possession, in the plaintiff. *Carlisle v. Weston*, 1 Met. 26; *Codman v. Freeman*, 3 Cush. 810; *Staples v. Smith*, 48 Me. 470; *Butman v. Wright*, 16 N. H. 220; *Lunt v. Brown*, 18 Me. 236.

"The gist of trespass to personal property is the injury done to the plaintiff's possession. The substance of the declaration is that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff. To maintain the action, it is absolutely essential that the plaintiff should have had, at the time of the alleged injury, either actual or constructive possession of the property injured. *Wilson v. Martin*, 40 N. H. 91; *Lunt v. Brown*, *supra*; *Muggridge v. Eboeth*, 9 Met. 285; *Wade v. Mason*, 12 Gray, 385.

And an action of trespass cannot be supported, against one coming to the possession of goods lawfully, for a subsequent unlawful conversion of them.

Bradley v. Davis, 14 Me. 44; *Butman v. Wright*, *supra*.

Judgment for defendant.

Peters, Ch. J., Danforth, Virgin, Emery, and Haskell, JJ., concurred.

Ellen D: JONES

v.

Elijah SMITH *et al.*

1. It is a breach of the condition of a replevin bond to fail to enter the replevin writ in court after it has been duly served.
2. The defendant in an action on a replevin bond may show, in mitigation of damages, title in himself to the property replevied, when there was no judgment in the replevin suit determining the title to the property.

(Penobscot—Decided June 10, 1887.)

ON report. *Judgment for plaintiff for nominal damages.*

Debt on a replevin bond.

The material facts are stated in the opinion.

Mr. Jasper Hutchings, for plaintiff:

Plaintiff is entitled to maintain her action, and to recover nominal damages at least.

Smith v. Whiting, 97 Mass. 316; *S. C.* 100 Mass. 122.

The case at bar is unlike *Pettygrove v. Hoyt*, 11 Me. 66.

Messrs. Davis & Bailey, for defendants:

The plaintiff has sustained no damage by the nonentry of the replevin writ. In fact, if we are correct in our view of the case, she is the gainer thereby, and cannot maintain the action.

See *Pettygrove v. Hoyt*, 11 Me. 66; *Smallwood v. Norton*, 20 Me. 88. Also see *Gilman v. Wills*, 66 Me. 278.

Foster, J., delivered the opinion of the court:

Debt on a replevin bond. The principal parties are the same as in the preceding action, *Jones v. Smith*, *ante*, p. 689.

The replevin suit in which the bond was given was for ten tons of hay in the barn upon the premises named in that action, a part of which was grown and cut on the premises in 1884; and for one ton of unthreshed pease also grown thereon the same season, harvested and lying in heaps in the field at the time the replevin suit was commenced.

This defendant had cut the hay and harvested the pease under an arrangement with the assignee of the mortgagee in possession, and was the undoubted owner of the property replevied. To obtain possession of the same after this plaintiff had redeemed the estate mortgaged, and come into possession thereof under a decree for redemption, this defendant brought his writ of replevin, returnable at the October Term of Court, 1884, for Penobscot County.

The writ was duly served upon this plaintiff, as appears by the officer's return thereon; but it was never entered in court, and no judgment has been rendered in the replevin suit. This was a breach of the bond, one of the conditions of which was that the party should prosecute the said replevin to final judgment, and which has not been done. *Pettygrove v. Hoyt*, 11 Me. 69; *Tuck v. Moses*, 54 Me. 121, 122; *Smith v. Whiting*, 87 Mass. 316, 318; *Persse v. Watrous*, 30 Conn. 139; *Porreau v. Bevan*, 5 B. & C. 284; 11 E. C. L. 287.

In *Morgan v. Griffith*, 7 Mod. 880, it was said by Lee, *Ch. J.*, that "in all replevin bonds there are several independent conditions, one to prosecute, and another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any of these distinct parts of condition."

Dias v. Freeman, 5 T. R. 195, was an action upon a replevin bond, the declaration alleging that the plaintiff in replevin did not appear at the county court next after giving the bond, according to the condition; and did not then and there, or in any manner, or at any place or time, prosecute his suit with effect against the defendant in said suit. On special demurrer the declaration was adjudged good, and the plaintiff had judgment thereon; although it did not appear that the suit in replevin was legally determined, or what the judgment was, if any, that was given therein, or whether there was any judgment for return or not.

This question came before the court in Connecticut in *Allen v. Woodford*, 36 Conn. 148, and

it was there held that a breach of the bond may occur in consequence of a failure to return the writ through negligence of the officer or the plaintiff; but that the title of the plaintiff in replevin may be shown in such case in mitigation of damages in an action upon the bond.

And in *Smith v. Whiting*, 100 Mass. 122, the precise question was presented; and it was there held that, if the plaintiff in replevin fails to prosecute the replevin to final judgment in conformity with the condition of his bond, it will constitute a breach thereof, and entitle the defendant in replevin to judgment for nominal damages in an action on the bond, even if he had no title to the property replevied.

What damages is the plaintiff entitled to recover? The bond is given as an indemnity for whatever loss or damage the plaintiff may have suffered. There has been no judgment in the replevin suit determining the title to the property, and the question of property has in no way been passed upon. The question of damages, so far as it has not been settled by any judgment, is therefore open to the defendants. *Tuck v. Moses*, 58 Me. 476; *Buck v. Collins*, 69 Me. 448.

There can be no valid objection to permitting the defendant, in a suit like the present, to show anything in mitigation of damages, when it is not inconsistent with any judgment in the replevin suit. Thus, in an action upon the replevin bond, it has been held competent for the defendants to show, in mitigation of damages, that, since the taking by the replevin writ, the plaintiff's interest in whole or in part has ceased to exist, and that the actual damages sustained by the plaintiff was the simple question involved (*Tuck v. Moses*, 58 Me. 462); so, in an action on the bond by one of the owners of the property held in common, it has been held that his interest may be shown in mitigation of damages and as limiting the amount to be recovered (*Bartlett v. Kidder*, 14 Gray, 449); or that the suit was prematurely brought, and that the action of replevin failed solely upon that account (*Davis v. Harding*, 3 Allen, 802); or that the goods have been delivered and accepted pending the suit, and in such case that only nominal damages could be recovered, unless, perhaps, the plaintiff might be entitled to interest on the value (*Conroy v. Flint*, 5 Cal. 327). In these cases there had been a judgment for return, and yet the court held the evidence admissible as not being inconsistent with the judgment, or impeaching it, in reference to the right of property which had not been determined in the progress of the replevin suit. Of course if it has been so determined, it cannot be opened anew in the suit on the replevin bond. This is the doctrine of all the authorities. *Tuck v. Moses*, *supra*; *Buck v. Collins*, 69 Me. 447, 448; *Clapham v. Orabtree*, 72 Me. 477; *Davis v. Harding*, 3 Allen, 806.

Consequently, in mitigation of the plaintiff's damages, it has been held that in a suit on the replevin bond the defendant may show that the plaintiff had no title to the property, on the ground that the judgment in the replevin suit was not necessarily conclusive upon that question. *Wallace v. Clark*, 7 Blackf. 298; *Allen v. Woodford*, 36 Conn. 143; *Smith v. Whiting*, 100 Mass. 122; *Sedg. Dam.* 503; *Field, Dam.* § 888; *McFadden v. Ross* (Ind.), 5 West. Rep. 693.

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"Such is the reasonable doctrine" remarks Danforth, J., in *Tuck v. Moses*, *supra*, "for it is simply a question of actual damages to the plaintiff or those he represented. It could be no damage to him to withhold that which he had no right to receive, or, having received, he would be under legal obligation to return." And in *Farnham v. Moor*, 21 Me. 509, in a suit on a replevin bond, "judgment is to be rendered upon default," remarks Whitman, C. J., "for the plaintiff, for as much as he is in equity and good conscience entitled to recover." This is the principle by which the courts have been governed in their determination of cases like the one now before us. *Miller v. Moses*, 56 Me. 128; *Leonard v. Whitney*, 109 Mass. 265; *Claggett v. Richards*, 45 N. H. 364; *Witham v. Witham*, 57 Me. 449, and *Clapham v. Orabtree*, 72 Me. 478, are all in harmony with this equitable position of the courts which will not be found to militate in the least against the wholesome doctrine of estoppel by judgment.

This case is before the court on report. The defendants by their pleadings, and by way of mitigation of damages, assert title to the property, at the time the replevin suit was commenced, to have been in Elijah Smith, the plaintiff in that suit—now one of the defendants in this. The evidence satisfies us that this is true. While it is not a complete defense to this action, the plaintiff, however, will be entitled to recover only nominal damages, as that is the extent of the damage disclosed by the evidence.

Judgment must therefore be for the plaintiff for the amount of the penalty named in the bond (*Davis v. Harding*, 3 Allen, 802; *Wright v. Quirk*, 105 Mass. 48); but execution is to issue for only one dollar, as nominal damages.

Judgment accordingly.

Peters, Ch. J. Danforth, Virgin, Emery, and Haskell, JJ., concurred.

Sylvester S. WORMELL

v.

MAINE CENTRAL R. R. CO.

1. Where an employee at the time of receiving an injury is in the performance of duties outside of his regular employment, he will nevertheless be held to have assumed the risks incident to those duties, and cannot recover if the injury is the result of a want of due care on his part.
2. A servant is under the same obligation to provide for his own safety from dangers of which he has notice, or might discover by the use of ordinary care, as a master is to provide it for him.
3. The question of due care is ordinarily for the jury, but it is for the court to determine whether the proof is sufficient to authorize the jury to find due care.
4. Facts stated which were held by the court to be insufficient to show due care.

(Kennebec—Decided June 4, 1887.)

ON motion for a new trial and exceptions by the defendant. *Sustained.*

The facts are clearly stated in the opinion. *Messrs. Baker, Baker, & Cornish*, for defendant:

In *Wigmore v. Jay*, 5 Exch. 354, cited with approval in 76 Me. 143, and in *Gallagher v. Piper*, 16 C. B. N. S. 669, approved in 69 Me. 466, the negligence relied on was that of a general manager whose duty it was to employ the men and supply the materials. But the court held that it was the negligence of a fellow servant only. So as to a general traffic manager of a railroad (*Conway v. Belfast & N. C. R. Co.* 9 Ir. C. L. 498); the general manager of a gas company (*Allen v. New Gas Company*, L. R. 1 Exch. Div. 251); so as to a train-despatcher (*Robertson v. Terre Haute & I. R. Co.* 78 Ind. 77; 41 Am. Rep. 552); so as to a train-despatcher and materialman who had authority to hire and discharge men and direct the movements of trains (*McKune v. California Southern R. R.* 66 Cal. 302).

The case of *Hard v. Vermont & Canada R. R. Co.* 32 Vt. 473, cited and approved in 48 Me. 296, 62 Me. 466, is precisely in point. The negligence there relied on was that of the master mechanic of the road, but the court held him to be only a fellow servant.

In Massachusetts the doctrine is settled in the same way, in case of a superintendent. *Zeigler v. Day*, 128 Mass. 152.

It makes no difference that the servant whose negligence causes the injury is a sub-manager or foreman of higher grade or greater authority than the plaintiff.

Holden v. Fitchburg R. R. Co. 129 Mass. 268. See *Floyd v. Sugden*, 134 Mass. 563.

The courts of Maine have uniformly applied the same rule to the facts of each case as it has come before them.

Lawler v. Androscoggin R. R. Co. 62 Me. 463; *Blake v. Maine Cent. R. R. Co.* 70 Me. 60; *Doughty v. Penobscot L. D. Co.* 76 Me. 143; *Cassidy v. Maine Cent. R. R. Co.* Id. 488.

All the cases upon this point will be found collected in a note to *Fox v. Sandford*, 67 Am. Dec. 591, 592.

But if Philbrick could be regarded as a vice-principal, it could be only for an act within his own department; and any order touching the moving or shackling of cars within the yard limits at Waterville was solely the department of the yardmaster, and any act of Philbrick as to the yardmaster's duties could at best have only the same effect as if done by the yardmaster himself, and the yardmaster is plainly a fellow servant.

In attempting to give any order touching the moving or shackling of cars, Philbrick would plainly be acting not as master mechanic, but as yardmaster only; and his power to bind the master would be at most limited to the power of the person whose duty he was usurping. He was attempting an order which had no relation to his position as master mechanic, and as to this order would be only a fellow servant.

Chicago & A. R. R. Co. v. May, 108 Ill. 288; *Hoke v. St. Louis, etc. R. Co.* 11 Mo. App. 574; *Quinn v. New Jersey Lighterage Co.* 28 Fed. Rep. 363.

In *Pittsburgh, C. & St. L. R. Co. v. Adams*, 3 West. Rep. 387, the court says: "It is impor-

tant and essential that the persons who gave the orders should have had authority to bind the corporation by such orders."

In *Miller v. Union P. R. Co.* 17 Fed. Rep. 69, the plaintiff was injured by being sent by his superior upon a dangerous and unsafe car, and McCrary, J., charged the jury as follows: "In order to make out the allegation that the company was negligent in ordering the plaintiff into a position of unusual danger, the plaintiff must show to your satisfaction, first, that the foreman was invested by the company with power to order the plaintiff to get upon the push-car to be carried to the station. He was not authorized, even in an emergency, to adopt a mode of transportation not permitted or sanctioned either by the rules or the customs of the company."

See *Mann v. Oriental Print Works*, 11 R. I. 52; *Union P. R. Co. v. Fort*, 17 Wall. 559 (84 U. S. bk. 21, L. ed. 741); *Hoar v. Maine Cent. R. Co.* 70 Me. 73.

The few acts testified to were wholly occasional and isolated, and never amounted to a custom in law or in fact; and a verdict based on them must be set aside.

Miller v. Union P. R. Co. 17 Fed. Rep. 70.

If the duty commanded is so inherently, necessarily, and glaringly perilous that none but a reckless man would undertake it at all, then the servant cannot recover; for the mere act of assuming the duty is of itself contributory negligence, though in the mode of performing it he exercised all possible care.

Lalor v. Chicago, B. & Q. R. R. Co. 52 Ill. 431; 4 Am. Rep. 616; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 3 West. Rep. 387; *Jones v. Lake Shore & M. S. R. Co.* 49 Mich. 573; *Smith v. Peninsular Car Works* (Mich.), 27 N. W. Rep. 662; *Union P. R. Co. v. Fort*, 17 Wall. 553 (84 U. S. bk. 21, L. ed. 739); *Miller v. Union P. R. Co.* 12 Fed. Rep. 600; *S. C. 17 Fed. Rep. 67*; *Thompson v. Chicago, M. & St. P. R. Co.* 14 Fed. Rep. 564; *Oreo v. St. Louis, K. & N. W. R. Co.* 20 Fed. Rep. 93; *English v. Chicago, M. & St. P. R. Co.* 24 Fed. Rep. 906; *Wallace v. De Young*, 98 Ill. 638; 88 Am. Rep. 109.

The court says: "His employers could not require him to perform such service unless it was within the terms or scope of the agreement when his services were hired. They had no legal right to hire him to perform one kind of service and require him to do another kind."

See *Cassidy v. Maine Cent. R. Co.* 76 Me. 489; *Griffiths v. London & St. K. D. Co.* L. R. 12 Q. B. Div. 495; 13 Q. B. Div. 259; *Nason v. West*, 2 New Eng. Rep. 72; *Leary v. Boston & A. R. R. Co.* 139 Mass. 580.

The master is not bound to notify of any danger connected with the duty to be assumed if that danger would be obvious to anyone in the exercise of ordinary care.

Coolbroth v. Maine Cent. R. R. Co. 77 Me. 165.

"The servant not only assumes all risks ordinarily incident to the business, but also all other open and visible risks whether usually incident to the business or not."

"The servant is bound to see for himself such risks and hazards as are patent to observation."

Wood, Mast. & Serv. § 326, pp. 680, 682; *Woodley v. Metropolitan R. R. Co.* 21 Moak, Eng.

Rep. 519, note; *Gibson v. Pacific R. R. Co.* 46 Mo. 163; *Beach, Contrib. Neg.* § 188; *Wheeler v. Wason Mfg. Co.* 135 Mass. 296; *Hathaway v. Michigan Cent. R. R. Co.* 51 Mich. 253; 47 Am. Rep. 569.

In the language of *Mr. Justice Cooley* in *Michigan Cent. R. R. Co. v. Smithson*, 45 Mich. 212: "The best notice is that which a man must necessarily see and which cannot confuse or mislead him. He needs no printed placard to announce a precipice when he stands before it."

The employer must warn the servant only of concealed and not of obvious or merely incidental perils.

Cummings v. Collins, 61 Mo. 523; *Sutherland v. Markland R. R.* 29 Jur. 475. See *Leary v. Boston & A. R. R. Co.* 139 Mass. 580, where all the authorities are reviewed.

The plaintiff's own negligence in the manner of shackling contributed to his injury.

On this branch of the case the recent decision of *Hathaway v. Michigan Cent. R. R. Co.* 51 Mich. 253; 47 Am. Rep. 569, is almost precisely parallel.

See also *Goulin v. Canada S. Bridge Co.* 7 West. Rep. 459.

Messrs. Walton & Walton, for plaintiff:

No written limits having been assigned to the master mechanic, so far as the evidence discloses, though there had been to the yardmaster,—not, however, produced at the trial,—the only way to ascertain what was within the jurisdiction of each, and what work each did and was required to do, was by showing what, as a matter of fact, they were in the habit of doing; and, for this purpose, the evidence relating to the custom of sending men out of the shop to do work elsewhere was properly admitted.

8 Wood, R. R. p. 1488; *Ohio & M. R. Co. v. Collarn*, 78 Ind. 261; *Pennsylvania Co. v. Stoelke*, 104 Ill. 201.

Whether Keen and Carr were experts, so that their testimony should have been received as such, was a matter addressed to the discretion of the presiding judge.

Jones v. Tucker, 41 N. H. 546; 1 Greenl. Ev. Redf. ed. p. 483; *Berry v. Reed*, 58 Me. 487; *Boardman v. Woodman*, 47 N. H. 120; *Howard v. Providence*, 6 R. I. 514; *State v. Ward*, 39 Vt. 225.

Such evidence as the testimony of conductors and brakemen who, by long experience, were thoroughly acquainted, not only with what was required in engines, but the proper mode of braking, was of the very best quality, and only by their testimony could the jury learn what was required.

1 Greenl. Ev. Redf. ed. p. 485, and notes; *Hammond v. Woodman*, 41 Me. 177; *Moulton v. McOwen*, 108 Mass. 587; *Houston & T. Cent. R. Co. v. Couser*, 57 Tex. 298; *A. & S. R. R. Co. v. Dorsey*, 68 Ga. 228; *Smith v. Gugerty*, 4 Barb. 614; *Buffum v. Harris*, 5 R. I. 243; *Bellefontaine & I. R. R. Co. v. Bailey*, 11 Ohio St. 338; *Mott v. Hudson River R. R. Co.* 8 Bosw. (N. Y.) 345; *Tinney v. New Jersey Steamboat Co.* 5 Lans. (N. Y.) 507; 12 Abb. Pr. N. S. 1; *Lane v. Wilcox*, 55 Barb. 615; *Allis v. Day*, 14 Minn. 516; *Transportation Line v. Hope*, 95 U. S. 297 (Bk. 24, L. ed. 477); *Cooper v. Iowa* 486

Central R. R. 44 Iowa, 184; *Taylor v. French L. Co.* 47 Iowa, 662; *Hayward v. Knapp*, 23 Minn. 481.

Plaintiff in his writ alleges that he lost the use of his arm and has been unable to labor as before he was so injured; and the presiding judge, in his charge to the jury upon this point, instructed them only that the plaintiff was entitled to compensation for the loss of his ability to labor.

Atlanta & West Point R. R. Co. v. Johnson, 66 Ga. 259.

The master mechanic was not a fellow servant with the plaintiff.

Shanny v. Androscoggin Mills, 66 Me. 430, and cases there cited; 2 Thomp. Neg. pp. 1038-1034, and notes and cases cited.

The duty of providing suitable machinery to carry on their business and a suitable place for the plaintiff to work in, including giving him full notice of the nature of the risks attending the service, was a responsibility resting on the defendants, which they could not throw off by delegating it to a foreman or other workman.

Coombs v. New Bedford Cordage Co. 103 Mass. 599; *Corcoran v. Holbrook*, 59 N. Y. 517; *Sco-boda v. Ward*, 40 Mich. 420; *Hill v. Gust*, 55 Ind. 45; *Toledo W. & W. R. R. Co. v. Ingraham*, 77 Ill. 809; *Doughty v. Penobscot L. D. Co.* 76 Me. 143; *Cayser v. Taylor*, 10 Gray, 274; *Ford v. Fitchburg R. R. Co.* 110 Mass. 240; *Hough v. Texas & P. R. R. Co.* 100 U. S. 213 (Bk. 25, L. ed. 612); *Spelman v. Fisher Iron Co.* 56 Barb. 151; *Brothers v. Carter*, 52 Mo. 372; *Gibson v. Pacific R. R. Co.* 46 Mo. 163; Thomp. Neg. 969-1056; *Dowling v. Allen*, 74 Mo. 13; *Smith v. Oxford Iron Co.* 42 N. J. L. 467; *Illinois Cent. R. R. Co. v. Welch*, 52 Ill. 183; *Mullan v. Philadelphia & S. M. S. Co.* 78 Pa. 25; *Baker v. Alleghany V. R. R. Co.* 95 Pa. 211; *Baxter v. Roberts*, 44 Cal. 187; Wood, Mast. & Serv. pp. 714, 737, 763-769; 3 Wood, R. R. 1471-1487.

Whether the plaintiff should have done as ordered was a question of fact for the jury, as stated in the charge.

Patterson v. Pittsburg & C. R. R. Co. 76 Pa. 389; Wood, Mast. & Serv. p. 760.

There is no question that the drawbar in this case was not in proper condition, because the buffer did hit the deadwood and crushed plaintiff's arm against it.

The defendant is liable if this was the case, as its agent, Philbrick, whose duty it was to provide and repair the machinery, could have known by reasonable diligence the fact of its improper condition.

Shanny v. Androscoggin Mills, 66 Me. 430; *Gilman v. Eastern R. R. Co.* 13 Allen, 433; *Ford v. Fitchburg R. R. Co.* 110 Mass. 240; *Holden v. Fitchburg R. R. Co.* 129 Mass. 263; *Warden v. Old Colony R. R. Co.* 187 Mass. 204; *Gormly v. Vulcan Iron Works*, 61 Mo. 423; *Dowling v. Allen*, 74 Mo. 13; *Brabbitt v. Chicago & N. W. R. Co.* 88 Wis. 389; *Strahlendorf v. Bessenthal*, 30 Wis. 674; *Dobbin v. Richmond R. & I. R. Co.* 81 N. C. 446; *Corcoran v. Holbrook*, 59 N. Y. 517; *Sheehan v. New York Cent. & R. R. Co.* 91 N. Y. 832; *Mitchell v. Robinson*, 80 Ind. 281.

While the plaintiff's attention was intent upon his right hand, with which he was guiding

the shackle, is it any wonder that his left hand was not held safely; was brought forward, caught by the buffer, and crushed?

Snow v. Housatonic R. R. Co. 8 Allen, 441. Is he to blame that he did not know which way to face?

Hockett v. Middlesex Mfg. Co. 101 Mass. 101; *Plummer v. Eastern R. R. Co.* 78 Me. 591.

He was not in fault in obeying orders and relying upon Philbrick's direction. Negligence should not be attributed to him therefor.

Howard Oil Co. v. Farmer, 56 Tex. 301; *Connolly v. Poillon*, 41 Barb. 886; *Keegan v. Kavanaugh*, 63 Mo. 280; *Luebke v. Chicago, M. & St. P. R. Co.* 59 Wis. 127; *Wood, Mast. & Serv.* pp. 720-738, 760; 3 *Thomp. Neg. pp.* 974, 971.

The jury were justified in finding that Mr. Wormell was not in fault; but there was negligence on the part of Philbrick in sending plaintiff out to do the shackling without informing him of the peril to which he would thereby be exposed, irrespective of the question of the suitability of the coupling, draw-bar and buffer attachment.

Whart. Neg. §§ 216-220; *O'Connor v. Adams*, 120 Mass. 427; *Parkhurst v. Johnson*, 50 Mich. 70; *Keegan v. Kavanaugh*, *supra*; *Dowling v. Allen*, 74 Mo. 13; *Hill v. Gust*, 55 Ind. 45; *Howard Oil Co. v. Farmer*, 56 Tex. 301; *Lalor v. Chicago, B. & Q. R. R. Co.* 52 Ill. 401; 3 *Wood, R. R. p.* 1487; *Wood, Mast. & Serv. p.* 723, § 854.

It is only where the servant with full notice of the risk he assumes chooses to enter the employment, that the master is relieved from liability.

Coombs v. New Bedford Cordage Co. 102 Mass. 572; 3 *Rorer, R. R. p.* 886; *Wood, Mast. & Serv.* 714, § 858.

So far as the case considered as a whole is concerned it was one manifestly for the jury, particularly when the jury had an opportunity to examine an engine and car for themselves.

Brown v. Moran, 42 Me. 44; *Lawless v. Connecticut R. R. Co.* 186 Mass. 1; *Arkerson v. Dennison*, 117 Mass. 407; *Avilla v. Nash*, Id. 318; *Huddleston v. Lovell Machine Shop*, 106 Mass. 282; *Meesel v. Lynn & B. R. R. Co.* 1 Allen, 234; *Snow v. Housatonic R. R. Co.* Id. 441; *Reed v. Deerfield*, Id. 522; *Bigelow v. Rutland*, 4 Cush. 247; *Plummer v. Eastern R. R. Co.* 78 Me. 594; *Spoifford v. Harlow*, 3 Allen, 176; *Quirk v. Holt*, 99 Mass. 164; *Jaynor v. Old Colony & N. R. Co.* 100 Mass. 106; *Shapleigh v. Wyman*, 134 Mass. 118; *Tyler v. New York & N. E. R. R. Co.* 137 Mass. 88; *Johnson v. Bruner*, 61 Pa. 58; *Pennsylvania R. R. Co. v. Ogier*, 35 Pa. 60; *Flay v. Minneapolis & St. Louis R. Co.* 30 Minn. 231; *Beck v. Burger*, 62 N. Y. 558; *McIntyre v. New York Cent. R. R. Co.* 87 N. Y. 287; *Hawley v. Northern Cent. R. Co.* 82 N. Y. 370; *Same v. Same*, 17 Hun, 115; *Marsh v. Chickering*, 25 Hun, 406; *Howard Oil Co. v. Farmer*, 56 Tex. 301; *Swoboda v. Ward*, 40 Mich. 420; *Hill v. Gust*, 55 Ind. 45, and the other cases there cited in this argument.

Mr. F. A. Waldron, also for plaintiff:
In *Lawless v. Connecticut R. R. Co.* 186 Mass. 1, the court says: "It is the duty of the defendant to furnish a locomotive engine suitable for the work which it required the plain-

tiff to perform with it, and to exercise ordinary care in the performance of this duty, and it was responsible to the plaintiff, if he was using due care, for an injury resulting from its negligence or want of ordinary care in this respect."

110 Mass. 240; 129 Mass. 268; 100 U. S. 213 (Bk. 25, L. ed. 213); 139 Mass. 584.

The decided cases adopt this rule: "It is the duty of a master to notify his servant of peculiar dangers which are not known or obvious to them, but known to the defendant, its officers, or agents. And the notice and instructions must be adapted to the immaturity and inexperience of the servant."

102 Mass. 572; 120 Mass. 427; 29 Conn. 548; 80 Wis. 674; 31 Ohio, 479; 37 Mich. 205; 25 Ala. 659; 21 Hun, 896; *Prince, Mast. & Serv.* 376.

If it be said that a man in the exercise of ordinary care could have avoided the danger to which he was exposed, we answer in the language of the court in *Hawks v. Locke*, 139 Mass. 209: "We are to regard (consider) not only that which may prove to have been necessary upon a review of the situation in cool blood, but what would naturally seem so in the hurry and excitement of the moment when the parties had to act."

In *O'Connor v. Adams*, 120 Mass. 427, the evidence showed that defendant's agent ordered the plaintiff to work in a place of peculiar danger of which he had no knowledge or experience, without informing him of the risks or instructing him how to avoid the danger. And the court held the defendant responsible for the injury sustained by the plaintiff.

In *Lalor v. Chicago, B. & Q. R. R. Co.* 52 Ill. 401, a laborer employed in loading and unloading freight cars was ordered to couple cars by defendant's superintendent, who knew him to be inexperienced and unacquainted with the manner of doing such work when he ordered him to do it. The laborer did not appreciate the danger to which he was exposed, and the court held the defendant responsible in damages for the injury sustained.

The standard is different in each case; and, as the facts and circumstances are developed at the trial, it cannot be determined by the court, but must be submitted to the determination of the jury.

4. Cush. 247; 10 Allen, 159; 6 Allen, 87; 12 Allen, 58; 8 Allen, 234, 522; 32 Vt. 612; 28 Conn. 264; 101 Mass. 101; 102 Mass. 572; 11 Allen, 419; 136 Mass. 1; 2 Cent. Rep. 70.

The plaintiff's loss is a constant source of annoyance and trouble to him, and as he becomes old and feeble the trouble must necessarily increase with his declining years.

Court will not set aside a verdict on the ground of excessive damages unless it is manifest that the jury acted intemperately, or were influenced by passion, partiality, prejudice, or corruption.

3 Me. 305, 276; 16 Me. 187; 12 Me. 308; 57 Me. 302; 60 Me. 290; 62 Me. 552, 84; 68 Me. 48; 64 Me. 9; 66 Me. 573.

Not even if the jury found a verdict for plaintiff and assessed damages in a larger sum than the court would have awarded under the same evidence.

Kimball v. Bath, 38 Me. 219.

Foster, J., delivered the opinion of the court:

The plaintiff was at work as a locomotive machinist in the car shops of the defendant corporation at Waterville. On the day the injury was received he was directed by the foreman of the car shops to go out with an engineer and move an engine from the paint shop near by, to the repair shop where the plaintiff worked. The engine with which the moving was to be done was then standing on the turntable in the machine shop. In order to move the engine from the paint shop to the repair shop it became necessary, first, to remove certain cars which were on the track in the yard. The plaintiff went out, and while waiting for the switches to be turned, Philbrick, the master mechanic of the road, came out and asked him if he knew how to shackle the passenger car that stood upon the paint-shop tracks, and the plaintiff replied that he did not know how to shackle any cars. Thereupon the master mechanic took him to the car and explained the peculiar danger that might arise from the shackling of a passenger car, no special instructions being given in relation to shackling flat cars, but told him he must not get in line of the drawbars, and finally told him that he guessed he could get along by being careful. The flat cars stood next to the engine and had to be coupled first. In attempting to couple the tender to the first flat car he made several efforts, but failed, as he claimed, because the shackles were too short. Finally, when the engine and the tender backed the third time, standing as he stood before between the tender and the flat car, with the tender on his right and the flat car on his left, while adjusting the shackle with his right hand, he allowed the wrist of his left hand to rest over the edge of the deadwood of the flat car directly over its drawbar and directly in front of the buffer upon the tender, which is a projecting arm out of which the shackle extends, and, failing to connect the shackle with the drawbar of the car, the buffer came back against and crushed his left hand, necessitating its amputation.

The plaintiff bases a recovery against the defendant corporation upon two grounds:—that the implements and means furnished were not proper and suitable for the work which the plaintiff was directed to do; and that Philbrick, representing the corporation as a vice-principal, placed him in a position of peculiar peril without notifying him of the danger.

The latter position is the one most strenuously urged and relied on by the plaintiff, who recovered a verdict against the defendant; and the case is now before this court on motion to set aside the verdict, and also on exceptions.

With the view which the court has taken of the case, it does not become necessary to determine in what capacity Philbrick was acting, whether as vice-principal or as a fellow servant with the plaintiff, inasmuch as it is the opinion of the court that the verdict cannot be upheld upon other grounds.

The action set forth is founded upon the charge of negligence. It is the gist of the action. To entitle the plaintiff to recover he must prove such negligence, the omission of some duty, or the commission of such negligent acts, on the

part of the defendant as occasioned the injury to the plaintiff.

If the injury was occasioned through his own neglect and want of ordinary care, or was the result of accident solely, the defendant being without fault, the action is not maintainable. "The negligence is the gist of the action, but the absence of negligence contributing to the injury, on the part of the plaintiff, is equally important." *Brown v. European & N. A. R. Co.* 58 Me. 887; *Osborne v. Knox & Lincoln R. R.* 68 Me. 51.

There is no presumption of negligence on the part of the defendant from the fact alone that an accident has happened, or that the plaintiff has received an injury while in the employment of the defendant. In the long line of decisions, both in this country and England, from *Priestly v. Fowler*, 8 Mees. & W. Exch. 1, to the present time. It has been held that the mere fact of the relationship of master and servant, without a neglect of duty, does not impose upon the master a guaranty of the servant's safety, but that the servant of sufficient age and intelligence to understand the nature of the risks to which he is exposed, engaging for compensation in the employment of the master, takes upon himself the natural, ordinary, and apparent risks and perils incident to such employment. *Coolbroth v. Maine Cent. R. R. Co.*, 77 Me. 167; *Nason v. West*, 78 Me. 257, 2 New Eng. Rep. 72.

The relationship of master and servant may, and most frequently does, exist by simple mutual agreement that the servant is to labor in the service of the master. In such case the law holds that the terms of the contract are not fully expressed, and that there exists by implication reciprocal rights and obligations on the part of each, which it will protect and enforce equally as if expressed by the parties. Among other things it implies that each is to exercise ordinary and reasonable care. It implies that the master is to use ordinary care in providing and maintaining suitable means and instrumentalities with which to conduct the business in which the servant is engaged, so that the servant, being himself in the exercise of due care, may be enabled to perform his duty without exposure to dangers not falling within the obvious scope of his employment. The implied duty of the master in this respect is measured by the standard of ordinary care. *Hull v. Hall*, 78 Me. 117, 1 New. Eng. Rep. 673. The law holds him to no higher obligation than this.

Nor is the employer bound to furnish the safest machinery, instrumentalities, or appliances with which to carry on his business, nor to provide the best methods for their operation, in order to save himself from responsibility resulting from their use. If they are of an ordinary character and such as can, with reasonable care, be used without danger, except such as may be reasonably incident to the business, it is all that the law requires. *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. 376.

Thus it has been held that, where an injury happens to a servant while using an instrument, an engine, or a machine in the course of his employment, of the nature of which he is as much aware as his master, and in the use of which he receives an injury, he cannot, at all

events if the evidence is consistent with his own negligence in the use of it as the cause of the injury, recover against his master, there being no evidence that the injury arose through the personal negligence of the master; and that it was no evidence of such personal negligence of the master that he had in use in his business an engine or machine less safe than some other in general use. *Dynen v. Leach*, 26 L. J. Exch. N. S. 221.

And in accordance with the same principle it was held in *Indianapolis, B. & W. R. R. Co. v. Flanigan*, 77 Ill. 865, that a railroad company was not liable for an injury received by an employee, while coupling cars having double buffers, simply because a higher degree of care is required in using them than in those differently constructed.

So in *Fort Wayne, etc. R. R. v. Gilderleeve*, 38 Mich. 133, it was decided that a railroad company, which used in one of its trains an old mail car which was lower than others, was not liable to its servant, who knowingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger was greater than with cars of equal height.

Every employer has the right to judge for himself in what manner he will carry on his business, as between himself and those whom he employs; and the servant having knowledge of the circumstances must judge for himself whether he will enter his service, or, having entered, whether he will remain. *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; *Buzzell v. Laconia Mfg. Co.* 48 Me. 121; *Shanny v. Androscoggin Mills*, 66 Me. 427; *Coombs v. New Bedford Cordage Co.* 102 Mass. 585; *Ladd v. New Bedford R. R. Co.* 119 Mass. 413.

Moreover, the law implies that where there are special risks in an employment of which the servant is not cognizant, or which are not patent in the work, it is the duty of the master to notify him of such risks; and, on failure of such notice, if the servant, being in the exercise of due care himself, receives injury by exposure to such risks, he is entitled to recover from the master whenever the master knew or ought to have known of such risks. It is unquestionably the duty of the master to communicate a danger of which he has knowledge and the servant has not. But there are corresponding duties on the part of the servant; and it is held that the master is not liable to a servant who is capable of contracting for himself, and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom. *Loejoy v. Boston & L. R. R. Corp.* 125 Mass. 82; *Ladd v. New Bedford R. R. Co. supra*; *Priestley v. Fowler*, 3 Mees. & W. Exch. 1. It is his duty to use ordinary care to avoid injuries to himself. He is under as great obligation to provide for his own safety, from such dangers as are known to him or discoverable by the exercise of ordinary care on his part, as the master is to provide it for him. He may, by the want of ordinary care, so contribute to an injury sustained by himself as to destroy any right of action that might, under other circumstances, be available to him.

These rules are elementary and fundamental, and are everywhere recognized. They

grow out of the necessities of the relation of master and servant, and are founded and sustained by public policy. Though dressed in language differing somewhat in style of expression, it will be found that the decisions generally are in accord with the principles herein expressed. One writer has thus summed up the doctrine in the following language: "As we have seen it to be the duty of the master to point out such dangers as are not patent, so it is the duty of the employee to go about his work with his eyes open. He cannot wait to be told, but must act affirmatively. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work when there is danger. He must inform himself. This is the law everywhere." Beach, *Contrib. Neg.* § 138; *Russell v. Tillotson*, 140 Mass. 201.

In speaking of the respective duties and obligations between master and servant, in reference to dangers which are concealed and those which are obvious, the court, in *Cummings v. Collins*, 61 Mo. 523, says: "The defendants are not liable for any injury resulting from causes open to the observation of the plaintiff, and which it required no special skill or training to foresee were likely to occasion him harm, although he was at the time engaged in the performance of a service which he had not contracted to render."

Upon a careful examination of the evidence in the case under consideration, we are satisfied that the verdict cannot stand. There is not sufficient evidence upon which a jury could properly found a verdict that the plaintiff himself was in the exercise of due care at the time he received his injury. This is an affirmative proposition which, in this State and many of the others, it is incumbent on the plaintiff to make out by proof before he could be entitled to recover. *Dickey v. Maine Telegraph Co.* 43 Me. 492; *Lesan v. Maine Cent. R. R. Co.* 77 Me. 87; *State v. Maine Cent. R. R. Co.* Id. 541; *Crafts v. Boston*, 109 Mass. 521; *Taylor v. Carew Mfg. Co.* 140 Mass. 151, 1 New Eng. Rep. 210.

Nor will this proposition be sustained where the evidence in reference to it is too slight to be considered and acted on by a jury. It must be evidence having some legal weight. Such are the general doctrines of the decisions. A mere scintilla of evidence is not sufficient. *Connor v. Giles*, 76 Me. 184; *Riley v. Connecticut R. R. Co.* 135 Mass. 292; *Corcoran v. Boston & A. R. R. Co.* 133 Mass. 509; *Nason v. West*, 78 Me. 256, 2 New Eng. Rep. 72, and cases there cited; *Cornman v. Eastern Counties R. Co.* 4 Hurl. & N. Exch. 784.

It is not denied, as contended for by the learned counsel for the plaintiff, that the question of due care is ordinarily one of fact for the jury. But the question oftentimes becomes one of law whether there are such facts or circumstances upon which the jury can properly base their determination in favor of such care. If not, it is within the province of the court, in the due administration of justice according to well-settled legal principles, to revise their findings.

And in this case the evidence uncontradicted, from the plaintiff himself as to the manner of the accident, is conclusive against the verdict

upon this point. Not only do the facts as detailed by him, and about which there appears to be no controversy, fail to show the exercise of due care, but rather that degree of carelessness and neglect on his part which must be held to have very largely if not wholly contributed to the injury complained of. He was a man fifty-five years of age, and had been for many years familiar with engines of all constructions; had been a locomotive machinist for twelve years, repairing them constantly, and six years in the employ of the defendant corporation. For five years prior to the accident, engines with buffers had been in common use upon the road; and he had worked upon every pattern of engine that came into the shops where he was employed. He testifies that the engine with which he was injured came that morning from the repair shop where he was working, and that it might have been there four or five weeks, and he might have worked on it. He had received a general warning from Philbrick to be careful, and was specially warned of the danger in reference to shackling passenger cars. It also appears from his testimony that he stood there watching the clearing of the tracks for fifteen to thirty minutes. He had full leisure to examine and inform himself of all the common dangers incident to shackling. It appears that he attempted three times to do the shackling, and the third time he received the injury. The first time he stood with the engine backing down upon his right, himself facing the engine and shackling apparatus on its rear, of which the buffer was the most prominent part. The shackle itself which he took hold of projected from the buffer, and he could not see one without seeing the other. Everything was in plain sight. It was in broad daylight. At the first attempt he failed to connect the shackle with the drawbar, consequently the tender brought up against the deadwood of the car on his left. As the shackle did not connect, the contact between the tender and the flat car could only have been caused by the buffer striking against the deadwood of the car precisely in the spot where he afterwards placed his left hand and received his injury. He then tried a new shackle, repeating the same process. The second time the shackle failed to connect, and the engine and car came together again in precisely the same manner as at first, the buffer again striking the car at the very point where afterwards he placed his hand. After these two attempts immediately under his eye, he tried a third shackle, and the engine a third time backed down towards him, again giving him full opportunity for observation—he facing the buffer as before, and necessarily looking right into the shackling apparatus of which the buffer was a part, and this time hung his left wrist over the front edge of the center of the deadwood, directly in front of the approaching buffer, in precisely the same place where the buffer had just struck the deadwood twice before. It was, as the evidence shows, the only place upon the car where he could not have placed his hand with perfect safety. Placing it where he did, the injury was inevitable. It required no special skill or training to know that such an act would necessarily result in injury. This was

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not an extraordinary or concealed danger which required to be specially pointed out to a person of mature years and ordinary intelligence. He had been employed, as he himself testifies, for twelve years solely in work about and upon all manner of engines and cars, including engines with buffers precisely as this one was equipped. No man needs a printed placard to announce a yawning abyss when he stands before it in broad daylight. *Yeaton v. Boston & L. R. R. Corp.* 185 Mass. 418; *Coolbroth v. Maine Cent. R. R. Co.* 77 Me. 168; *Philadelphia, W. & B. R. R. Co. v. Keenan*, 103 Pa. 124; *Osborne v. Knox & L. R. R.* 68 Me. 51.

And it was held in *Wheeler v. Wason Mfg. Co.* 185 Mass. 298, that, where the servant is as well acquainted as the master with the dangerous nature of the machinery or instrument used, or of the service in which he is engaged, he cannot recover. *Beach, Contrib. Neg.* § 140.

Very similar were the facts in the case of *Hathaway v. Michigan Cent. R. R. Co.* 51 Mich. 253; 47 Am. Rep. 569, to these in the case before us. There the plaintiff, an inexperienced brakeman, was called upon by the conductor in the night-time to couple two cars of the Erie road which were made specially dangerous by having double deadwoods, which the plaintiff had never seen before. In that case, as in the present, one of the real grounds set up by the plaintiff was that he had not been sufficiently instructed in what was required of him by the company to enable him to discover and appreciate the danger, and that some notice thereof should have been given him by the company other than the general one which he received. The court says: "The plaintiff had the full opportunity of examining the one by which he stood some moments before the cars came together; its size, shape, and location of the drawbar were before him. He had only to look at it to be informed of any perils surrounding it. The moving car at a distance of twenty feet, with its deadwood and drawbar in plain view slowly approached the one where the plaintiff was standing. It does not appear that there was any hurry about the business. How could the plaintiff have been better warned? He could see the deadwoods and drawbar thereon as well as if he had made the coupling of them a thousand times before. He could not fail to see if he looked at all." See also *Taylor v. Carver Mfg. Co.* 140 Mass. 151, 1 New Eng. Rep. 210.

If the plaintiff, as is contended, was, at the time of this unfortunate occurrence, in the performance of duties outside of his regular employment, he will nevertheless be held to have assumed the risks incident to those duties. This principle is settled by numerous decisions. *Woodley v. Metropolitan District R. Co.* 2 Exch. Div. 389; *Union P. R. R. Co. v. Fort*, 17 Wall. 553 [84 U. S. bk. 21, L. ed. 739]; *Edmond v. Dilworth*, 111 Pa. 348; 1 Cent. Rep. 808; *Buzzell v. Laconia Mfg. Co.* 48 Me. 121; *Hayden v. Smithville Mfg. Co.* 29 Conn. 548; *Wright v. New York Cent. R. Co.* 25 N. Y. 570; *Leary v. Boston & A. R. R. Co.* 189 Mass. 587.

In the last case cited where the question is fully discussed, the court says: "Where one has assumed an employment, if an additional or more dangerous duty is added to his orig-

nal labor, he may accept or refuse it. If he has an existing contract for the original service, he may refuse the additional and more dangerous service; and, if for that reason he is discharged, he may avail himself of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks; and, while he may require the employer to perform his duty, he cannot recover for an injury which occurs only from his own inexperience."

From the disposition of the case already made, it becomes unnecessary to consider the defendant's exceptions. The law pertaining to the case, in order to cover it fully at the time of the trial, was necessarily somewhat complicated; and it is very questionable whether the numerous abstract propositions appearing in the charge, and following each other in quick succession, could be readily comprehended by a jury unaccustomed to grapple with abstruse and intricate legal propositions. While the charge may have been correct in the abstract, we are of the opinion that several of the defendant's requested instructions were proper to a full understanding of the principles involved, and their application to the questions at issue, and should have been given.

As the case is disposed of, however, on other grounds, nothing further need be said in relation to the exceptions.

Motion sustained. New trial granted.

Peters, Ch. J., Danforth, Virgin, Libbey, and Haskell, JJ., concurred.

Melville V. SPINNEY

v.

George F. BOWMAN *et al.*

1. Unless the excepting party affirmatively shows that he has been aggrieved **exceptions will not be sustained.**
2. **New trial will not be granted because the foreman of the jury, or the officer in charge, kept them out until 2 o'clock in the morning, and did not inform the other jurors at 11 o'clock—three hours earlier—of the direction of the presiding justice to permit the jury to separate if they had not agreed at that hour.**

(Sagadahoc—Decided June 6, 1887.)

ON exceptions and motions by the plaintiff in an action of trespass. *Overruled.*

The case was submitted to the jury December 30, 1885. The motions were filed on or subsequent to January 2, 1886, asking for a new trial for the following reasons:

"1. Because, he says, he has been informed, and believes, and hereby alleges, that the said verdict was made and agreed to when the jury who tried the said cause were no longer in legal session, and long after it was ordered by the court that the said jury be discharged of the said cause.

"2. And because, he says, he has been informed and believes, and doth herein and hereby allege, that, whereas the judge presiding

ordered and directed the officer who had the said jury in charge to dismiss the said jury at 11 o'clock, in case they should not have agreed on a verdict, the plaintiff saith the said jury had not agreed upon a verdict at the time aforesaid, nor were then about to agree; that in accordance with the directions of the said judge they should then have been dismissed without a verdict; that, on the contrary, the said officer, disregarding the said order, and practically overruling the same, made the said order known only to the foreman of the said jury, and still kept the jury together till 2 o'clock then next following, or thereabouts, when the said jury made and agreed to their said verdict."

"Because, he says, as he is informed and believes, and doth hereby and herein allege, whereas the judge presiding ordered and directed that the jury who rendered the said verdict be dismissed without a verdict at 11 o'clock midnight, in case they should not have then agreed; and whereas at 11 o'clock aforesaid the said jury had not agreed nor were about to agree, the said officer made the said offer of said judge known to the foreman of the said jury, informing him that the jury were then to be dismissed; the said foreman, one J. Frank Hayden of Bath, did not inform his fellow jurors of the said order, and continued and caused the said jury to continue in their deliberations on the said case, in contempt of the said order of the said judge, until 2 o'clock then next ensuing, or thereabouts, when the said jury made and agreed upon their said verdict.

"And the plaintiff further saith that the foregoing facts came to his knowledge too late to be earlier shown to the court."

Mr. W. Gilbert, for plaintiff.

Messrs. Baker, Baker, & Cornish, for defendants.

Per Curiam:

A careful examination of the complex bill of exceptions fails to show any error in the ruling of the presiding justice; but, on the contrary, shows that the parties had a fair and impartial trial under proper instructions upon questions of law. Unless the excepting party affirmatively shows that he has been aggrieved, exceptions will not be sustained. *Soule v. Winslow*, 66 Me. 447; *Bean v. Dolliff*, 67 Me. 228; *State v. Bennett*, 75 Me. 590; *Powers v. Mitchell*, 77 Me. 361.

The motions for a new trial must be overruled, either upon the ground that they came too late (*State v. Bowden*, 71 Me. 89; *Townsend v. Kelley*, 2 New Eng. Rep. 428), or that, taking the facts stated in the motions to be true, they do not furnish any ground for disturbing the verdict.

Motions and exceptions overruled.

John F. WOODMAN

v.

Woodman C. PITMAN *et al.*

1. The **right of traveling upon the ice of a river and the right of cutting and**

- taking the ice are natural and common rights.
2. The right of way over the ice in a river where large quantities of ice are annually taken for commercial purposes, and where the traveler is provided with good roads upon either bank of the river, and at established ferries across the river, is not a paramount right.
 3. The Legislature may regulate conflicting public interests in the ice upon a tidal river, and in the absence of legislative regulation such matters necessarily become the subjects of judicial interpretation; and the law has within itself elastic and creative force enough to adapt itself to such questions.
 4. Ice-cutters should mark their fields, after commencing to cut, with fences or other sufficient constructions to notify and warn travelers upon the ice of dangerous places. But when that is not done, and a traveler carelessly drives into an opening or upon thin ice, caused by the ice operations, and is damaged, he cannot recover from the ice-cutter.

(Penobscot—Decided June 18, 1887.)

ON exceptions and motion to set aside the verdict, by the defendants. *Motion sustained.*

An action on the case for damages occasioned by the loss of a two-horse team while being driven by the servant of the plaintiff upon the ice on Penobscot River below Bangor at a place where the ice had been cut by the defendant, and the new ice which had formed had not acquired sufficient thickness and strength to sustain the weight of the team.

Other material facts are stated in the opinion. The verdict was for plaintiff for \$621.

Messrs. Wilson & Woodard, for defendants:

The utmost extent to which any authority on this subject has gone is this, that when a certain place or space on such a highway had for a long time been appropriated for the exercise of the right of passage, so that it was not only possible, but probable, almost to the extent of certainty, that the right would continue to be there exercised, and the signs and marks of this appropriation were plainly visible, then it would be wrong there to do such acts as would render the exercise of the right of passage dangerous.

French v. Camp, 18 Me. 438.

If there was any evidence from which the jury could legitimately infer the existence of the facts involved, and the requested instruction was legally correct, it should have been given.

Rumrill v. Adams, 57 Me. 565; *Roberts v. Plaisted*, 63 Me. 385.

Instructions, even if technically accurate, so given that they have a tendency to mislead and confuse the ordinary mind, cannot be sustained.

Hopkins v. Fowler, 39 Me. 568; *Gilmore v. McNeil*, 45 Me. 599.

Mr. Chas. P. Stetson, for plaintiff:

It is well settled that a requested instruction

must be wholly correct (*Snow v. Penobscot River Ice Co.* 77 Me. 55); also that "where the presiding judge instructs the jury in a manner appropriate to the facts of the case, though not in terms as requested, there is no ground for exceptions" (*State v. Barnes*, 29 Me. 561; *Hearn v. Shaw*, 72 Me. 187).

In an action for personal injuries received by reason of a defect in a way, the question whether the plaintiff, or driver, was in the exercise of ordinary care is proper for the jury to consider and determine.

Morse v. Belfast, 77 Me. 44.

What is want of due care on part of plaintiff, is a question for the jury.

Plummer v. Eastern R. R. Co. 73 Me. 501.

The instructions as to right of plaintiff to travel on the ice, and the duty of the defendant in cutting ice to guard the place cut with suitable barriers to warn the traveler, were correct.

French v. Camp, 18 Me. 433; *State v. Wilson*, 42 Me. 25; *Ang. Watercourses*, § 538.

"The rights of the riparian proprietor were not changed in the least when the surface of the river was covered with ice; all the citizens had still a right to traverse the river in that state at pleasure."

42 Me. 25.

The words, "Did that negligence" (referring to the negligence of the defendants) "cause the injury?—I do not know that there is any dispute that it did," were either a mistake of the reporter or slip of the tongue of the judge. It was not noticed at the time. It could not have affected the jury, because they were fully instructed on this point in other parts of the charge.

Hearn v. Shaw, 72 Me. 191; *State v. Bennett*, 75 Me. 590.

Defendants cannot take advantage of this slip or mistake, because the counsel did not call the attention of the presiding judge to it before the case went to the jury.

Rule 18; *Bradstreet v. Rich*, 74 Me. 308.

Peters, Ch. J., delivered the opinion of the court:

This case largely depends for its solution upon what may be the extent of the right to harvest ice from our large rivers, compared with the conflicting right of traveling upon such rivers during the winter season. This is an interesting topic of inquiry, in view of the importance which ice has lately assumed as a merchantable commodity, and is a branch upon which the law has as yet hardly passed beyond a formative period. The inexhaustible and ever-changing complications in human affairs are constantly presenting new questions and new conditions, which the law must provide for as they arise; and the law has expansive and adaptive force enough to respond to the demands thus made of it; not by subverting, but by forming new combinations and making new applications out of its already established principles,—the result produced being only "the new corn that cometh out of the old fields."

Neither of the rights which seem in conflict in the present case,—that of harvesting ice and that of traveling upon the ice,—is absolute in any person. No one has any absolute prop-

ty in either. They are derived from a natural right, which all have, to enjoy the benefit of the elements, such as air, light, and water; and are common or public rights, which belong to the whole community. In the Roman law they were classified as "imperfect rights." Not that all persons can or do enjoy the boon alike. Much depends upon first appropriation. One man's possession may exclude others from it. Says Blackstone (2 Com. 14): "These things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards." They are the subjects of qualified property by occupation. 2 Kent, Com. 348.

Each right is, in theory, speaking generally, relative or comparative. Each recognizes other rights that may come in its way. Each must be exercised reasonably. And what would be a reasonable exercise of the one or the other at any particular place,—for, clearly, there would be a difference in the relative importance of the different rights in different localities,—depends in a large degree upon the benefits which the community derive therefrom. The public wants and necessities are to be considered. The two kinds of franchise belong to the people at large, are owned in common; and the common good of all must have a decisive weight on the question of individual enjoyment.

These and all other public rights, and the relation that shall subsist between them, when not thereby trenching upon Congressional jurisdiction, may be regulated by the Legislature. The Legislature is the trustee of the public rights for the people. And, as such agent or trustee, the Legislature of this State has gone a great way in abridging an individual enjoyment of some of the common rights and privileges possessed by society, when the legislation has presumably enured to the common good. It authorized the changing of the channel of Saco River, although the effect of the diversion was to impair the value of a good deal of private property (*Spring v. Russell*, 7 Me. 278); has allowed private interests to be subserved to the injury of other private interests by permitting dams and mills to be erected, which prevented the flow and ebb of the tide, upon the ground that the public as a whole were to be benefited thereby (*Parker v. Cutler Milldam Co.* 20 Me. 358); has granted to a single individual the exclusive right of navigating Penobscot River above the tide, with steamers, for a period of twenty years, for the consideration of improvements to be made in the navigation of the river by the grantee (*Moor v. Veazie*, 31 Me. 360; *S. C.* 32 Me. 343; *Veazie v. Moor*, 14 How. 568, 55 U. S. bk. 14, L. ed. 545). These are illustrations of the legislative power in such matters.

The Legislature has the constitutional authority, no doubt, to provide rules regulating the possession and cultivation of the ice-fields upon our navigable rivers, where the tide ebbs and flows, at all events, so far as the business is carried on below low-water line; and for the adjustment of conflicting interests which may

affect that privilege. If it omits to do so, such matters necessarily become the subjects of judicial interpretation. While the judicial is not coextensive with the legislative jurisdiction upon the questions, there can be no doubt that it is within the scope of judicial authority to determine the manner in which such public privileges may be best enjoyed by the public, provided that any judicial regulation which may be attempted shall do no violence to existing law.

The law is subject to slow and gradual growth. A remarkable instance of the development of the law is seen in the doctrine unanimously adopted by the courts in this country that a river may be considered navigable although not affected by a flow of the tides from the sea. The common law was otherwise. Lord Hale, the great publicist, knew no such doctrine. Legislation did not create it. The courts felt obliged to adopt the interpretation, as a new application of an old rule, from an irresistible public necessity. The court of no State has probably ventured so far as this court has in maintaining that small streams have floatable properties belonging to the public use. Our climate and forests, together with the interest and wants of the community, make the doctrine here reasonable,—a reasonable interpretation of the law. While in some of the States, where less necessity for the doctrine exists, it is considered by their courts to be untenable as subversive of private rights. So, in handling the somewhat novel and important questions now pending before us, we are certainly at liberty to construct, out of admitted legal principles, such reasonable rules as will meet the requirements of the case.

The importance to the public, of the ice privileges within the territory before named, is incomparably greater than is that of traveling on the ice. Winter river-roads are of much less consequence at the present day than formerly. In the earlier days the natural ways were the only ways for travel, and upon the large ponds and lakes, and upon the rivers in remote places, the same necessity may even now exist. But at Bangor, and for some distance below, the principal area of Penobscot River from which the ice-cuttings have been for some years customarily taken, the public have no need of a way on the ice. The traveler receives much more than an equivalent for any deprivation of the natural passage, in the use of the roads on the banks of the river, at all times kept passable at the public expense. Roads over the ice are rarely suitable and passable,—only occasionally so. The access to them from the shores is difficult if not dangerous, where the tide, as it does here, ebbs and flows. Permission must be had of the riparian proprietor to cross his land, to enable one to get to the river without being a trespasser. The inconveniences rendered the privilege nearly if not quite worthless. Nor is any considerable use of the river for such purpose proved or suggested.

On the other hand, the business of gathering ice for merchantable purposes has assumed extraordinary importance on our rivers. Large amounts of capital are invested; thousands of men and of teams are employed at a season of the year when other employment cannot be

obtained by them; the outlay is mostly in bills for labor, widely circulated; a crop of immense value is annually produced from an exhausted soil, without sowing; the shipping business is materially aided by it, the wealth of the State is greatly increased by it; it is eminently a business of the people. It would seem unreasonable to embarrass such an important enterprise by according to the traveling public a paramount right of passage, when such right, even to its possessor, is scarcely good for anything.

It is an error, we think, to invest the right of passing on the ice in all places with the same degree of importance as that which attaches to the right of vessels in navigable waters. It may be an offshoot of the navigable right,—something akin to it,—but a right of a secondary or inferior degree. The idea of roads over the frozen surface of rivers was never broached in the old common law,—it has grown up since,—and should be the superior right or not, according to circumstances. We know of only one judicial decision touching the subject,—that in our own State (*French v. Camp*, 18 Me. 488), and that does not contradict the views we express in this discussion. There the plaintiff's injury came from the defendant's carelessness in cutting a hole through the ice, and leaving it exposed, upon or near a place where there had been a winter-road for more than twenty years. *Weston, Ch. J.*, there says: "Assuming that the defendant has as good a right to the use of the water as the plaintiff or the public generally had to the right of passage, the use of a common privilege should be such as may be most beneficial and least injurious to all who have occasion to avail themselves of it." In the present case it must be remembered the defendants are not defending themselves as riparian owners, for that would justify their possession only to low-water line, but as a portion of the public, partaking of a common and public right. *Brastow v. Rockport Ice Co.* 77 Me. 100.

An unlawful obstruction to navigation, being a common nuisance, is remedial by indictment or by abatement; or a court of equity may take jurisdiction upon an information filed by an attorney-general. *Gould, Waters*, § 121. It would seem strange to see the ice-harvesters accused of nuisance. But nuisance exists, in lawful business, only where actual injury is sustained. It must be some essential injury and damage. "People living in cities and large towns must submit to some annoyance, to some inconvenience, to some injury and damage; must even yield a portion of their rights to the necessities of business." *Wood, Nuis.* 11. In an English case it was said: "Where great works are carried on, which are the means of developing the national wealth, persons must not stand on extreme rights, and bring actions for every petty annoyance." *St. Helens Smelting Co. v. Tipping*, 11 Jur. 785, reported in 116 E. C. L. 1098. In *Rhodes v. Otis*, 33 Ala. 578, a much-quoted case, the test of the floatability of a stream was held to be, whether fit for valuable floatage and useful to important public interests. In *Wetherfield v. Humphrey*, 20 Conn. 217, it was held that, in order to make a stream navigable, "there must be some commerce and navigation upon it which is essentially valuable." Same

decision in 23 Conn. 198. Navigators must endure inconveniences for the greater general good. *Brown v. Preston*, 33 Conn. 219. To constitute nuisance, the obstructions must materially interrupt general navigation. *State v. Wilson*, 42 Me. 9. In *Rouse v. Granite Bridge Corp.* 21 Pick. 844, 847, *Shaw, Ch. J.*, said: "But, in order to have this character, it must be navigable to some purpose useful to trade or agriculture." In *Attorney-General v. Woods*, 108 Mass. 486, it is said that this language is applied to the capacity of the stream rather than to its uses. But the last was a case where the officers of the Commonwealth were endeavoring to prevent an act supposed to injuriously affect the harbor of Boston.

It is our opinion that any occupation of the Penobscot River, within the limits now receiving our attention, for the purpose of a winter way, would be, at this day, of such insignificant importance, so useless and valueless in comparison with other public interests, that it cannot be set up to prevent or abridge the taking of ice within those limits to any extent whatever.

We do not, however, apply the rule stated to any place where a way is commonly used across the river, connecting town or county roads, or where a ferry is established by law. *Rev. Stat. chap. 20, § 7.*

The traveler's right, even if existing theoretically, does not, under the circumstances, assert itself. Reasonable use is practically no use. The same public possessing both rights prefer to abandon the use of the one for the much more valuable use of the other.

We are aware that the law, in facilitating the enjoyment of public rights,—and no private right is involved in this controversy,—scans closely the grounds upon which it admits the advantage of one person to be set off against the disadvantage of another. In an early English case (*Cox v. Russell*, 6 B. & C. 566) an extreme rule was promulgated, in later cases not fully assented to, that the staltis erected in the river Tyne, should not be regarded as a public nuisance, if the public benefit produced by them counterbalanced the prejudices done to individuals,—the supposed public benefit being that in consequence of the erections coals would be brought to the London market in better condition or for lesser price. In subsequent cases it has been maintained that the benefit to be derived from tolerating any impairment of the navigable convenience must be direct, and that the staltis in the Tyne were a remote and indirect benefit merely, and not computable as a public benefit in the sense of the term in which it should be used when considering the question of nuisance; and it has been explained that the benefit must be a public benefit to the same public; that the same public, or some part of the public which suffers the inconvenience, must also receive the benefit; that it must be both beneficial and injurious to the public using the same waters.

A satisfactory explanation of the doctrine appears in a discussion by *Jessel, M. R.*, in *Attorney-General v. Terry*, L. R. 9 Ch. 421, where he says: "Then it may be asked, What is a public benefit? In my view, it is a benefit of a similar nature, showing that on a balance of convenience and inconvenience the public

at that place not only lose nothing, but gain something by the erection." In that case it was decided that any benefit in the way of gaining trade, to a single individual erecting a wharf in navigable waters, was too remote to be held to be for the advantage of the public generally, when the channel intruded upon was so narrow that every foot of it was wanted for navigation. In the opinion an illustration of public benefit is given by supposing the piers of a bridge to be placed in the middle of a navigable river, thereby "to some extent, to a more or less material extent, obstructing the navigation," but the necessity is great and the injury trifling. In that case, says the opinion, "it would be a benefit that would counterbalance the public injury."

Applying the doctrine as carefully as it is guarded in the cases most widely differing from the case of *Roe v. Russell*, above cited, we feel assured that our conclusions are correct in sustaining the contention of the present defendants. Here the ice-gatherer and the traveler belong to the same public; have presumably interests alike; were using the same river—the same waters—though in different ways. The ice-takers were occupying the river under the natural right of dipping water therefrom, and it is as if thousands of men were simultaneously exercising the right together. The enterprise directly fosters the interests of navigation on the river. On the other hand, as we have before said, the right of travel, so far as pertaining to the navigation of the river, is under the circumstances, at most, a secondary, theoretical right, and of no real and essential value. Even private property may be taken for public use by affording compensation. Here, if the traveler is not allowed the use of the river, it is because more than compensation is supplied to him in other roads provided for his use.

We think the trial was conducted upon a too literal application of the principles which govern the use of navigable streams, and that the jury were thereby prejudiced against the defendants to their injury.

These views being accepted, it necessarily follows that this portion of the river should be considered as virtually closed during the winter against general traveling. The whole tract cut over must be constantly beset with danger to a traveler who does not keep up an especial acquaintance with the condition of the ice. Besides, the ice-fields, after they have been staked and fenced and scraped—and in some instances connecting fields extend across the river—have so far become the property of the appropriator, that an action would lie against one who disturbs his possession. *People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229.

At the same time the appropriators should, by suitable means, reasonably guard their fields against exposing to danger persons who may be likely to innocently intrude upon them, if such likelihood may be seen to exist. It is not necessary, in the present case, to inquire whether the defendants sufficiently observed such caution or not, inasmuch as we are clearly of the belief that the plaintiff's servant in charge of his team was guilty of an act of carelessness which caused the plaintiff's loss.

Even if the defendants were in fault, their delinquency would be a prior act, while the servant's was a subsequent, distinct, independent act. The defendants had no reason to suppose the servant would go in the direction he did, or be heedless in his course if he were to go there. As one judge said: "One man is not required to take another man's discretion in his keeping."

At all events, the defendants' act or omission was not negligence against the plaintiff,—not an act which the plaintiff can complain of. The idea is clearly expressed in 2 Law Quar. Rev. (London.) p. 507: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." In such case defendants are not even guilty of contributory negligence; that is, their negligence does not in a legal sense contribute to it or participate in it. It is merely a passive agency, or condition, or situation through or by which the accident happened,—but no part of its real and controlling cause. *O'Brien v. McGlinchy*, 68 Me. 552, 557.

The servant was hardly even a traveler on the river in the ordinary sense of the term. He was himself an operative at the ice-fields. He came with his team upon the ice by crossing defendants' land, striking a traveled way which led upon the ice, along the shore, up to the field of operations he was to engage in. From a freak of his own, instead of keeping the road, as properly he should, he crossed one of defendants' fields, as properly he should not, and, while attempting to go across or around another field of theirs, his team broke through the ice and was lost.

The pretense is set up that the defendants had no fence as a protective barrier at the end of the field extremest from the west bank of the river, to prevent the traveler from going upon the thin ice. None was needed. The exercise of ordinary care by the servant was all that was needed. There was a large ridge of snow and ice at the easterly end of the field, several feet high, thrown up by scraping the field from west to east in preparation for ice-cutting. It seems that the ice was left uncut and solid for a space of twelve or fifteen feet in width inside of the piles or ridge, in order to afford space wide enough for a pair of horses to travel upon while cutting out and handling the cakes of ice. It is a risky track for any horses, but what dangers there are upon the track is incidental to the business. The servant confesses that he was acquainted with the mode of the business,—that he knew that the ice had been scraped up to the ridge of snow,—knew that there might be holes and thin ice where the field had been scraped,—knew that he was going upon the scraped ice,—and still he recklessly undertook to conduct his team on the inside of the ridge, when there was an abundance of room to drive safely outside of it. By his carelessness, for which there seems to be no rational explanation, the plaintiff's property was lost.

Motion sustained.

Walton, Danforth, Virgin, Libbey, and Foster, JJ., concurred.

Haskell, J.: I concur in the result; but I

cannot agree to the reasoning of the opinion of the court, for the following reasons:

The right of navigation in public waters is paramount, although they may be subjected to any other useful purpose, even though such use may temporarily impede the paramount right; but when a use blocks navigation, it must cease until the necessities of navigation be served.

A vessel may lawfully be at anchor in and completely obstruct a roadstead so long as it is not needed for passage by other vessels; but when needed, the channel must be left open. The rights of passage and of anchorage are common rights, but the former from necessity is paramount, that both rights may be reasonably enjoyed. Both may be exercised, but neither can lawfully be destroyed.

A sailing vessel, in ascending a river, may occupy the whole channel if necessary, and a steamer astern must so remain unless it may pass her safely; but when the former comes to anchor the steamer has the paramount right of passage, and the channel must be left open if possible.

So, a traveler upon a highway has a paramount right to pass along, and teams standing and obstructing the way must move to give reasonable chance for passage.

Frozen navigable rivers are public highways; and the traveler ordinarily has the paramount right of passage as necessarily incident to the reasonable enjoyment of his right, but it must be exercised in common with such uses as the frozen surface of the river is adapted to. One such use is the harvesting of ice, a use that may impede travel. Both are common rights, and both may be lawfully exercised; but both cannot be enjoyed at the same spot at the same time, because the one may be there destructive of the other, so that it may be reasonable for that use giving the larger public benefit to restrict other uses to a narrower compass, but it cannot lawfully monopolize the whole right to the utter destruction of all other rights.

Ice-gathering has become a remunerative and useful industry, and is a great benefit to the public. The nature of the business necessarily requires that it should not be subjected to a paramount right of travel that may destroy its reasonable enjoyment. Both ice-gatherers and travelers are partakers in a common right. Neither has such a paramount right as to permanently and entirely extinguish that of the other, but both may exercise their right reasonably, under all the circumstances surrounding their conduct.

If the public has appropriated a particular portion of the ice of a stream or pond, and has worn a well-beaten track upon the same, would it be reasonable for the ice-gatherer to interrupt such use? So, if the ice-gatherer has appropriated and marked his ice-field, leaving the traveler room for passage, would it be reasonable for the traveler to go upon it and defile it? Both uses of the ice are lawful, but neither may wholly exclude the other. Both cannot have the possession and use of the same ice for different purposes, although both have a common right to it so long as it remains unappropriated by either. The taker of water from a stream may not interfere with the navigation of it, but the harvester of ice obstructs

the public highway at that place, so the one can no more take the whole ice and destroy the public highway, than the other, without legislative authority, could divert the stream and leave its bed dry and unnavigable. Courts may declare the relative rights of persons, but they cannot extinguish them.

The plaintiff's servant had no need to enter upon the defendants' ice-field, and he is chargeable with notice of the dangerous character of the spot, and for his imprudence in so doing the plaintiff is not entitled to recover.

Charles B. HAZELTINE *et al.*

v.

BELFAST & MOOSEHEAD LAKE R. R. CO. *et al.*

- *1. Holders of preferred stock in the Belfast & Moosehead Lake Railroad Company are entitled to a dividend from net profits each year during which they are earned, but not, under the terms of their subscription, to cumulative dividends. The arrearages of one year are not payable out of the earnings of subsequent years. The inquiry is whether earned during the particular year for which they are demanded.
2. Whilst the prospective wants and liabilities of a railroad corporation may be taken into account in ascertaining whether net profits have been earned from which the corporation can afford to declare a dividend, directors are not justified in refusing to declare a dividend to preferred stockholders from earnings on hand, merely because the corporation cannot pay all of its funded mortgage indebtedness at maturity if dividends be paid; other conditions are to be considered.
3. The court will compel a corporation to declare and pay dividends on preferred stock when the question becomes one more of right to be determined by the law than of discretion to be determined by the directors, and the directors refuse to perform their legal duty.
4. The defendant corporation owes nothing but a bonded mortgage debt of \$150,000, to mature in 1890; the common stock is \$380,400, and the preferred \$267,700; the road cost \$1,050,000; the earnings of the road have paid off an indebtedness of \$251,900, which entered into its construction, the reduction commencing in 1871, and terminating in 1885, leaving in the latter year \$22,412.32 cash assets on hand; the expenses of the corporation are trifling beyond the payment of \$9,000 annually as interest on the bonded debt; the road is under lease until 1921, at an assured rent of \$36,000 per year, the lessee running the road at its own risk and expense.

*Headnotes by PETERS, CH. J.

and keeping it in repair and paying all taxes thereon; the corporation has the ability, upon the strength of the lease, or on the value of the road, to renew a portion of the debt, or all of it, upon advantageous terms; and the preference shareholders have been for many years deprived of dividends to enable the corporation to consummate the payment of its debts. *Held*, under these and other less important facts, that the preferred stock is entitled to a full annual dividend from the balance of earnings remaining on hand at the expiration of the year 1885.

(Waldo—Decided June 6, 1887.)

PILL in equity. *Bill sustained.*

The facts are fully stated in the opinion.

Mr. Wm. H. Fogler, for plaintiffs:

The character of the preferred stock of this company, and the rights of the holders in relation to dividends, have been fully and exhaustively discussed and determined by this court in the recent case, — *Belfast & M. L. R. R. Co. v. Belfast*, 77 Me. 445.

"In determining whether a company is entitled to pay a dividend to its shareholders, the property acquired for permanent use in carrying on the business may be valued at the price actually paid for it, although it could not be sold again except at a loss."

Morawetz, Corp. 2d ed. § 440.

"All that is required is that the whole capital originally contributed by the shareholders shall be put into the business and kept there."

Id.

"The rule above stated applies to all corporations whose capital stock is intended to provide a permanent means of carrying on business. * * * If the capital of a company of this description is invested in machinery, land, or fixtures used in carrying on its business, the machinery, land, or fixtures may be valued at their original cost, provided they be kept in their original condition."

Id. § 441.

"A corporation may be largely indebted, and yet be entitled to pay dividends to its shareholders before the indebtedness has been paid, and it may even borrow money for the purpose of paying a dividend, provided a surplus would remain after deducting the amount of the company's capital and indebtedness from the fair value of the assets which it owns."

Id. § 433.

The law as to the right of shareholders to dividends, as stated by *Morawetz*, above quoted, applies to shareholders generally. But the complainants are the holders and owners of preferred stock. The preference is vested by virtue of a contract with the corporation.

Nichols v. New York, L. E. & W. R. Co. 15 Fed. Rep. 575.

"It is the duty of the directors to pay the preferred shareholders their promised or guaranteed dividends whenever the company has acquired funds which may rightfully be used for the payment of dividends. This rule applies with peculiar strictness when the preferred shareholders are entitled to receive their

dividends annually out of profits earned during the current year only, and a deficit in any year does not become payable out of subsequent profits."

Morawetz, Corp. 2d ed. § 459.

"There is this distinction between dividends or income upon preferred stock and those upon common stock, that whereas, in regard to the latter the question of their declaration is a matter of discretion with the directors, with which courts will generally not interfere, in regard to the former the question of ability to pay is to be decided by the court whose interposition is invoked, and the decision of the directors is not conclusive."

Green's Brice, *Ultra Vires*, p. 164, note a.

In *Richardson v. Vermont & M. R. R. Co.* 44 Vt. 613, the court states the rule as follows:

"In other words, there must be such pecuniary ability as would, but for the obligation to pay this interest, justify the payment of a dividend to stockholders."

In *Kent v. Quicksilver Mining Co.* 13 Hun, 53, which was a bill by preferred stockholders to restrain the company from issuing further shares of preferred stock, the court says of the rights of the holders of this class of stock:

"And as the shares themselves are issued in a form clearly importing a right in the holders to demand and receive a corresponding portion of the net earnings of the company, it cannot consistently be held that he can be deprived, without his consent, of that right by the combined act of the directors and other shareholders in the corporation."

The decision of this question is not left with the corporation or its directors. The corporation is one of the contracting parties, and neither it nor its agents can be safely entrusted with the power to determine its own liabilities or the rights of the other party to the contract.

Barnard v. Vermont & M. R. R. Co. 7 Allen, 531.

That the court has the authority to determine the rights of the complainants, and the power to enforce them, cannot be questioned.

Belfast & M. L. R. R. Co. v. Belfast, and *Richardson v. Vermont & M. R. R. Co. supra*; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157; *Thompson v. Erie R. Co.* 45 N. Y. 468; *Prouty v. Mich. S. & N. Ind. R. R. Co.* 1 Hun, 655; *Beers v. Bridgeport Spring Co.* 42 Conn. 16; *Pratt v. Pratt*, 83 Conn. 446; *Scott v. Eagle F. Ins. Co.* 7 Paige, 203; *Nichols v. New York, L. E. & W. R. Co. supra*.

The fund is still in the hands, or under the control, of the corporation. It is a trust fund, and no act of the directors or of the corporation can lawfully divert it from its proper use.

Beers v. Bridgeport Co.; *Pratt v. Pratt*, and *Boardman v. Lake Shore & M. S. R. Co. supra*; *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 483.

A court of equity "may vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties."

1 Story, Eq. Jur. § 28.

"Equitable remedies are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is, in fact,

no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties."

1 Pom. Eq. Jur. § 109.

Messrs. Drummond & Drummond, for defendants:

The condition was that no assessment (except for preliminary survey and location) should be made, nor any work be commenced, "until the full amount be secured for its completion to Newport." The design of this provision and the result expected from it are expressly stated (as if to avoid any possible question); "thereby avoiding the necessity of any mortgage or incumbrance being ever contracted by this corporation."

To prevent the violation of such a contract, a single stockholder may maintain a bill in equity against the directors, the corporation, or the other stockholders.

Wood's Field, Corp. § 861.

The holder of a certificate does not thereby become a creditor of the corporation, and cannot maintain an action at law against the corporation for a failure to declare and pay dividends.

Id. § 107.

We admit, however, a distinction between the two classes of stock, as stated by the same author.

Id. § 108.

In a recent case in the New York Court of Appeals, in which a stockholder brought a suit to compel it to declare a dividend, the corporation had \$36,000 on hand; it owed \$75,000, due in seventeen years. The corporation had no immediate need of the surplus on hand, or of its earnings, except to pay the current expenses, which, including interest on the debt, were about \$10,000 a year. The court said: "The property of every corporation, including all its earnings and profits, belongs primarily to such corporation exclusively, and not to its stockholders, individually or collectively. They have a certain claim, it is true; but their claims are always subordinate to the claims of creditors, and the latter approach much nearer to the condition of the ownership than the former. No stockholder can entitle himself to any dividend, or to any portion of the capital stock, until all debts are paid. The funds on hand, which the plaintiff asks to have divided and distributed among the stockholders, are only about half sufficient to pay the indebtedness of the defendant. It is no sort of consequence, in a legal point of view, that the debt is not yet due, and has a number of years to run before it matures. The creditors still have the better right to the funds which the defendant holds for them in trust. The court cannot undertake to say, judicially, that the future business of the corporation will be prosperous; nor has it any right to postpone the rights and claims of creditors to future earnings and accumulations, even if it could be certain they would accrue. The board of directors, in their discretion and in view of all the facts within their knowledge, might do this; but no court, I apprehend, would ever undertake to deal in such a manner with the funds of the corporation

which was indebted to an amount at least double the fund sought to be distributed."

Karnes v. Rochester & G. V. R. R. 4 Abb. Pr. N. S. 107, cited by Wood, § 98.

But it is said that the object of the directors is to help the non-preferred stockholders. To this we reply that it is their duty to promote the rights of those stockholders; but beyond that, if the directors are performing their duty and acting within the scope of their rights, it matters not what their motive may be.

Counsel claims that this is *res judicata*, covered by **Belfast & M. L. R. R. Co. v. Belfast**, 77 Me. 445. But so far as the decision in that case goes, it sustains our position in every respect.

It is the settled rule, both at law and in equity, that the property of the corporation is held primarily for the payment of the debts of the corporation.

See Wood's Field, Corp. § 365.

It is often said that dividends cannot properly be made until the debts have been paid.

Id. and cases cited.

Our statute, chap. 46, §§ 46, 47, recognizes this principle; and the payment of dividends when a debt of such magnitude is so soon to become due, is in violation of its spirit, if not of its terms.

Peters, Ch. J., delivered the opinion of the court:

The facts of this case and most of its questions were before the court in the case of **Belfast & M. L. R. R. Co. v. Belfast**, 77 Me. 445. The preferred stockholders of the company are now complainants against the company and its directors, seeking to obtain through a court of equity dividends on their stock.

On March 20, 1888, when this bill was brought, the following facts existed: The road was, and since May 10, 1871, had been, leased to the Maine Central Railroad Company, the lease to run until May 10, 1921, the lessee to operate the road during the intervening period at its own risk and expense, to keep it in repair and pay all taxes thereon, and pay a rent of \$38,000 per year.

The common stock amounts to \$380,400, and the preferred to \$267,700, all paid in, amounting at par value to \$648,100. The road cost \$1,050,000. The means expended for its construction, besides stock paid in, consisted of a bonded debt of \$150,000, a floating debt of \$150,000, and an indebtedness to the city of Belfast, the principal stockholder, of \$101,900 for borrowed money. The bonded debt is secured by mortgage on the road, the principal of which will mature May 15, 1890, having existed in the same form since May 15, 1870, the interest thereon having been regularly paid semi-annually. It is the only debt existing against the company, nor is it pretended that any other can arise against the company from this time to the end of the lease in 1921. The company's expenses are trifling, being only such as are necessary to keep up a formal corporate organization. The floating debt had been wholly extinguished, the borrowed money paid, and there were in the treasury \$22,412.32 of cash assets, all from rents received under the lease, at the date of this complaint.

At that time the directors had laid aside out of money on hand, \$19,900, which, with future rents, might be available as a reserve fund wherewith to pay the bonded debt when it matures in 1890. But before this appropriation, which can easily be recalled, the complainants had used due diligence in the way of demands, notices, motions, and other movements, to obtain from the directors a recognition of their equitable right to a dividend.

Three questions arise on the facts: 1. Are the preferred stockholders entitled to annual dividends, if earned? 2. At the date of the bill had dividends been earned? 3. Is this a case authorizing the court to require the directors to declare a dividend?

While all of these questions were hardly before the court in the former case, to be directly adjudicated, still they were necessarily involved in it, and we then considered them carefully, hoping the parties would be satisfied with the results which were foreshadowed, without proceeding with further litigation. We then indicated that we were of the opinion that the preferred stockholders would be entitled to dividends after the floating debt became paid; and, after considering the questions anew, we at this time see nothing to require us to change that opinion.

There can be no possible doubt that the obligation of the company to the privileged shares rests on by-law 18, and that the by-law establishes the terms of a contract between company and stockholders. We have already so decided.

The by-law runs thus: "Dividends on the preferred stock shall first be made semi-annually from the net earnings of the road, not exceeding 6 per cent per annum, after which dividend, if there shall remain a surplus, a dividend shall be made on the non-preferred stock up to a like per cent per annum; and should a surplus then remain of net earnings, after both of said dividends, in any one year, the same shall be divided *pro rata* on all the stock."

The construction which we gave to this contract in the previous case was certainly very liberal towards the holders of the common stock; and all the doubts were weighed in their behalf, in the decision that the preferred stock was non-cumulative. Had the by-law merely provided that the preferred shares should be entitled to a dividend of 6 per cent annually when earned, the arrearages of one year would have been payable out of the earnings of subsequent years, and there would have been no occasion for the present controversy between the two classes of stockholders. There is no question among the authorities on this point. *Jones, R. R. § 620; Morawetz, Corp. 2d ed. § 458; Cook, Stock & Stockh. § 272.* The latter author, in a note to § 269 of his work, published in 1887, cites *Belfast & M. L. R. R. Co. v. Belfast*, 77 Me. 445, as inconsistent with the general rule, but states the ground for the variance, that, inasmuch as the by-law implies that the entire net earnings of each year should be paid out in dividends, a deficiency of preferred dividend in any year could not be made up in subsequent years.

The next question is whether the money on hand shall be regarded as net earnings out of which a preferred dividend should be paid;

and the question has been discussed, secondarily, as to what extent future earnings under the lease will come under the same head. This point depends usually on several considerations; is a relative question,—not always susceptible of clear demonstration,—and a matter, to a considerable extent, of good judgment in conducting the company's business, and of good faith in upholding its contracts on the part of directors.

All the cases in which an inquiry has arisen concerning the propriety or legality of paying preferred dividends, where the contract is to pay as often as annually if there are annual earnings, concur in this, that the inquiry must be whether net profits have been earned in the particular year at the expiration of which dividends are demanded. The future wants and liabilities of the company may, no doubt, be taken into the calculation to a certain extent, as will be more fully explained hereafter.

We think that under any of the approved definitions of net earnings, meaning such net earnings as are applicable to dividends, the complainants make out a case.

Certainly, in a literal view, there must be net earnings each year till 1890, if not up to the end of the lease. For the bills payable are \$9,000 per annum,—a trifle, only, more,—and bills receivable are \$36,000, leaving \$27,000 balance on hand each year. The preferred dividend would be \$16,062 per annum, leaving about \$11,000 in the treasury annually. This balance cannot now possibly be paid on any debt of the company. It is only claimed by the respondents that in the future it may be so used.

In *People v. Niagara County Supervisors*, 4 Hill, 20, it is said: "Profits generally mean the gain which comes in or is received from any business or investment where both receipts and payments are to be taken into account." The case of *Dent v. London Tramways Co. L. R. 16 Ch. Div. 344*, strongly resembles the present case on this point. There, as here, the preference dividends were dependent upon the profits of the particular year only. *Jessel, M. R.*, says: "That means this, that the preferred shareholders only take a dividend if there are profits of the year sufficient to pay their dividend. They are coadventurers for each particular year, and can only look to the profits of that year. If they are lost for that year, they are lost forever. Profits for the year mean the surplus receipts after paying expenses and restoring the capital to the position it was in on the 1st day of January of that year." *Elkins v. Camden & A. R. R. Co. 36 N. J. Eq. decided in 1892*, presents questions similar to the present, and announces the rule that the preferred stockholders' "rights are to be governed and regulated each year by the pecuniary condition of the corporation at the close of the year."

In *Morawetz on Corporations*, 2d ed. § 459, an approved work, the doctrine is stated: "The directors of a corporation have a discretionary power to withhold profits from the holders of common shares in order to accumulate a surplus, etc.; but it is the duty of the directors to pay the preferred shareholders their promised or guaranteed dividends whenever the company has acquired funds which may rightfully be used for the payment of dividends. This

rule applies with peculiar strictness where the preferred shareholders are entitled to receive their dividends annually out of profits earned during the current year only, and a deficit in any year does not become payable out of subsequent profits."

But apply to the question the definition of net profits which would be regarded as the most liberal to the company, or the holders of the common stock; allow that there must be net profits such as should be applied to dividends; and that funds may be kept on hand sufficient to make reasonable provision for both the present and future necessities of the company. A very much quoted definition, as applicable to railroad corporations, is that formulated by *Mr. Justice Blatchford* in *St. John v. Erie R. Co.* 10 Blatchf. 271: "Net earnings are, properly, the gross receipts less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains,—that is, out of net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders to go toward dividends, which in that way are paid out of the net earnings." This definition was substantially repeated in *Warren v. King*, 108 U. S. 889 [Bk. 27, L. ed. 769]. *Mr. Justice Blatchford*, upon another bench, delivering the opinion, and asserting that, "while the rights of a preferred stockholder are not to be superior to the rights of creditors, they are nevertheless enforceable against the company according to the terms of the contract made by them." We refer to the views to which we committed ourselves upon this branch of the case in 77 Me. 452, *supra*.

It will be noticed that the definition of net profits, in the case of railroad corporations, which are generally more heavily in debt than other kinds of business corporations, calls for the payment of interest on the company debt, but not necessarily for payment of any portion of the principal. At this point the parties come to a closer issue, and really to the turning point of the controversy. And that is, whether the bonded debt of \$150,000, due in 1890, must be first wholly paid before any declaration of dividends. The respondents so contend. The complainants contend that, in ascertaining net profits, a portion only of the earnings should be reserved for the payment of the debt, and that the debt, or some portion of it, when it comes due, should be extended in some form.

The authorities, on the subject of ascertaining what are the annual net profits or earnings of a railroad corporation, perhaps without exception, make a distinction between the payment of its floating debt and the payment of its permanent or bonded debt,—between ordinary and extraordinary indebtedness. It is not indispensable, however, that the company be free from the pressure of floating debt before it may lawfully pay dividends even to holders of its non-preferred stock. It may even, under some circumstances, borrow money to pay dividends. *Morawetz*, Corp. 2d ed. § 488, and cases.

In many cases there is difficulty in ascertaining what the actual condition of a company may be. None exists here. There could not

well be an instance of less complicated affair. The business of the company is guaranteed, its amount of income fixed, its expenses are nominal, and its freedom from all the liabilities and risks usually incident to the management of a railroad is assured for the next thirty-three years.

In every sense this last debt of \$150,000 is a permanent debt. It is a bonded mortgage, and interest-bearing debt. The lease secures it many times over. The road itself is an absolute security for it, and undeniably for much more. It is a permanent debt for another reason. It entered into the construction of the road and is represented in its permanent property. A distinction between expenses for construction and ordinary expenses is maintained in the leading cases on this subject. The argument is that capital paid in and capital borrowed unitedly produced the earnings, and that a proportionate share of the earnings should be accorded to each. 77 Me. 453, *supra*.

In that view the bonded debt earns but \$9,000 per annum of the \$36,000 earned in all. It will be readily seen that there are special reasons for deeming the complainants' claim equitable. They have been required to remain in waiting for dividends for many years, in order that a large amount of the company's indebtedness, say \$250,000, should be first paid,—quite an exacting construction against them being required to produce such result. The company or its common shareholders would have suffered no injustice had the debt to the city of Belfast been placed in a permanent funded form. Another thing, before spoken of, which favors the complainants, is that by our former opinion their dividends were held to be non-cumulative, and if lost now are forever lost. Still another thing may be of importance enough to be taken into account, and that is that the corporation is paying 6 per cent interest on its bonds, and receives about one third interest on the sums which it proposes to keep on hand.

The respondents go further than to deny that net profits have been or will be earned; they contend that they should not be divided even if they have been earned. Of course, all the net earnings of an indebted company should not always be devoted to dividends. We think a company should have a right to base its calculations upon a final payment of its debts at some time. But steps in that direction are not to be untimely, or oppressive to other interests, and should be such as not to unreasonably interfere with the expectations or interests of stockholders, and such as will not prevent a reasonable performance of all other obligations which have been assumed by the company. The more practical question is as to how far the earnings shall be reserved and how far divided. But it comes round to the primary question, which is, Have net profits been earned, such as are reasonably applicable to dividends? The argument of the learned counsel for the respondents seems to proceed upon the idea that the complainants have a prior right to receive dividends only whenever they have been actually declared, but that the company has the right to refuse to declare dividends, whether they have been earned or not. Such is not the letter or spirit of the contract

entered into. The promise of the company was, that dividends semi-annually from net earnings "shall be made."

But when the present mortgage debt of \$150,000 was established, it was to be paid in twenty years, and shall it not be paid at the end of that time, asks counsel? It may have been supposed that twenty years would be long enough for the debt to run without a renewal. But if it was even supposed that the debt could be conveniently paid at maturity without renewal, was it not calculated by the parties that dividends would be in the mean time distributed to the preferred stockholders? The result only proves a miscalculation by the company of its ability to literally perform its obligations. Is it an excuse for not declaring dividends out of net earnings, provided there are net earnings, merely that a company cannot pay an entire bonded debt at maturity without creating a new debt or borrowing again? Is it not reasonable to require the company to keep all its obligations, when they can easily do so? If the company had no means or credit which would enable them to place a new obligation on the market, there would be force in the position. But no such liability is or possibly can be pretended. Can it be said that a railroad company makes no net profits in a year in which it gains \$36,000 and has only \$9,000 to pay out, because it owes \$150,000, payable in four years, abundantly secured upon its property, when the company has a perfect credit and abundant means to enable it to replace the old with a new loan on advantageous terms? Does a merchant who carries on business partly on borrowed capital, and no profits in a year at the end of which, besides retaining his capital, he has received \$37,000 more than all he has paid out, simply because he owes a debt for his borrowed capital which he has abundant ability to pay, but not without further borrowing? Says Moravetz (Corp. § 489): "In ascertaining whether a company has a surplus which may be divided among the shareholders, permanent improvements made by means of borrowed money may often be valued as counterbalancing the liability of the company for the money used to construct them."

Two cases are relied on for the respondents, either of which appears to us as having any tendency to support their general position. One is *Karnes v. Rochester & G. V. R. R. Co.* 4 Abb. Pr. N. S. 107. That case shows that two of railroad directors were chosen, and a controversy was going on between them as to which was the legitimate board. Pending that litigation a common shareholder—there was a preferred stock—brought a bill to have all moneys assets of the corporation distributed among the stockholders. There were \$3,000 in government bonds on hand; the debt was \$70,000, due in seventeen years; the annual expenses were about \$10,000; and the bill, which was demurred to, did not allege whether there was any annual balance of profit or not. The court, amongst other grounds of decision, said that no breach of any obligation on the part of the company to the stockholders, nor any omission of duty, was alleged; and the acts of directors should not be interfered with by courts except to prevent injus-

tice; that the corporation could make no dividends, and the directors were not a party to the bill; that there was nothing to indicate that the money on hand was not needful for the security of the creditors of the company; that it was not even alleged that the directors had refused to make a dividend, nor stated that one in justice ought to be made; and the bill was dismissed.

The other case is *Nickals v. New York, L. E. & W. R. Co.*, lately determined in the Supreme Court of the United States, reported in 15 Fed. Rep. 575. The case was first decided in the circuit court, 21 Blatchf. 177, where it was held that the company could not, against the interests of preferred stockholders, divert a large quantity of funds from them to other uses of the company. The decree was reversed in the upper court; not for any difference between the two tribunals as to the law of the case, as stated by the judge below, but upon a difference of opinion in making an application of the law to the facts. The points of the case are correctly represented by the headnotes which are as follows: "The holder of preferred stock is not entitled absolutely to a dividend, even if there be 'net earnings' from which such dividend might be paid. The directors may use the 'net earnings' for the improvement of the road, where such improvement is shown to be imperatively necessary to the preservation of the corporate property, and the continuance of the corporate business." The court were deeply impressed with the uncontradicted testimony of the president of the company that, "but for using the funds in question in that case, the company could not have paid its fixed charges, but would have again gone into bankruptcy, and the entire interest of the stockholders been destroyed." That is unquestionable doctrine. Preferred stockholders are not to be protected to the extent of endangering the rights of creditors, or wrecking or crippling the enterprise of the road. *Clark, Stockh. § 271; Culver v. Reno Real Estate Co.* 91 Pa. 867.

The condition of the railroad above alluded to, the Erie system, illustrates the fallacy of the claim that all the earnings of a railroad corporation should be withheld from stockholders until its debts are paid. That company has a capital of over \$77,000,000 of common and preferred stock; and an indebtedness exceeding \$100,000,000, secured and unsecured. The court need not have troubled itself over the difficulties presented in that case, if it had had the courage to assume that the preferred stockholders were not entitled to dividends until the \$100,000,000 of debt were paid. There is hardly a railroad company in the world that has not a funded debt. Such a rule would work an injustice amounting to cruelty in many cases. Rev. Stat. chap. 47, § 100, provides that savings banks may invest their deposits in the stocks of any dividend-paying railroad in New England. How would the rule contended for work with savings bank deposits invested in Maine Central Railroad stock, a company having \$3,600,000 stock and \$11,000,000 of indebtedness; or in the Boston & Maine, with a debt of \$7,000,000; or in the Boston & Albany, with a debt of \$10,000,000; or, if we look out of New England, in the

Chicago, Burlington, & Quincy Railroad Company, one of the most reputable companies in our country, having more than \$80,000,000 of funded indebtedness? What would annuities and life estates be practically worth to the holders of them in railroad companies, under a rule which allowed no dividends until all debts are paid. The history of railroad enterprises teaches us that the old liabilities of companies are well nigh habitually paid by the creation of new ones, the general design being to lessen the liabilities which are represented in the construction by gradual processes.

The last point which the case presents is whether the court can interfere in behalf of the complainants. We think it can and should. The directors refuse to perform a duty. They ignore a contract. They are chosen by the holders of the common stock, who are the majority, and are hostile to the interest of the complainants. We asserted the right of the court in the former case, and there cited authorities in support of it. Says Morawetz (Corp. § 280): "Where certain shareholders are entitled to privileges which do not belong to the other members of the company, the court will provide a remedy for an infringement of these privileges by the other shareholders or the company's agents." See Cook, Stock & Stockh. § 541, and cases cited. Says Wheeler, J., in *Nichols v. New York, L. E. & W. R. Co. supra*: "When it comes to the question of using the profits which would go to one set of stockholders for the benefit of another set, a more rigid rule should be upheld. The question becomes more one of right to be determined by the law, than one of policy to be determined by the discretion of the directors." When the resolution of directors makes an alteration in the priorities and payments provided in the memorandum of association, it is beyond their power, and may be interfered with by the court. *Ashbury v. Watson*, L. R. 30 Ch. Div. 376. Even an action at law was allowed on a contract to make a dividend of earnings. *Bates v. Androsoggin & K. R. R. Co.* 49 Me. 491.

But has the court the power, asks the learned counsel, to prevent a company paying its debt when it comes due? Not at all. On the contrary, the court would compel the company to pay its debts to the letter. It will also exercise its power in a legitimate case to require the company to keep its other obligations legal or equitable. While the company does not owe a debt to the preferred shareholders,

it does owe them an obligation, founded upon a contract which is as sacred as any other contract. If the company had not sufficient means or credit with which to pay its debts without applying upon them the funds in question, the funds should be so used. But no creditor makes opposition to complainant's claim, nor have they any occasion to. The creditors must be protected, and so must the different classes of stockholders, according to their respective rights. If the preferred stock is in the way of an earlier enjoyment of dividends by the holders of the common stock, than otherwise would have been, it is an impediment of the company's own creation. The contract to pay dividends on preferred stock was upon the sole condition that net earnings are possessed by the company. New conditions cannot be imposed by the company alone. Good faith forbids it.

Finally, what shall the decree be? The complainants, admitting that the mortgage debt should be paid within some reasonable time, which must from necessity be somewhat arbitrarily fixed, and adopting the scheme suggested by the court in the former case, ask that a decree be passed allowing dividends for the present and the future for such an amount semi-annually as will not deprive the company of an opportunity of extinguishing its debt within the life of the lease, if it desires to, and of paying dividends to the preferred stockholders during the same period. That would require a calculation which a master, and not the court, should make, and we are inclined to the view that such an extensive decree may not be expedient, all things considered, at the present juncture. The future action of the company may make such a comprehensive proceeding avoidable.

The limited and more direct inquiry is whether on January 1, 1886, the company should have declared a dividend on the preferred stock; requiring therefor the payment of \$16,062. We think, as between itself and that class of stockholders, it was possessed of net earnings enough, which by its agreement it had pledged for that purpose. It had \$204,412.32 in its treasury; it received \$18,000 in addition on May 10, 1886; it had nothing to pay until a half year's interest, \$4,500, became due on May 15, 1886.

Bill sustained with costs. Decree according to the opinion.

Walton, Danforth, Virgin, Libbey and Foster, JJ., concurred.

VERMONT.
SUPREME COURT.

RUTLAND TRUST CO.
v.
SHELDON & SONS *et al.*

The orator was a trustee under a mortgage deed, of marble quarries, mills etc., executed by the defendant S. to secure his bonds. There was a provision in the deed by which the mortgagor could sell any portion of the premises, and the orator could quitclaim the portion so sold, provided the full value thereof was used in purchasing or retiring the bonds; and the security for the remainder of the bonds "shall not in the judgment of said trustee become impaired." S. having sold a portion of the premises, and some of the bondholders objecting to a conveyance, the orator brought this bill for advice "as to whether or not the occasion is a proper one for the exercise of the power; * * * and if so, upon what terms and provisions." On the findings of the master that the sale was for full value; that purchase money had been wholly applied to retiring the bonds secured; and that the security for the remainder had not been lessened, the court below decreed a conveyance, "unless the said trustee * * * shall decide that the security for the remainder of said bonds will have become impaired," etc. *Held*, error, in that the trustee was virtually decreed to convey without any exercise of its judgment, and the decree went beyond the prayer of the bill.

(Rutland—Filed July 7, 1887.)

BILL in chancery. Heard on bill, answers, replication, and special master's report, March Term, 1886, Rutland County, Veazey, Chancellor. Decree reversed.

The decree was:

"Upon consideration of the same, it is adjudged and decreed that the report of said special master be accepted and confirmed; and that the contingency has arisen provided in said mortgage, when it is necessary and expedient for the purpose of said firm of Sheldon & Sons, to sell and dispose of the portion of said mortgaged premises described in said bills of complaint; and that the price of the same therein named is the full value of the same; and that by such sale with payments of the proceeds in retirement of an equal amount of the mortgage bonds and cancellation thereof, the security for the remainder of said bonds will not become impaired or reduced; and that the occasion is a proper one for the exercise of the power conferred upon said trust company, as trustee, to sell and convey said 100-feet strip of said premises and apply the proceeds; and that said trustee has in its discretion a legal right so to do,—all as provided in said mortgage deeds.

"And it is further adjudged, ordered, and

VT.

decreed that said trustee convey by quitclaim to said S. W. Rowell the said 100-foot strip described in said bill of complaint for the price therein named, upon surrender and cancellation of an equal amount of said mortgage bonds, all in strict conformity to the provisions of said mortgage deed; unless the said trustee, by its board of directors or trustees, shall decide that the security for the remainder of said bonds will become impaired or reduced thereby; and that the occasion has not arisen when it is necessary or expedient for the purpose of the business of the said firm of Sheldon & Sons to make said sale."

The special master found, among other things, that Sheldon & Sons on the 1st day of December, 1883, executed and mortgaged to the orator, as security for the holders of bonds therein mentioned, to the amount of \$350,000, real estate consisting of lands, marble quarries, yards, mills, etc.; that said bonds, so far as issued, were held by various persons and creditors within and without the State; that they were payable in installments of \$10,000 semi-annually; that the mortgage to the orator contained the following provision:

"And in case the parties of the first part (Sheldon & Sons) shall at any time find it necessary or expedient, for the purpose of the business of said firm, to sell and dispose of any portion of said mortgaged premises, said trustee, its successor, or successors, are authorized and empowered to release and quitclaim the same to the purchasers thereof from the parties of the first part, free and discharged from any lien or charge hereby created, provided the full value of the parcel or parcels so sold shall be used in purchasing or retiring bonds hereby authorized and heretofore issued, and provided that, by such sale and payment, the security for the remainder of such bonds shall not, in the judgment of said trustee, become impaired or reduced;" that Sheldon & Sons, in January, 1885, found it both necessary and expedient, for the purposes of the business of said firm, to sell and dispose of a portion of said mortgaged premises; that on the 24th day of January, 1885, they did sell a strip of valuable quarry land for the consideration of \$80,000, and executed deed thereof; that the grantee in payment of such strip of land agreed to pay and deliver to said Rutland Trust Company, for cancellation, \$80,000 of the aforesaid bonds; and that he has, in pursuance of said agreement to purchase, delivered for cancellation bonds issued under and secured by said mortgage to the amount of \$80,000, to said trust company for cancellation when the orator shall release and quitclaim the strip of land so sold and deeded as aforesaid; that the orator caused said property covered by said mortgage, and the strip so sold and deeded, to be examined by a committee of the trustees to ascertain whether or not the security of the \$270,000 of bonds remaining outstanding after the cancellation of the \$80,000 surrendered for cancellation would be impaired in case it should execute a release of said mortgage upon said strip of land so sold; that said committee reported that security of said mortgage would not be impaired or reduced by the sale of said land and the application of the purchase price on said mortgage."

The other facts are sufficiently stated in the opinion.

Chaffee and Lyon, bondholders, appealed.

Mr. Edward Dana, for appellants Chaffee & Lyon:

The power conferred is a discretionary one. 2 Perry, Tr. § 507.

This negative decree takes away all discretion on the part of the trustee, and makes it a mere tool. The trustee has not refused to act. The court below not only adjudged the occasion was proper for the exercise of the discretionary power, but that the price of the parcel is its full value; that the security would not be impaired, etc. This is the province of the trustee.

2 Perry, Tr. §§ 478, 510; 2 Washb. Real Prop. 818; *Hawkins v. Kemp*, 3 East, 415, 480; *El-dredge v. Heard*, 106 Mass. 579; *Keales v. Burton*, 14 Ves. 487; *Hawley v. James*, 5 Paige, 455; *Sheldon v. Homer*, 5 Met. 462; *Ferre v. American Board*, 58 Vt. 172.

Messrs. Walker & Swington, for petitioner:

There is no question but that the trustee is entitled to come to this court for assistance and protection.

Bisph. Eq. § 147; 2 Story, Eq. 960, 1267.

The only question is as to the form of the order. This decree does not supersede the discretion of the trustee, but is in form a judgment. Anything less would be meaningless. The trustee is entitled to protection. This must be given in such form that hereafter it may assert the record as an estoppel.

2 Perry, Tr. 508, 602; Hill, Tr. 489, 494; Tiff. & B. Tr. 788; 2 Jones, Mort. § 1770.

Mr. William H. Smith, for Sheldon & Sons.

Ross, J., delivered the opinion of the court:

The orator is trustee in a mortgage deed executed by Sheldon & Sons to it to secure the payment of their notes or bonds to the amount of \$350,000. There is a provision in the deed by which the mortgagor has the right to sell and dispose of any portion of the mortgaged premises, and by which the orator is authorized to release and quitclaim the portion sold, "provided the full value of the parcel or parcels so sold shall be used in purchasing or retiring bonds hereby authorized and heretofore issued; and provided that, by such sale and payment, the security for the remainder of such bonds shall not, in the judgment of said trustee, become impaired or reduced." Sheldon & Sons made a sale of a portion of the mortgaged premises, and some of the bondholders objected to a conveyance by the orator. The orator, being in doubt whether a proper occasion had arrived for the exercise of the power of conveyance given in the deed, brought this bill against Sheldon & Sons and the bondholders, praying to have the matter investigated, and for advice "as to whether or not the occasion is a proper one for the exercise of the power conferred by said provision of said mortgage deed, and if so, upon what terms and provisions, if any, to the end that said matter may be forever set at rest, and all bondholders under said mortgage be concluded from hereafter calling the same in question, and for such other or different

order or relief as may be just." The master has found that the sale was for full value; that the purchase money has been wholly applied to retiring the bonds secured; and that the security for the payment of the unretired bonds has not been lessened, or will not be by the conveyance. On these facts it is not contended by the bondholders but that a proper occasion for the exercise of the judgment of the trustee, in accordance with the provisions of the deed, has arisen; but they contend that the decree of the court of chancery went too far in that it decreed that the orator should make the conveyance, "unless the said trustee, by its board of directors or trustees, shall decide that the security for the remainder of said bonds will become impaired or reduced thereby, and that the occasion has not arisen when it is necessary or expedient, for the purpose of the business of said firm of Sheldon & Sons, to make said sale." We think that this contention must be sustained. This portion of the decree virtually decrees that the orator shall make the conveyance without any exercise of its judgment in the premises; because it is to convey if it does not exercise its judgment to the contrary. By the deed, all parties thereto contracted for the exercise of the trustee's judgment, when a proper occasion should arise, and agreed, impliedly at least, to be bound in the premises by the exercise of that judgment, when made impartially and in good faith. It is not the province of the court of equity to make or vary the contracts of the parties, but to enforce them as made. It is no ground of objection that the orator is a corporation, and has no individual judgment, and only the aggregate or average judgment of its directors or trustees. It was for the honest, impartial exercise of such judgment as in law it had, that the parties contracted for. There is no suggestion in the bill, or facts reported, that any of its directors or trustees are owners of the unretired bonds, and so have become disqualified to act, by reason of an adverse interest. Besides, this clause of the decretal order goes beyond the prayer of the bill. It is contended that a decree, in the form rendered, is necessary to set the matter forever at rest, and conclude the bondholders. Such a decree no more concludes the bondholders, than the *bona fide*, impartial judgment of the orator, by which the bondholders have impliedly agreed to be concluded. By coming to the court of equity for advice and direction, the orator has, in effect, expressed its willingness and readiness to follow the advice and obey the direction of that court in the premises, or to execute the trust imposed by the deed in accordance with such advice and direction. Hence, the case does not involve the consideration of what the right and power of the court of chancery might be, if the orator had declined to execute the trust, or if it had been shown that a majority of its directors or trustees had become disqualified by having become interested in the bonds, and Sheldon & Sons, or the purchaser from them, had brought a bill to compel the orator to make conveyance.

The decree of the Court of Chancery is reversed, and cause remanded, with a mandate in accordance with these views.

Rolla GLEASON
v.
ESTATE OF J. A. BEERS.

1. When one delivers logs at a custom sawmill to be sawed at an agreed price, the owner of the mill becomes a bailee, bound to exercise ordinary care in keeping and manufacturing the logs, and to prove in case of their loss that it was without his fault.
2. The question of the bailor's contributory negligence is not raised, when it is not found that he intermeddled with the logs after delivery in the mill yard.
3. The defendant's intestate contracted with the plaintiff to saw his lumber at a stated price. *Held*, that the estate should not be allowed more than the agreed price, even though it had proved, which is not found, that the plaintiff had violated his part of the contract; as that would only lay the foundation for damages.

(Chittenden—Filed July 5, 1887.)

APPEAL from the judgment of the Probate Court. Heard on a referee's report, September Term, 1886, Chittenden County, Powers, J., presiding. Judgment for the plaintiff to recover on item No. 23 the sum of \$122.50; on item No. 81 the sum of \$99.45; that the defendant be disallowed item No. 23, the charge of \$16.68 for sawing 4,170 feet; and that it be allowed only \$2 per thousand feet for sawing lumber charged in Nos. 24, 25, 26, 29, 31, 32, deducting \$38.35. *Affirmed*.

As to the other items, judgment was rendered on the report in accordance with the referee's findings. The referee found, as to item No. 23, that in the winter of 1874-5 said Gleason drew to said Beers' sawmill in Bolton 20,000 feet of spruce logs, to be sawed by Beers for Gleason; that the logs were drawn and left in the mill yard in the usual way of custom work; that Beers deceased in February, 1881; that only five of the logs were afterwards found in the mill yard, and one Flannery had 2,129 feet of lumber out of the logs so delivered, leaving 17,500 feet not accounted for, worth \$7 per thousand; "that, while the evidence fails to show that Beers had or made use of said logs, that evidence equally as strong fails to establish the fact that Gleason had or made use of any portion of the same," except said 2,129 feet. The referee found that this item No. 23, \$278.71, should be disallowed.

The other facts are sufficiently stated in the opinion.

Mr. J. A. Wing, for plaintiff:

Where property is left on which the bailee is to perform work for reasonable pay, the bailee is to exercise ordinary care in the protection of property.

Story, Bailm. § 489 *et seq.*; 1 Wait, Act. & Def. 497; 3 Wait, Act. & Def. 597.

Thus, if a watch is left with a watchmaker for repairs, if lost through his neglect, he is answerable, as he is bound to use ordinary diligence for its safe keeping.

Halvard v. Decheleman, 29 Mo. 459.

So a miller is bound to exercise reasonable

care and diligence for the preservation of grain left at his mill to be ground, and to return it on demand, and the fact that he was not notified that the wheat was so left would not discharge his liability.

Spangler v. Eicholtz, 25 Ill. 297; *Wallace v. Canaday*, 4 Sneed, 864.

It is a principle of law that where the bailee is to do work on the property, if the property is lost through any want of care of the bailee, he is liable and cannot recover for the work and material used on the property lost.

Messrs. W. P. Dillingham and C. F. Clough, for defendant:

The *onus probandi* to prove affirmatively that the plaintiff is free from negligence or want of ordinary care is on the plaintiff in all cases like this. And it has been so held in most all of the States,—Massachusetts, Connecticut, Maine, New York, Illinois, Indiana, Wisconsin, and others.

Shearn. & Redf. Neg. p. 48, § 48.

The referee finds expressly that Beers never converted the logs, and that Gleason never demanded them.

1 Jacob's Fisher, Dig. 855.

In *Walker v. Herron*, 22 Tex. 55, it is held that if it remains uncertain whether the plaintiff used ordinary care or not, he cannot recover.

Ross, J., delivered the opinion of the court:

But three items named in the report of the referee are in contention. Item 23 of the plaintiff's account, we think, was properly allowed by the county court. The intestate owned and operated a custom sawmill. He thereby invited the custom of the plaintiff. The plaintiff delivered at the mill the logs named in this item, to be sawed, for which he was to pay the intestate an agreed compensation. This was a bailment of the logs to the intestate for the mutual benefit of the bailor and bailee. This obligated the bailee to the exercise of ordinary care in keeping and manufacturing the logs. They were in the possession of the intestate, to be accounted for by him or his estate, either as logs or manufactured lumber. The estate has not accounted for the logs included in this item, either as logs, lumber, or as lost or destroyed without the fault of the intestate. Ordinary care requires that the estate should either produce the logs or the lumber, or show they were taken from the possession of the intestate by the plaintiff, or were lost or removed without the fault of the intestate. This is the ordinary rule in this class of bailments. Story, Bailm. § 442 *et seq.* The question of contributory negligence is not raised by the facts found by the referee. It is not found that the plaintiff intermeddled with any of the logs in contention after he delivered them into the custody of the intestate, nor that he was called upon to do anything in regard to them. Hence, the plaintiff neither did, nor omitted to do, anything so far as found from which negligence on his part could contribute to the loss of the logs or lumber.

Item 23 of the claims made by the estate was properly disallowed. It is a charge for manufacturing about one fourth of the logs included in plaintiff's item 22. As by that item the

plaintiff is only allowed for the value of the logs unmanufactured, the estate should not be allowed for their manufacture.

We think the intestate's charge for sawing, on the facts found by the referee, should be reduced \$1 per thousand, as was done by the county court. The agreement between the plaintiff and intestate was that the plaintiff was to pay only the cost of sawing, which is the sum allowed by the county court. This agreement is found to have been a part of the agreement by which the intestate and the plaintiff and others rebuilt the intestate's mill. The facts found, that the plaintiff did not put in a clapboard machine as he reserved the right to do, that he did not saw any clapboards, nor procure any to be sawed, for the intestate, do not vary the price which the intestate was to charge the plaintiff for sawing boards; especially, when it is not found that the intestate ever had any lumber to be manufactured into clapboards, or ever called upon the plaintiff to put in the clapboard machine, or manufacture any clapboards for him. So far as is found by the referee, the plaintiff did not break or disregard his part of the agreement in regard to rebuilding the mill and manufacturing clapboards for the intestate at cost. If he had broken his agreement in this respect, it would have laid the foundation for a claim in favor of the estate against the plaintiff for damages, rather than give the estate the right to charge a greater price than agreed for sawing boards for the plaintiff.

We find no error in the judgment of the County Court, and that judgment is affirmed.

STATE of Vermont.

v.

Benjamin H. WOOLEY.

1. Under an indictment for the illegal sale of intoxicating liquor, a respondent is entitled to a specification of offenses; but the character of the specification with reference to extent and minuteness is a matter of discretion of the trial court.
2. It was not error to allow a witness to testify who was unknown to the State's attorney when the specification was made, and so not named in it.
3. When a town agent is indicted for making illegal sales of liquor, evidence is admissible to prove that he sold to persons commonly reputed and known to be men of intemperate habits; that he knew their reputation for drunkenness; and that he avoided selling to them when unlawfully engaged in the traffic of liquor prior to his appointment.

(Rutland—Filed July 5, 1887.)

ON respondent's exceptions. *Overruled.*

Indictment charging the respondent with the illegal sale of intoxicating liquor. Trial by jury, September Term, 1886, Rutland County, Veazey, J., presiding. Verdict, guilty of

three second offenses; and respondent sentenced as provided by law.

The respondent requested the court to direct the State's attorney to furnish him with a specification, with the number and nature of the offenses of which he is charged; when and where committed; to whom the intoxicating liquor was sold, furnished, or given away.

The specification stated that the State's attorney would claim that the offenses had been committed since the respondent was appointed agent for the sale of liquors of the town of Rutland, which was May 4, 1886; that the witnesses "summoned are [naming several persons]; and there are various other witnesses unknown to the State's attorney at present;" and that the State's attorney did not know the number of offenses that he could prove, but placed the number at two hundred, the same being conjectured. The respondent objected to the specification, claiming that it did not conform to his request; but the court sustained it, on the representation of the prosecuting attorney that it was as full as he was able to make it. The court charged:

"The agent has authority to sell for medicinal, chemical, and mechanical purposes only. His duty is not only to keep liquor and sell it for these purposes, but he must be reasonably diligent, and careful not to be imposed upon and let liquor go for other purposes; and if he does not exercise such care, and persons thereby get and use liquor for other purposes, the agent is liable as for an unlawful sale. He is not liable for lack of care in a sale if the other party, the purchaser, buys for a lawful purpose. He is liable if careless, as explained, when the liquor is bought and used for unlawful purposes."

Messrs. C. H. Joyce and J. D. Spellman, for respondent, cited—

State v. Freeman, 27 Vt. 533; *State v. Rowe*, 48 Vt. 265.

Mr. F. S. Pratt, for the State, cited—

State v. Bacon, 41 Vt. 526; *State v. Davis*, 53 Vt. 876; *State v. Fisher*, 35 Vt. 584; *State v. Parks*, 29 Vt. 70.

Ross, J., delivered the opinion of the court:

While, from the general form of charging the offense, and to prevent possible injustice in the administration of the law, the respondent in this class of prosecutions is entitled to a specification of offenses (*State v. Conlin*, 27 Vt. 318; *State v. Freeman*, Id. 523), the character of the specification, with reference to minuteness and extent of detail, is a matter of discretion of the trial court, to be exercised with reference to the circumstances of the case (*State v. Bacon*, 41 Vt. 526; *State v. Rowe*, 48 Vt. 265; *State v. Davis*, 53 Vt. 876). This is too well settled in this State to require further elucidation. While conceding the general doctrine to be as stated, the respondent contends that there was error in allowing witnesses to testify who were not named in the specification. The State's attorney, after specifying the witnesses summoned, added: "And there are various other witnesses, unknown to the State's attorney at present." It is the general form of charging the offense, prescribed by the statute which gives the right to a specification. If the form of the indictment required as specific a state-

ment of the offense as is required by the common-law rules of criminal pleading, no further specification of the offense would be legally required. Hence, the respondent is not legally entitled to a more minute detail of statement of the facts necessary to constitute the offense in the indictment and specifications, when taken together, than he would be entitled to in an indictment at common law. In an indictment at common law a good sale, furnishing, or giving away could be charged as made to a person unknown to the grand jurors, and for that reason not named. In legal effect this is the charge, in this respect, by the specifications furnished. There was no legal error in allowing offenses to be proved by or to such other unknown, and for that reason unnamed, witnesses.

The only other exception now insisted on is in reference to the objected testimony of Stearns, Peabody, and Bailey. That testimony, in effect, was that the respondent, while agent for the town for making sales of intoxicating liquors for lawful purposes, made sales to persons commonly reputed and known to be men who made an improper use of it; and that the respondent was well acquainted with the reputation and character of such persons, in respect to drunkenness, and avoided making sales to them when engaged in the traffic unlawfully, prior to his appointment. We think this is a fair statement of all that is contained in the exceptions with reference to the testimony of these witnesses. Clearly it had a tendency to establish illegal sales, or sales which the respondent ought to, and did, know were for illegal purposes. Such sales are as much a violation of the law when made by an authorized agent as when made by a person without authority. The agency only authorizes sales for three specified purposes. Sales for all other purposes are the grossest infractions of the law, when knowingly made by an authorized agent. They are a perversion of the law, a mockery of the law, designed to prohibit,—a cloak for perpetuating the evil.

The respondent's objections are overruled, and judgment rendered that he takes nothing from his exceptions.

Solon BRESEE, Admr.,

George S. WALKER, Exr.

The wife owned a two-fifths, and her husband a three-fifths, undivided interest in a home farm, and in their old age they conveyed by joint deed certain portions of the land, and the proceeds were appropriated for their mutual benefit and support.—*Held*, that, on the death of both, their heirs took only the respective share that each owned in the remainder; and that the husband's executor was not bound to account, as the presumption is that each obtained his just proportion.

(Rutland—Filed July 7, 1887.)

BILL in chancery. Heard on the pleadings and a special master's report, September

Term, 1885, Rutland County, Walker, Chancellor. Bill *pro forma* dismissed. *Affirmed*.

The case appears in the opinion.

Messrs. W. C. Danton and Edward Dana, for orator:

If the husband receives the capital of his wife's separate property, there is no presumption that she intended to give or transfer it to him. He is *prima facie* a trustee for her, and a gift from her to him will not be presumed without clear evidence.

Rich v. Cockell, 9 Ves. 369; *Porter v. Rutland Bank*, 19 Vt. 410; *Albee v. Cole*, 89 Vt. 823; *Child v. Pearl*, 48 Vt. 227; *Richardson v. Merrill*, 32 Vt. 27; *Sampley v. Watson*, 43 Ala. 377; *Marsh v. Marsh*, 48 Ala. 677; *White v. Waite*, 47 Vt. 502; *Perry*, Tr. § 679.

Mr. J. W. Stewart, for defendant, argued substantially as the court holds.

Royce, Ch. J., delivered the opinion of the court:

The orator bases his right to a decree, first, upon the ground that here was an agreement entered into between the testate and the intestate that, upon the death of the testate, the intestate or her heirs should have the sum of \$3,000 out of his estate. The master has found that such an agreement, substantially, was made, but reports that his finding rests upon the construction that he has given to the first codicil made to the will of the testator; and that, unless it properly bears such construction, there was not sufficient evidence to warrant the finding of such an agreement, or of any agreement, between the parties, beyond what is expressed in the will and codicil, viewed in the light of the attending facts and circumstances; so that whether such an agreement was made depends upon the construction to be given to said will and codicil, aided by the facts and circumstances found and referred to by the master.

The will of the testator, executed September 17, 1862, refers to an antenuptial contract made between himself and the intestate, and makes it, as explained and modified by the will, a part of said will. The antenuptial agreement was executed April 14, 1848, and by it the intestate transferred all her property, real and personal, to the testator, in consideration of having received from him a deed of two fifths of his real estate, and a bond to remove all incumbrances on the same, and the right, in case she should survive the testator, to certain enumerated personal property; and she agreed to make no claim to dower or an assignment of personal property from his estate, and discharge his estate and his heirs from the payment of any other sum in consequence of her having been the wife of the testator; and if, after the death of the testator, his heirs or representatives should wish to purchase the two fifths of said real estate that had been conveyed to her, they should have the privilege of doing so by paying her, within one year after the decease of the testator, the sum of \$2,000, which was its estimated value.

The testator and intestate were married April 16, 1848, and occupied said real estate, together with the other three fifths owned by

the testator, until 1860, when they, by their joint deeds, sold certain portions of it, and the proceeds were appropriated by them for their mutual benefit, support, and enjoyment. The intestate died June 1, 1868. The remaining portion of said real estate has, by agreement, been sold by the executor of the testator, and two fifths of the proceeds—\$1,200—has been paid to the orator.

By the antenuptial agreement the intestate obligated herself to reconvey to the testator's heirs, or legal representatives, the real estate that had been conveyed to her, upon the payment to her of \$2,000, as provided in said agreement. If they failed to make such payment, the title would remain in her, discharged from any obligation to reconvey it; and no such payment was made, or demand made for a conveyance by her. At the time the will was executed the real estate had so increased in value that the testator, in the language used by him, deemed it right that the sum to be paid her should be increased above that stipulated in the antenuptial contract, and that contract is referred to as explanatory of the amount stipulated to be paid. That contract, as we have seen, made the right of the intestate to any sum dependent upon the election of the heirs or representatives of the testator to claim a conveyance of the real estate to themselves; and in case such an election was made, the amount to be paid was fixed at \$2,000. The request made by the will to the intestate, and which is confirmed by the codicil, was made upon the express condition that she should survive the testator; and, although the whole will is mysteriously expressed, considering it in connection with the papers that are made a part of it, it is obvious that the testator did not intend by it to make any provision for his wife in case she did not survive him; and that, in case of her survival, he intended to release her from the obligation to convey the property deeded by him under the antenuptial contract unless she was paid \$3,000 therefor.

The construction put upon the will and codicil by the master, and upon which he based the contract found by him, was erroneous. The intestate did not derive any beneficial interest under the will and codicil; and no such agreement as is alleged in the bill having been found, upon competent evidence, the orator is not entitled to decree upon that ground; and admitting that the bill is so framed that specific performance might be decreed under it, there is no contract found the performance of which could be decreed.

It is further claimed that the testator became the trustee of the intestate on account of the sales made of real estate in 1860. The lands so sold were conveyed by their joint deeds; and it is found that the proceeds were appropriated by them for their mutual benefit, support, and enjoyment. There was no trust relation created by contract; and, inasmuch as the proceeds of the property in which they were jointly interested were mutually appropriated by them for their mutual benefit, the presumption would be that each obtained his just proportion.

It does not appear that the testator ever had any property of the intestate in his hands or possession that should be accounted for, so no

order requiring him to account as trustee should be made.

The decree of the Court of Chancery dismissing the bill is affirmed, and cause remanded.

William S. BROCK

v.

Samuel BRUCE and Trustee.

1. It is presumed that an appropriation of public money by school district officers to pay for repairs of schoolhouse was authorized by the district, when it does not appear whether it was or not.
2. Money borrowed by a school committee without the authority, but on the credit, of the district, and used to supply a temporary need in paying the expenses of the school, may be treated as if borrowed of himself, and as a part of the expenses for which a tax might legally be assessed under a vote of the district.
3. A committee in assessing a tax has a right to anticipate the wants of a district, and may legally assess it at any reasonable time before the money is required.

(Caledonia—Filed July 8, 1887.)

ACTION by the plaintiff, as collector, to collect a school tax. Trial by jury, June Term, 1886, Caledonia County, Ross, J., presiding. Verdict and judgment for the plaintiff. *Affirmed.*

The exceptions stated that the district at the annual meeting "voted to assess the grand list to defray the expense of school." See *Brock v. Bruce*, 58 Vt. 261. The jury returned a special verdict, in effect that the defendant absolutely refused to pay the tax on the plaintiff's demand, and that the defendant had no known property in this State sufficient to pay the tax.

Messrs. Ide & Stafford, for defendant:

Cited—*Brock & Bruce*, 58 Vt. 261; *Rev. Laws*, § 680; *Chandler v. Bradish*, 23 Vt. 416; *Rowell v. Horton*, 57 Vt. 81.

Messrs. Bates & May, for plaintiff:

Cited—*Rev. Laws*, §§ 430, 686; *Clement v. Hale*, 47 Vt. 687; *Wilson v. Seavey*, 38 Vt. 227; *Houston v. Russell*, 52 Vt. 110; *Wheeler v. Wilson*, 57 Vt. 157.

Rowell, J., delivered the opinion of the court:

When this case was here before, it was held that a tax to pay for these repairs could not legally be assessed under the vote to raise a tax for "the expense of schools;" and that the certificate of the prudential committee attached to the rate-bill, showing that the tax was assessed for repairs as well as for "the current expenses of the schools," was not conclusive, but might be contradicted by showing that nothing was, in fact, included for repairs. It is now claimed that the case shows, both by the certificate and otherwise, that these repairs were included, and that therefore the tax is illegal. But instead of showing that, it clearly shows that they were not included, but

were paid for out of the public money long before the tax was assessed.

But it is claimed that, if paid for out of the public money, such payment was a misapplication of the fund, as it was not authorized by a vote of the district; that the public money is devoted by law to the support of schools, and that a vote to raise a tax to defray the expense of schools is, in effect, a vote to raise what is necessary for that purpose after the public money is expended for the same purpose; and that by such misapplication the prudential committee could not get the right to assess a tax enough in excess of what was voted to cover the amount misapplied.

In respect of this claim it is sufficient to say that it does not appear that such payment was not authorized by the district. It does not appear whether it was or not and hence it cannot be presumed that it was not, but the presumption is rather the other way. Thus, in *Sargeant v. Sunderland*, 21 Vt. 284, the fact that a town treasurer made payments on the town's debt, nothing appearing to the contrary, was held to raise a presumption that he paid with the approbation of the town.

It is further claimed that the prudential committee had no right to borrow the \$100 of James on the credit of the district, or to include anything in the tax for its payment.

This money was needed and used for paying the expenses of the summer schools; and, if the committee had no authority to borrow it on the credit of the district, it may be treated as though they borrowed it of themselves; and it being to supply a temporary need in respect of expenses for which a tax might legally be assessed under the vote, it was properly a part of those expenses, and ought to be so regarded.

It is further claimed that the tax is illegal because assessed to cover future and unascertained expenses. But the case does not show that the future expenses were unascertained. For aught that appears the committee had accurate data from which to ascertain future expenses; and from the fact that the amount of the tax assessed and the amount of the school expenses for the year very nearly coincide, it would seem that it had.

Nor does it appear that the money was not needed for future expenses as fast as it was realized from the tax. The holdings that, under such a vote as this, the tax should not be assessed until the money is required, do not mean that it should not be assessed until the very day the money is required for use. The committee has a right to anticipate the wants of the district in this behalf by a reasonable time, and to assess the tax long enough beforehand to enable the money to be realized from it; and here it appears to have been paid out about as fast as collected and paid in.

Judgment affirmed.

Hannah BARNES and James J. Wilson
v.

L. B. DOW, Helen Dow, Smith Hodges, and
Henry Gifford.

Cross-Cause: Smith HODGES v. L. B. and
Helen DOW, Henry Gifford, J. J. Wilson,
and Hannah Barnes.

Cross-Cause: Henry GIFFORD, Admr. of J.
E. Morse's Estate v. L. B. and H. DOW,
Smith Hodges, J. J. Wilson, and Hannah
Barnes.

1. A beneficiary under a will, who is entitled to a life support out of an estate held by a trustee, has no power to mortgage the estate; and a mortgage executed by such beneficiary and the remainderman is valid only as against the latter, except so far as it secured money used in paying debts resting on the estate.
2. The testator gave by his will a life support to his sister, and secured it by a devise of his estate in trust to his executor, and the remainder to D, his nephew, thereby creating an active trust. The legatees executed a mortgage of the trust property to H to secure a note for money, a part of which was used in paying the debts of the estate. The sister brought a bill, alleging a failure to support, and asking for a foreclosure; the executor having deceased, his administrator brought a cross-bill, claiming a balance due from the estate; and H answered, and also filed a cross-bill, making the legatees and others defendants, praying for a foreclosure. Held, that H, having notice of the trust, was not an innocent purchaser; that he could not invoke the doctrine of subrogation; and that the beneficiary could not alienate the trust property, but that the mortgage should stand security for so much of the money as went to pay the debts of the estate.
3. In a case involving the allowance of the account of a deceased trustee, whose administrator was orator in a cross-bill in which the succeeding trustee and two legatees, one a beneficiary having a life support and the other a remainderman, were defendants, the remainderman was incompetent, under the statute (Rev. Stat. §§ 1001-1003), as a witness, in his own behalf, to disprove such account.
4. Memoranda in the day-book of one deceased, and in his handwriting, are not admissible in favor of his estate.
5. Equity has jurisdiction, although there is pending in the county court, on appeal from the probate court, a cause between the same parties and involving the same accounting; for (a) the account has equitable trusts attached to it; (b) the defendant prayed for an accounting in his cross-bill, and, having invoked the aid of chancery, he should not be heard to deny its jurisdiction; (c) the question was raised only by suggestion in argument; and (d) where a party is obliged to resort to chancery for one purpose, the court will retain and dispose of the whole matter.

(Windsor—Filed July 13, 1887.)

BILL in chancery. Decree reversed.
B Heard below on a bill, cross-bills, answers,

replications, concessions, master's report, and exceptions thereto. May Term, 1885, Windsor County, Taft, *Chancellor*.

It was decreed that the original cause be dismissed, as to Hodges, with costs; and that the orator have decree against the defendants in accordance with the prayer of the bill. In the cross-cause of *Hodges v. Dow et al.*, decree for the orator, with costs. In the cross-cause of *Gifford, Admr. v. Dow et al.* it was decreed that there was due from the estate of James Morse to Wilson, trustee, the sum shown by the master's report; and that the same be paid with costs. It was further adjudged that the said Hannah Barnes should have a lien upon the personal property belonging to the Barnes estate in the hands of Wilson, as against the said Dow and wife, in the sum of \$389, named in the report, and interest thereon. The orators in the original cause, and Gifford in all the causes, appealed. The bill, as originally drawn, was in favor of Hannah Barnes against Lewis B. Dow and wife and Smith Hodges, complaining that she had not been properly supported in accordance with the will of George Barnes, and asking for a foreclosure unless she was so supported. After the case had been entered in court, Henry Gifford, as administrator of James Morse, entered as a party defendant, and claimed that there was a large balance due the estate of Morse, as executor of the last will and testament of George Barnes; and filed his cross-bill to have the same paid out of the estate. James J. Wilson was appointed December 5, 1883, by the probate court, a trustee under the provisions of his will, in place of James Morse, deceased; and said Wilson asked and was granted leave to enter as co-orator. Dow and his wife, Helen Dow, answered that Hannah Barnes had been properly supported; but admitted that the facts as to giving the mortgage to Hodges were substantially as alleged by him in his cross-bill. Hodges also answered and filed a cross-bill, setting forth that on August 17, 1878, he loaned \$900, at the request of Morse and Dow and Hannah Barnes, upon a mortgage signed by Lewis B. Dow and Hannah Barnes; that said money was obtained from him by representation and assurances that it was to be used to pay debts due from the estate of said Barnes; that Hodges understood that he should have the first lien upon said real estate; that it was supposed that the note signed by Dow and the mortgage signed by said Dow and Hannah Barnes constituted the first lien and incumbrance upon said real estate; and, further, that the money was used in paying claims allowed against said George Barnes's estate; and praying that the money so advanced by Hodges be declared the first lien upon said real estate, for foreclosure, and also for general relief. It was agreed by all the parties before the master that any amendment, answer, or cross-bill necessary to equitably adjust all matters between them might be filed at any time, and that the court might hear and determine the same as if they were already filed.

It appeared from the report of the special master that George Barnes deceased in the month of December, 1876, leaving a will dis-

posing of his estate, both real and personal, as follows:

"2. I give, devise, and dispose to my nephew, Lewis A. Dow, and his heirs, all of my effects and estate, both real and personal, except the support of my sister, Hannah Barnes, during her lifetime, and I give my estate in trust of my executor.

"3. I give to Hannah Barnes, my sister, her support, during her natural lifetime, out of my estate.

"And I do hereby appoint James E. Morse, of Royalton, Vermont, to be the executor of this my last will and testament."

Said will was duly probated and allowed, and said Morse accepted said trust as executor. James E. Morse settled his administration account with the estate February 13, 1883, and died in the month following. Henry T. Gifford was appointed administrator of the estate of said Morse. December 5, 1883, James J. Wilson was appointed trustee under said will.

April 7, 1885, Wilson, as trustee, petitioned the probate court for a rehearing and correction of the account of Morse as executor of the Barnes estate. The matter was heard in probate court, and judgment and decree rendered therein, from which Wilson appealed to the county court; which appeal is now pending.

The special master reported that he found two subjects of contention before him; one in relation to the giving a mortgage by Lewis B. Dow and Hannah Barnes to Smith Hodges. In respect to this, it appeared that a short time before August 17, 1878, said Morse as executor claimed to desire to raise \$800 to pay claims allowed against the estate of George Barnes. He consulted with Dow as to the matter, and they concluded that the whole estate of George Barnes, after payment of the debts, belonged to the said Dow, subject to the support of the said Hannah Barnes; and that the desired amount of money could be raised on a note given by Dow and secured by a mortgage on the farm owned by said Barnes at his death; and that the mortgage should be executed by said Dow and Hannah Barnes.

As a result of these negotiations, on the said 17th day of August, 1878, Hodges let Dow have \$900, and received his note for that sum, payable August 16, 1882, with interest annually. The said Dow and Hannah Barnes on that day executed a mortgage to said Hodges to secure the payment of this note. Morse was one of the witnesses to this mortgage. Hannah Barnes was at first unwilling to sign said mortgage, but when told by Morse that it was to raise money to pay the debts of George Barnes's estate, and that the real estate was charged with that burden, and that it would make no difference to her, she executed the mortgage. She was advised to the same effect by the town clerk. Morse wrote the mortgage. Hodges was not present when the mortgage was executed, and never had any talk with Hannah Barnes in relation thereto. Of the money raised by this mortgage, \$496 were handed to Morse by Dow. Out of the remainder Dow paid debts of the estate, amounting to \$176.63, and also \$35 for a burial casket in which George Barnes was buried. The total amount of debts thus paid by Dow to Morse and on the claims,

amounted to \$706.65. In addition to this sum paid by Dow, he paid to one N. M. Russ a bill of \$69.50 on a store account which Russ had against him for goods furnished and used by Dow on his said farm and in his family while Hannah was a member of it and receiving her support from him under the will. Dow also paid to one Cross, for work on the farm the same year, the sum of \$69.55. The balance of the \$900 raised by said mortgage was used by Dow to buy a pair of oxen which he used on the farm. No payment on the mortgage note has ever been made.

It appeared that Dow lived on this farm from and after the death of the said George Barnes, and that Hannah Barnes lived with and was supported by him until trouble arose and she left. The personal estate of the said George Barnes was inventoried at \$2,805.85. November 4, 1878, Morse turned over to Dow personal property belonging to the estate which was in Morse's hands at the time of the execution of the mortgage to Hodges. December 10, 1883, Wilson, as trustee, took an inventory of certain personal property on the farm, amounting, according to his estimate, to \$394. The farming tools on the farm at the death of Barnes are still there, and their value equal to what it then was, namely, \$170.25. The debts were nearly or quite paid by November 4, 1878; and after that time, and up to the time when Wilson was appointed trustee, Dow managed the farm as his own. Dow had the use and possession of the farm and stock from the death of Barnes to the appointment of Wilson as trustee; and carried on the same, using the avails for the support of his family and Hannah Barnes, while she lived with them, hiring help and paying it; and disposed of the avails for his own use except what he let Morse have. Morse had paid out for the estate, and had charges against it to the amount of \$1,288. He had at the same time received from the estate in cash about \$1,185. This did not include the personal property, amounting to \$814.87, which Morse afterwards turned over to Dow. Neither Hodges, Hannah Barnes, nor Dow knew how the account between Morse and the estate stood on August 17, 1878. When the mortgage was executed, said Hodges, Dow, and Morse understood that Hodges was getting the first lien on the real estate. All that Hannah Barnes knew about it was what Morse and the town clerk had told her,—which was that the mortgage would not affect her if Morse's representations were true.

Another subject of contention before the special master was the account of Morse as executor. The account, as examined and allowed by the probate court in February, 1882, showed a large balance due Morse from the Barnes estate. It was claimed by Wilson, trustee, as above, and by Hannah Barnes and by Smith Hodges, that the account was erroneous, and if corrected would show a balance due from the Morse estate to the Barnes estate. The master found several items, which he specified, which should have been credited to the Barnes estate. The result of his finding was to bring the Morse estate in debt to the Barnes estate. The solicitor for Gifford, administrator of the Barnes estate, objected to any hearing as to the correctness of said Morse's ac-

count as executor, as said appeal to the county court was then pending. The master overruled the objection, and Gifford excepted. Said Dow, who was defendant in the original action and the cross-bills, was used as a witness in his own behalf and in behalf of Wilson, trustee, who had become a party to this suit. Mr. Gifford, administrator, objected to his testifying to anything transpiring prior to the death of Morse. The objection was overruled, and Dow was allowed to testify generally and particularly as to what took place at the settlement of Morse's administration account at the time it took place in the probate court; to which Mr. Gifford excepted. One James Barnes had an account against the estate of George Barnes, which was allowed by the commissioners, and which Morse charged the estate for paying; and it was claimed by Mr. Wilson that the claim was paid by said Dow and should not be charged in the account. At the hearing, Dow was asked by Mr. Wilson who paid the claim allowed by the commissioners to James Barnes. The witness answered that he paid it; to which question and answer Gifford objected. Similar questions were asked as to two other similar items, to which like answers were made, also against the objections and exceptions of Gifford. Dow was further asked by Mr. Wilson what was said to him by said Morse in relation to his paying claims against the estate. To this question Gifford objected and excepted. The answer was that "he told me, if there were any claims, I could pay them and take a receipt for them; it would save him the trouble of going around." Under like objections and exceptions Dow was allowed to testify at great length in respect to his dealings with Morse, as executor, and the property of Barnes, prior to the decease of Morse.

In the progress of the hearing on the part of Gifford as to item 11, he produced a book claimed to be in Morse's handwriting, and which he called his day-book. The master so found. The following two entries in said book were offered in evidence, but were excepted to. 1. "Signed note with Dow to Bank—200—he had. The money to pay Hannah Barnes's commissioner's account allowed; and I paid the note except what money I got from M. S. Adams for lumber." 2. "See Dow about bank note, which money he had to pay Hannah, and I paid note." The first of said entries appeared on the book under date of November 4, 1878. The second under date of December 28, 1878.

It was agreed that the estate of George Barnes failed to support Hannah Barnes agreeably to the provisions of said will, for the years 1880, 1881, 1882, and until December 12, 1883, and that the support so withheld was worth \$389; and that, although a portion of the support was withheld since the commencement of this suit, the court could adjudge that said Hannah should have a lien on the money and personal property in the hands of the trustee, Wilson, for security of the payment of said sum by said Dow; or make such further order as the case may require.

Mr. J. J. Wilson, for orators in the original bill:

The court having jurisdiction of a portion

of the matters in controversy, will retain and dispose of the whole case. The defendant Gifford, on the ground that his testator, Morse, is dead, objects to Dow as a witness. To exclude a party to the record as a witness, it must appear that he is a party to the original contract or cause of action in issue and on trial.

Shailer v. Bumstead, 99 Mass. 112; *Morse v. Low*, 44 Vt. 561.

In this case Dow and wife, Hodges, Hannah Barnes, and Wilson were all legal witnesses in the accounting between the estate and Morse in the probate court; but now they claim that Gifford, by his cross-bill, and by the aid of the statute, has disqualified them all. The object and intent of the statute was not to prevent everyone who might be a party to the suit from being a witness, but was intended to prevent the surviving party to the contract or cause of action in issue and on trial from testifying when the other party to the contract or cause of action in issue and on trial could not testify.

Thrall v. Seward, 37 Vt. 579; *Fitzsimmons v. Southwick*, 38 Vt. 514; *Benoir v. Paquin*, 40 Vt. 199; *Hollister v. Young*, 41 Vt. 160; *Walker v. Taylor*, 43 Vt. 616; *French v. Barron*, 49 Vt. 471.

The contract in issue, about which Dow testified, was raised by Gifford's cross-bill and the answers thereto of Barnes and Wilson. The contract in issue was, Did the Barnes estate owe the Morse estate?—or, to be more precise, Was there an implied contract that the Barnes estate should pay the Morse estate the three claims named in said report? Dow was not a party to that contract or cause of action. No amount of interest in Dow could disqualify him as a witness. The only possible parties to that contract were the Morse and the Barnes estates. The issue on trial was, Was there an express or implied promise from the Barnes estate to pay Morse the three claims named in said report? The questions asked Dow were: "Who paid the three claims?" and, "What did Morse say about it?"

Downs v. Belden, 46 Vt. 677; *Morse v. Low*, 44 Vt. 561; *Cole v. Shurtliff*, 41 Vt. 811; *Manufacturers Bank v. Scofield*, 39 Vt. 591; *Cheney v. Pierce*, 38 Vt. 528; *Taylor v. Finley*, 43 Vt. 81.

Parol memoranda in a passbook or elsewhere are not admissible as independent testimony.

Lapham v. Kelly, 35 Vt. 195; *Jewett v. Winship*, 42 Vt. 204; *Cross v. Bartholomew*, 42 Vt. 206; *Parria v. Bellows*, 52 Vt. 353.

The testator's intention is evident, as shown by the will. He intended to provide a support for his sister during her life. The residue of his estate was to go to his nephew. He intended to make his sister's support sure, so he conveyed his whole estate to his executor in trust. The title of the estate was in the trustee.

Holdship v. Patterson, 7 Watts, 551; 8 Watts & S. 330; *Swift*, Dig. 121.

Neither trustee nor the *cestui que trust* could divert this property from the appointed purposes.

1 Perry, Tr. § 386; *White's Exrs. v. White*, 80 Vt. 388; *Van Amee v. Jackson*, 35 Vt. 178; *Perkins v. Hays*, 8 Gray, 405.

This same doctrine is held in *Whiting v. Whiting*, 4 Gray, 237; *Hall v. Williams*, 120 Mass. 345; *Broadway Nat. Bank v. Adams*, 133 Mass. 170; *Foster v. Foster*, 133 Mass. 179; 105 Mass. 423; 59 Pa. 396; and 47 Pa. 113.

The trust fund was not attachable.

Keyser v. Mitchell, 67 Pa. 473; *Vaux v. Parks*, 7 Watts & S. 19; *Locke v. Mabbett*, 3 Abb. App. 69; *Wetmore v. Truslow*, 51 N.Y. 883.

Hodges could not invoke the doctrine of subrogation.

Royalton Nat. Bank v. Oushing, 53 Vt. 337; *Shield*, Subr. 1240; 40 Vt. 408.

Messrs. D. C. Denison & Son, for Gifford.

The master erred in hearing the question of the correctness of Morse's account. This question is for the probate court, and trustee has applied to that jurisdiction for relief, and has taken this question to the county court by appeal, where said cause is now pending.

Glastenbury v. McDonald, 44 Vt. 450.

No court will interfere with a judgment of another of competent jurisdiction. The master erred in admitting defendant Dow as a witness. Dow was offered as a witness in his own behalf and in behalf of Wilson, trustee, both parties to this suit, and was admitted. He is one of the parties claiming that Morse's account should be corrected. This very thing is the matter in issue and on trial; and the result of this testimony directly affects Morse's estate. The cause of action in issue and on trial is the account of J. E. Morse, executor of George Barnes. Dow is a party thereto, and by this statute is excluded.

Rev. Stat. § 1002; *Woodbury v. Woodbury's Est.* 48 Vt. 94; *Cole v. Shurtliff*, 41 Vt. 811; *Pember v. Congdon*, 55 Vt. 58; *Hollister v. Young*, 41 Vt. 156; *Jewett v. Winship*, 43 Vt. 204; *Manufacturers Bank v. Scofield*, 39 Vt. 591; *McKellop v. Jackman*, 50 Vt. 57; *Blair v. Ellsworth*, 55 Vt. 415; *Fitzsimmons v. Southwick*, 38 Vt. 509, 515; *Johnson v. Daxter*, 37 Vt. 641.

Mr. William E. Johnson, for Hodges, and Dow and wife:

We claim that, under the will, the legal title was in Lewis B. Dow. The gift is absolute in its terms, and a subsequent clause repugnant thereto is void. If we are right on this point, then the mortgage is valid without doubt. But if the court should think that the legal title, by the terms of the will, was in Morse, the executor, then we claim the mortgage valid. It is certain that the trustee and the *cestui que trust* together could mortgage or convey the premises (*Powall v. Myers*, 16 Vt. 414; *Flint v. Steadman*, 36 Vt. 211), that is, the trustee, with the consent of the *cestui que trust*, could convey. The act must be the act of both. Now what difference does it make in equity when both assent, and do that which all suppose is a sufficient act, intending to convey the trust property by a mortgage? In this case Morse, the trustee, and Hannah Barnes, with Dow, meet, and all do that which they suppose puts a first lien on the real estate, and they so intend and desire to do. Relief is granted not only against the original parties to the contract, but against all claiming under them in privity—heirs, devisees, etc.

Adams, Eq. § 168, note 2; *Beardsley v. Knight*, 10 Vt. 185.

Equity will grant relief when both parties intended to have an instrument prepared in one form, and by means of some omission it was prepared in another.

Adams, Eq. § 170. See the case of omission to affix seal to a bond (*Rutland v. Paige*, 24 Vt. 181); or omission to make a bond payable to the obligor's assignees (*Smith v. Wainwright*, 24 Vt. 97, 111).

Equity often grants relief against pure mistakes of law.

1 Story, Eq. §§ 118, 121, 138, and note.

Morse and Mrs. Barnes are estopped.

Bigelow, Estop. 434.

Whether the instrument is strictly a mortgage or not, it is an appropriation of the real estate for the payment of this debt of Hodges, and courts of equity will carry out the intention of the parties by making the property holden.

Frary v. Booth, 37 Vt. 90.

The debts due from the Barnes estate were, of course, a first claim, and stood prior to the rights of Dow or Hannah Barnes. In the same claim also must stand the expenses of carrying on the farm, and the support of Hannah Barnes. This money of Hodges's went to pay these claims. Now the orators want the benefit of all the property of the estate and of having their debts paid by Hodges's money, and at the same time are to be relieved from paying Hodges back his money. This seems to Hodges to be wicked.

Veasey, J., delivered the opinion of the court:

It seems plain, from the language of the will as a whole, that it was the intention of the testator to provide a life support for his sister Hannah out of his estate, and to secure it by a devise of his estate in trust to his executor, and then to give the remainder to his nephew, Lewis B. Dow. The language is awkward, but the meaning is clear. The devise to Dow and to the executor would be inconsistent, but for the exception in behalf of Hannah in the devise to Dow, followed by the direct gift to Hannah in the same paragraph. It created an active trust in the executor for special use, viz., the support of Hannah during her life; and that was to be the end of the trust. The provision is: "I give to Hannah Barnes, my sister, her support during her natural lifetime out of my estate." There was no limitation to income. It was a gift of support. The gift to Dow was the estate except this support. There was nothing for him except what was left after the support. The trust in the mean time was not to him, but to the executor. The legal title pending the trust could not be in both. Unless it was in the executor as trustee there was no trust; yet the form of the gift to Hannah necessitated a trust. We think the language of the will imports an unmistakable intention of a permanent and indefeasible provision for a life support of Hannah out of the estate. This intention could not be carried out without upholding the clause which put the legal title in the executor in trust. Dow, therefore, could make no conveyance to affect the title until the trust terminated. The object

of the gift to Hannah was such as to exclude the idea of alienation on her part. A life support must be as lasting and continuing as life. It was, in amount, indefinite and indeterminate. Hodges does not stand as an innocent purchaser, as he had notice of the trust.

This case, as we construe this will, comes within a recognized and settled exception to the general rule that the law does not allow property, whether legal or equitable, to be fettered by restraints upon alienation. The rule constituting the exception is thus formulated by Perry in his work on Trusts: "But a trust may be so created that no interest vests in the *cestui que trust*; consequently such interest cannot be alienated; as, where property is given to trustees to be applied in their discretion to the use of a third person, no interest goes to the third person until the trustees have exercised this discretion. So, if property is given to trustees to be applied by them to the support of the *cestui que trust* and his family, or to be paid over to the *cestui que trust* for the support of himself and the education and maintenance of his children. In short, if a trust is created for a specific purpose, and is so limited that it is not repugnant to the rule against perpetuities, and is in other respects legal, neither the trustees, nor the *cestui que trust*, nor his creditors or assignees, can divest the property from the appointed purpose. Any conveyance, whether by the operation of law or by the act of any of the parties, which disappoints the purposes of the settlor by diverting the property or the income from the purposes named, would be a breach of the trust. Therefore it may be said that the power to create a trust for a specified purpose does, in some sort, impair the power to alienate property." 1 Perry, 2d ed. § 886 a. See cases cited in note 3, and in the brief of the trustee on this point.

Sharswood, J., in *Rife v. Geyer*, 59 Pa. 396, says: "Wherever it is necessary for the accomplishment of any object of the creator of the trust that the legal estate should remain in the trustee, then the trust is a special, active one;" and it was there held that a benefactor has the power, by means of a trust, to restrict his bounty so that it shall not be liable to the debts, control, or engagements of the beneficiary. A trust of this nature is of necessity an active trust, requiring the legal title to be vested in the trustee.

If it appears from the will that it was the intent of the testator that the beneficiary should have nothing that she could dispose of, it will be as effectual to protect the trust as if there was an express clause against alienation. *Keyser v. Mitchell*, 67 Pa. 473; *Perkins v. Hays*, 3 Gray, 405.

Neither can a creditor of a beneficiary, standing as Hannah Barnes does in this case, reach his or her interest. *Van Ames v. Jackson*, 35 Vt. 173; and see cases cited in trustee's brief.

The defendant Hodges is in no situation to invoke the doctrine of subrogation, as he was simply a volunteer, and without any special agreement binding upon the trustee and beneficiary so far as related to the property. *Royalton Nat. Bank v. Cushing*, 53 Vt. 321.

The question is not what would be equitable as between the beneficiary and the mortgagee,

but as to the right of the beneficiary to alienate the property so as thereby to defeat the trust. This trust could be defeated only by a sale by the trustee to a purchaser without notice of the trust, and this would impose a personal liability on the trustee. The settlor impressed upon his own property a trust quality, for a purpose legal, commendable, and without wrong to anyone, and died. His death closed the door to any such invasion of his purpose as this case shows was attempted.

As an attempt to convey the property by the beneficiary to a party with notice of the trust, the transaction must fail, and it can stand only as against Dow and his interest.

But the debts against the Barnes estate were prior to any right of the legatees, and were chargeable against the estate; therefore, in so far as the money borrowed of Hodges went to pay the debts which Morse as executor was bound to pay, it would be just that Hodges should be reimbursed. This money was borrowed by Dow at the instance of Morse and with the assent of Hannah Barnes, to be applied in payment of debts, and was loaned by Hodges for this purpose, all parties apparently acting in good faith, and the money was to large extent thus appropriated. As the estate got the benefit of the money in part in the discharge of the trust by Morse, and without detriment in any respect, it should be returned to the lender to the extent that it relieved the estate. The estate should not be enhanced at the expense of Hodges, who acted in good faith. By returning the money to Hodges, to the extent that it benefited the estate by going into the hands of the executor and being used and accounted for by him, or being used by Dow, with his assent, in behalf of the estate, the trust is not depleted, and the estate is left as it would have been if the money had not been borrowed. By this the beneficial purpose of the settlor will not be defeated, and no wrong done to anyone.

The balance of the \$900 borrowed was used by Dow. He claims it also went to the benefit of the estate, but we do not think this so clearly appears as to warrant making it a charge against the estate.

Another subject of contention before the master, and here, was in reference to the correctness of Morse's account as executor of Barnes' estate. Morse had died, and Gifford was the administrator of his estate, and presented Morse's account as executor before the master. Dow was improved as a witness in his own behalf and in behalf of Wilson, trustee. Gifford seasonably objected to Dow's testifying to anything that transpired before the decease of Morse. The objection was overruled, and Dow was allowed to testify that he paid certain items of charge against the Barnes estate in Morse's administration account, in pursuance of an arrangement to that effect with Morse, to which Gifford excepted.

Our statutes first provide that interest shall not disqualify a witness; then that where "one of the original parties to the contract or cause of action in issue and on trial is dead, * * * the other party shall not be admitted to testify in his own favor, except," etc.; also "when an executor or administrator is a party, the other party shall not be permitted to testify in his

own favor unless," etc. Rev. Laws, §§ 1001-1008.

It is insisted that the testimony of Dow was not upon a contract or cause of action in issue and on trial, but was upon a collateral question; therefore Dow was a competent witness.

The general question in issue and on trial in this branch of the case was this: What items in Morse's account as executor should be allowed? It was a contention primarily between the two estates, but Dow had come into it as a party, and was interested in the result. Dow testified that certain items of charge for cash paid on claims allowed against the Barnes estate were paid by him; and this was offered for the purpose of having them disallowed. If Morse paid them they should stand. If Dow paid them they should be cut out. Morse was dead. If the question was collateral, then Dow was a competent witness, as repeatedly decided in this State.

It has been held that the words "contract in issue," as used in the statute, mean the same as contract in dispute or in question, and relate as well to the substantial issues made by the evidence as to the mere formal issues made by the pleadings. *Hollister v. Young*, 42 Vt. 403; *Pember v. Congdon*, 55 Vt. 58. It was undoubtedly the intention of the statute, after the disqualification of interest was removed, to preserve equality in evidence between parties to contracts, so that when controversies arose over them in court the representatives of a deceased party would stand on the same footing with the survivor. So it was held in *Farmers Mut. F. Ins. Co. v. Wells*, 53 Vt. 14, that the maker of a note could not testify to a payment to the payee while he was alive, though the latter had transferred the note before his decease to the plaintiff; and *Hollister v. Young*, 41 Vt. 156, was cited, wherein it was held that the assignee of a contract or cause of action, made or existing between the defendant and the deceased party, is entitled to stand upon that proviso of the statute against testimony of the surviving defendant, even though the estate or heirs of the deceased had no interest in the subject-matter of the suit. It has been repeatedly held in Missouri, and lately in *Meier v. Thieman*, 7 West. Rep. 141, that the words, "the other party," refer, and can only refer, to the other party to the original contract or cause of action, and not necessarily to the party to the record. Sherwood, J., thus says: "Whether party to the record or not, makes no difference as to the statutory incompetency of the witness: he is prohibited from testifying in his own favor in any case whatsoever where the other original party to the contract or cause of action in issue and on trial is dead. The letter of the statute makes no distinction as to the status of the witness on the record; the rule of his exclusion is as broad as the contract or cause of action in issue and on trial, and his testimony in his own favor. And the reason, policy, and spirit of the rule keep pace with its letter." On this point Wharton tersely says: "The reason of its exception is that where there is no mutuality there should not be admissibility; i. e., when the lips of one party to a contract are closed by death, then the other party should not be heard as a witness. * * * Much, however, as the statutes may differ in words,

they are the same in purpose. That purpose is to provide that when one of the parties to a litigated obligation is silenced by death, the others shall be silenced by law." 1 Whart. Ev. § 466.

Although this doctrine may not yet have been reached in our decisions, its justice and logic would seem to compel its ultimate adoption. But in this case all embarrassment on this point is obviated by the fact that Dow is a party to the record.

Dow not only testified to paying these items, but also to his arrangement with Morse that he should pay them. His testimony was: "He, Morse, told me if there were any claims I could pay them and take a receipt for them; it would save the expense of his going around." The evidence made a substantial issue between Dow and the Morse estate. There was no issue over the validity of the items. The question was as to whether Morse had paid them. The defense was that he had arranged with Dow to pay them, and that the latter had paid accordingly.

We think the cause of action in issue and on trial, as it took shape as to these items, was one in substance between Morse's estate and Dow, and that Dow was incompetent as a witness in his own favor.

That the master properly excluded the entries on Morse's book showing memoranda in his own favor is settled by numerous decisions. *Goddard v. Orcutt*, 44 Vt. 54; *Lapham v. Kelly*, 35 Vt. 195.

The objection to the court inquiring into the matter of Morse's account, owing to the pendency of the appeal in the county court from the allowance of the probate court, is not well taken. No question is made but that the consideration of this account is raised by the pleadings. No claim is urged that the settlement of the Morse account in his lifetime is conclusive. The only objection alleged is the pendency of the same matter on appeal in the county court. The appeal vacated the allowance of the probate court. *Lamoille Prob. Ct. v. Glead*, 35 Vt. 24.

The mere pendency of an action in one court is not in all cases a bar to another action for the same cause between the same parties in another court. *Stanton v. Embury*, 93 U. S. 548 [Bk. 23, L. ed. 983]; *Mut. L. Ins. Co. v. Harris*, 96 U. S. 588 [Bk. 24, L. ed. 787]; *Gordon v. Gilfoil*, 99 U. S. 168 [Bk. 25, L. ed. 833]. Many other cases could be added.

The court of chancery had jurisdiction of this cause, not on account of this feature of it, but on other grounds; and this feature is a mere incident, but necessary to be settled in order to a final relief between all the parties to the cause. Therefore, although the court of chancery does not interfere in the settlement of estates, as that pertains to the probate court, except in aid of that court, yet the case seems to come within the general rule that, where a party is obliged to resort to chancery for one purpose, that court will retain and dispose of the whole matter, although in some of its aspects a legal remedy exists. If there be doubt as to whether that rule is applicable, on the ground that the general limitation of the rule is to cases brought purely for discovery in first instance, we think it is cured here by the fact

that Gifford, in his cross-bill, prays for an accounting, and for general relief. Having invoked the aid of chancery he should not be heard to deny the jurisdiction. The objection was not raised by plea, but came as a suggestion in argument.

There is another rule tending to support the jurisdiction,—that where an account has equitable trusts attached to it, there is clear ground for equitable jurisdiction. Story, Eq. Jur. § 454.

Morse was trustee under the will, as well as executor, and his account covers both aspects of his administration, although in name it stands as his account as executor.

Decree reversed and cause remanded, with mandate.

Charles B. ROLLINS

v.

John K. ALLISON and Trustee.

1. When one claims that property is exempt from attachment by trustee process, it is incumbent on him to show it; it is not enough to prove that it is of the kind exempted by statute,—as a cow and hog.
2. Held, that in the present case the question as to whether such property was exempt from attachment was a proper one to be heard and determined by the commissioner.
3. It was discretionary with the court whether to allow counsel fees to the trustee or not.

(Orange—Decided August 6, 1887.)

TRUSTEE process. Heard on the report of a commissioner, June Term, 1885, Orange County, Rowell, J., presiding. Judgment on the report that the trustee is chargeable, and for the trustee to recover costs, except counsel fees, which are denied her. *Affirmed.*

The case is stated in the opinion.

Mr. John H. Watson, for the trustee:

That the trustee is not chargeable, see—

Rev. Laws, § 1556; *Parks v. Cushman*, 9 Vt. 320; *Clark v. Averill*, 31 Vt. 512; *Drake*, Attach. §§ 4, 461; *Rice v. Talmadge*, 20 Vt. 378; *Porter v. Stevens*, 9 Cush. 530; *Richards v. Stephenson*, 99 Mass. 311; *Wilcox v. Hawley*, 31 N. Y. 653; *Stevenson v. Marony*, 29 Ill. 532.

The property was exempt, unless it affirmatively appears that the debtor had another cow and swine.

Hastie v. Kelley, 57 Vt. 293.

The trustee should be allowed her counsel fees.

Rev. Laws, § 1158.

Messrs. Smith & Sloan, for plaintiff:

It should affirmatively appear that the property was exempt.

Bourne v. Merritt, 22 Vt. 429.

There was no error in disallowing counsel fees.

Perry v. Whitney, 30 Vt. 390.

Royce, Ch. J., delivered the opinion of the court:

The only question presented by the report of the commissioner is as to the liability of the trustee. The commissioner found that the trustee had certain articles of personal property in her possession, belonging to the principal defendant, at the time of the service of the writ upon her; and it is now claimed that the trustee should not be adjudged chargeable on account of the cow and hog, which formed a part of said property, for the reason that they were exempt from attachment under Rev. Laws, § 1556.

That section provides that the goods or chattels of a debtor, with certain exceptions, among which are one cow and the best swine, or the meat of one swine, may be taken and sold on execution. It does not appear that, upon the hearing before the commissioner, the trustee or defendant claimed that the cow and hog were exempt; but they rested their right to hold them upon the ground that they had been turned out to the trustee by the defendant to pay her for money she had before advanced to him. The question as to whether the property was exempt from attachment was a proper one to be heard and determined by the commissioner. It was not enough, to excuse the trustee from liability, to show that the property was of the kind that is exempted by the statute; she should have shown that it was in fact exempt. The same proof would be required to excuse the trustee from liability that would be required in a suit brought by the defendant against one who had wrongfully attached the property. In *Bourne v. Merritt*, 22 Vt. 429, it is said that if the plaintiff claimed that the property was exempt from the operation of the general law subjecting property to attachment and execution, it was for him to show it.

There was no error in refusing counsel fees to the trustee; it was discretionary whether to allow them or not.

The judgment is affirmed.

Vernon P. NOYES

v.

Edwin H. LANDON *et Ux.*

1. The law requires the utmost good faith from an **agent**, and he will not be allowed to make profit for himself in the transaction of the business of his **principal**; thus, if an agent purchases at a discount an outstanding draft against his principal, the discount enures to the benefit of the principal. And if, in such case, the principal, without a knowledge of the discount, gives his personal notes to the agent for the full amount of the draft, the consideration falls to the amount of the discount.
2. When such **notes** are transferred before due as collateral security for indorsements previously made, to one without notice, who is a *bona fide* holder, he takes them **discharged of all equities**; but otherwise, if they are transferred after they are due.
3. The defendant, being financially embarrassed, called on B to assist him in his difficulty, and agreed to pay him liberally for his time and expenses. B accordingly purchased the defendant's outstanding draft, and he gave B his notes in payment therefor. *Held*, that B was an **agent in purchasing the draft**.
4. Where one was financially embarrassed and employed another to assist him, and the value of the services was afterwards agreed upon and included in the amount of a promissory note,—*Held*, it was not **usury**.

(Chittenden—Filed August 5, 1887.)

BILL in chancery. Heard on a special master's report, September Term, 1886, Chittenden County, Taft, *Chancellor*. Decree that said Noyes held those notes (eleven in number), which had not matured at the time of the transfer to him of the same, in good faith and free from any equities existing between said Burton and said Edwin H. Landon; that as between said Burton and said Edwin H. there was a failure of consideration of said notes to the extent of the sum of \$855.17, as of the date of the original notes; that, as the latter-named sum is larger than the amount of the note that was overdue at the time the notes in question were transferred to said Vernon P. Noyes, it is considered that no recovery can be had for the overdue notes, and that a decree pass to the petitioner for the amount of the eleven notes, less the indorsements, with costs. *Affirmed*.

The facts on which the decree was based are stated in the opinion.

Mr. H. C. Adams, for defendants:

The transferee must have parted with something or some right upon the faith and credit of the security thus received, to be a holder for value.

Griswold v. Davis, 31 Vt. 390.

Nothing of the kind appears in this case, but the contrary.

Atkinson v. Brooks, 26 Vt. 569, holding that taking collateral security implies a binding promise to extend the time of payment, is overruled in *Austin v. Curtis*, 31 Vt. 64.

And the doctrine that when notes are taken "to be applied when collected" the transferee is not a holder for value, is approved in *Atkinson v. Brooks*, *supra*.

De la Chaumette v. Bank of England, 9 B. & C. 208; *Williams v. Little*, 11 N. H. 66; *Rice v. Raitt*, 17 N. H. 116.

Messrs. Farrington & Post, for orator:

Noyes was a *bona fide* holder, and not subject to equities, if any existed between Burton and Landon.

Swift v. Tyson, 16 Pet. 1 (41 U. S. bk. 10, L. ed. 865); *Atkinson v. Brooks*, 26 Vt. 569; *Brooklyn City & N. R. R. Co. v. Nat. Bank of the Republic*, 102 U. S. 14 (Bk. 26, L. ed. 61); *Straughan v. Fairchild*, 80 Ind. 598; *Sayles v. Garrett*, 110 U. S. 288 (Bk. 23, L. ed. 150).

The transfer before maturity of negotiable paper as security for an antecedent debt is not an improper use of such paper, and is in the usual course of commercial business.

1 Dan. Neg. Inst. §§ 184, 821.

Royce, Ch. J., delivered the opinion of the court:

It appears from the report in this case that, previous to May, 1865, the defendant E. H. Landon and one J. G. Rockwell had been in partnership in the business of buying and selling farm produce, and that in the course of their business they had drawn on Demorest & Simonds for \$5,055.17, and that the draft had been discounted by the Old Bank of Burlington; that Rockwell & Landon became financially embarrassed, and when said draft was about maturing they called on O. A. Burton, the payee of the notes hereinafter referred to, to assist them in their financial trouble, and agreed to pay him liberally for his time, trouble, and expense in so assisting them; that the liabilities of Rockwell & Landon were so arranged between themselves that it became the duty of Landon to pay said draft; that Burton, in the interest of Landon, endeavored to have the Bank of Burlington take the notes of Landon, secured by mortgage, in payment of said draft, which the bank declined to do; that June 10, 1865, Burton purchased said draft of the bank for the sum of \$4,200, which was \$855.17 less than the amount due upon it; that August 14, 1865, the parties met, and the question as to how much Burton was going to charge for his services, expenses, and trouble was talked over, and the interest was figured by Burton on said draft at its face value, and \$600, the amount charged by Burton to Landon as his proportionate share for his services, time, trouble, and expenses, was added, and Landon then executed his notes to Burton for the amount so found to be due, and secured the same by a mortgage that day executed by himself and his wife; that Landon did not then know that Burton purchased said draft at a discount of \$855.17, but supposed that he paid what appeared to be due upon it; that Landon and Burton had several meetings subsequent to that date and previous to January 17, 1882, at which the interest on said notes was computed and application of payments was made; that January 17, 1882, the parties again met, the interest was computed, and conversation was had about the entire transaction, and Landon then claimed that Burton charged him rather too high for his services in 1865, and something was said about making some deduction from the amount that appeared to be due; that Burton asked Landon what would be satisfactory to him, and he replied, "Throw off \$466.90, which will make it even \$6,000, and put it into twelve notes of \$500 each, payable yearly;" that Burton asked him if that would settle the whole matter, and he replied that it would, and thereupon the twelve notes and the mortgage sought here to be foreclosed were executed; that the \$855.17 discount obtained by Burton upon the purchase of the draft, and the \$600 charged by him for his time, trouble, and expenses, and the interest on the same, formed a part of the consideration for said notes; that said notes were made payable to the order of O. A. Burton, one January 17, 1883, and the rest yearly thereafter; that at some time previous to October, 1883, Noyes, the petitioner, had indorsed notes made by said Burton and payable to the Savings Bank at Burlington for \$19,000, and that

in May, 1885, he paid said notes; that in October, 1883, Burton turned over and transferred to said Noyes eleven of said Landon notes, and in the early part of the winter of 1884 the other of said notes, as collateral security for such indorsements; that Noyes notified Landon April 10, 1884, that he held said notes; and that Noyes had no notice of any claim by Landon that they were tainted with usury or fraud until March 20, 1885.

The defendants claim that the arrangement made with Burton in 1865 constituted him the agent of Rockwell & Landon, and that what he did in the purchase of the draft from the Burlington bank was done as their agent, and that the discount he procured, of \$855.17, enured to their benefit; and that inasmuch as that sum entered into and formed a part of the consideration of the note described in the mortgage, it, with the interest that has accrued upon it, should now be applied as payment upon said notes. The petitioner claims that in the purchase of said draft Burton was not acting as the agent of Rockwell & Landon; that the discount he procured was for his own benefit, and that he is not accountable to Landon therefor.

The first inquiry is whether the arrangement made with Burton created the relation of principal and agent. Rockwell & Landon were in financial trouble and applied to Burton to aid and assist them, agreeing to pay him liberally for his time, trouble, and expenses in so aiding and assisting them. Burton acceded to their request, and thereupon went to work with them and did what they thought was necessary to be done to extricate them from their financial troubles; and when his services were completed they paid him by including what he charged in the notes given to him.

Agency is founded upon a contract, either express or implied, by which one of the parties confides to the other the management or transaction of some business to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it. 2 Kent, Com. 611. To prove an agency it is sufficient to show that the principal employed the agent, and that the agent undertook the trust. That Burton understood he was employed is evident from the fact that he demanded and received pay for his services, and that as far as they were made acquainted with what he had done they adopted and ratified his acts. So Burton was, by virtue of what then transpired, constituted the agent of Rockwell & Landon to settle and arrange their financial matters. One of those matters was providing in some way for the draft that was about maturing, and which Burton purchased at a discount. In purchasing the draft, Burton acted as the agent of his principals, Rockwell & Landon, and the discount he procured was for their benefit. The law requires the utmost good faith from agents. The relation is one of trust and confidence, and an agent will not be permitted to make profit for himself in the transaction of the business of his principal. The law of the subject is well stated by Lord Cottenham in *Reed v. Morris*, 2 M. & C. 361, in the following language: "Why is an agent precluded from taking the benefit of purchasing a debt which his principal is bound to discharge? Because it is his duty, on behalf of

his employer, to settle the debt on the best terms he can obtain; and if he is employed for that purpose, and is enabled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he might make an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt he was employed to settle." The same rule is laid down in 2 Pom. Eq. Jur. §§ 901, 902; 1 Story, Eq. Jur. §§ 815, 816, and *Davis v. Smith*, 48 Vt. 269.

It appearing that neither Landon nor Rockwell knew that Burton procured the discount upon the draft until since the commencement of this suit, the consideration for the notes to the extent of the amount of that discount and interest on the same has failed.

It is further claimed that the \$600 claimed by Burton for his services, which was put into the note given by Landon in 1865, and which constitutes a part of the consideration for the notes given in January, 1882, should be treated as usury, or else as so extortionate that it should be disallowed. There is nothing found to justify the claim that it was usury, or that it was unreasonable or extortionate in amount. Landon knew at the first settlement made with Burton what his claim was, and gave his note for the amount. At the settlement made January 17, 1882, the subject-matter of the reasonableness of the claim was discussed between Burton and Landon, with full knowledge by Landon of the services performed, and it appears to have been settled and adjusted to Landon's satisfaction. He cannot now ask to have that settlement of this item reopened.

There being a want of consideration for the notes in suit to the extent above stated, as between the parties to the notes, the maker could have availed himself of that fact as a defense. That defense is equally available as against the note that was past due at the time it was transferred to Noyes. Whether it is any further available depends upon the character in which Noyes held the other eleven. They were current when transferred, and were transferred as security for his indorsements previously made. That a transferee can hold such notes in payment of or as security for an existing indebtedness, unaffected by any equities that may exist between the parties to them, growing out of the note transaction, seems to be well settled. *Swift v. Tyson*, 16 Pet. 1 [41 U. S. bk. 10, L. ed. 865]; *Brooklyn City & N. R. R. Co. v. Nat. Bank of the Republic*, 102 U. S. 14 [Bk. 26, L. ed. 61]; *Brush v. Scribner*, 11 Conn. 388; *Tarbell v. Sturtevant*, 26 Vt. 513; *Atkinson v. Brooks*, Id. 569; *Austin v. Curtis*, 31 Vt. 64; *Byles, Bills*, 198; *Story, Bills*, §§ 191, 192.

It was held in *Williams v. Smith*, 2 Hill, 301, that one to whom a promissory note has been transferred before due as collateral security for indorsements to be made by him, which are afterwards made, and who takes it without notice of a defense existing against it in the hands of the person from whom he received it, is entitled to be treated as a *bona fide* holder in the commercial sense. See also *Story, Prom. Notes*, 7th ed. 186.

The indorsements made by Noyes were made before the transfer of the notes to him, and he

paid the notes so indorsed pending this suit; and while it is not found that Burton agreed to transfer them as security for his indorsements, it is fairly presumable that the transfer was made in pursuance of such an agreement, and that Noyes relied upon this promised security as the condition upon which he made the indorsements. We are unable to see any reasonable distinction that can be made between taking collaterals as security for an existing indebtedness and an existing liability. In the one case the liability is certain and fixed, and in the other it is contingent; and there would seem to be the same justice in permitting one to obtain and retain securities for his protection in the one case as in the other.

There has been great diversity of opinion among courts and law writers in defining who are *bona fide* holders of negotiable paper, and as to the protection they are entitled to; but since such paper has become so important a factor in the transaction of business, the disposition of courts generally has been to encourage its circulation and use, and to afford all reasonable protection to those who have obtained it in good faith. Landon made his notes negotiable, and thus put it in the power of Burton to transfer them; Noyes received them without notice of any defense that could be made to them. If either one must suffer, the loss should fall upon Landon; for "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." *Lickbarrow v. Mason*, 2 T. R. 63.

Among all the reported cases—and I have made quite diligent search—I have not been able to find one closely resembling this in all its facts. None of the cases to which we have been referred by the learned counsel have presented the question of the transfer of current notes to secure an indorsement previously made. But in view of the general rules that prevail and are applicable for the protection of *bona fide* holders of current negotiable paper, we conclude that Noyes obtained a title, discharged of all equities, to the eleven notes that were transferred to him while current, and that Landon's defense is only applicable to the note that was past due. It will be seen by a careful examination of the cases referred to in 26 and 31 Vt. that the questions decided in those cases are not at variance with the views here expressed.

The decree of the Court of Chancery is affirmed, and cause remanded.

Luvia A. LYMAN, Admx.,

v.

CENTRAL VERMONT R. R. CO.

1. When the same party is receiver of one railroad and lessee of another, and both are operated by him together, the leased road is not receivership property; and an employee can maintain an action at law against him, without leave of the court of chancery, to recover for injuries resulting from the negligence of his servants in operating the leased road.

2. Such action is also maintainable although the defendant is receiver instead of lessee of the railroad where the injury occurred.
3. In such cases it is not a question of jurisdiction in the courts of law, but only whether equity, on application of the receiver, will exercise its own jurisdiction of restraining suits. And if equity interposes, the injunction is *in personam*, directed to the party, but not to the court.
4. A plea to the jurisdiction is the first plea in the regular order of pleading; and it is waived when filed with the general issue.
5. A plea to the jurisdiction is defective that professes to answer the cause of action as a bar, and concludes with a prayer for judgment if the plaintiff ought to have or maintain his action.
6. A plea that amounts to the general issue acknowledges the jurisdiction of the court.
7. A mere argumentative denial of a material averment in the declaration amounts to an admission of its truth.
8. The decisions of the United States Supreme Court, though entitled to the highest respect, are controlling upon State courts only in cases affecting rights under Federal cognizance.
9. *Barton v. Barbour*, 104 U. S. 126 (Bk. 26, L. ed. 672), distinguished and criticized.

(Rutland—Decided August 15, 1887.)

ACTION on the case. Heard on demurrer, September Term, 1884, Rutland County, Vezzey, J., presiding. Judgment *pro forma* that the demurrer to the defendant's special plea be sustained, and that the plea is insufficient. *Affirmed*.

The declaration was, in part, as follows:

"For that the defendant at, to wit, Shoreham, in the county of Addison, was the lessee of a certain railroad, known as the Addison Railroad, passing through said town, and as such lessee was and had long been operating and managing the same, and running locomotives and cars thereon, from, etc.; and the plaintiff's husband and intestate, Daniel F. S. Lyman, was an employee of the defendant, as master and tender of the drawbridge, forming a part of said Addison Railroad, over Lake Champlain; and as defendant's employee, in the discharge of his duty as its servant, frequently passed over said road, on his way to Rutland, in the county of Rutland, aforesaid, and return, upon the defendant's locomotives and cars, and thereupon it became and was the duty of the defendant to provide a suitable, safe, and sufficient roadbed and track, and to use due and proper skill, care, and diligence in providing a suitable, safe, and sufficient roadway for the passage of said locomotives and cars to and fro over said railroad.

"Yet the said defendant, disregarding and neglecting its duty aforesaid, did not then and there provide a suitable, safe, and sufficient

roadbed and track for the passage of said locomotives and cars to and fro over said railroad; but, on the contrary thereof, did negligently and carelessly provide a roadbed and track which was insufficient, unsuitable, and unsafe for the passage of locomotives and cars over the same, whereby and by means of the unsuitable, insufficient, and unsafe condition of said roadbed and track, a certain locomotive of the defendant, whereon said intestate was then and there riding, said intestate, having got upon said locomotive at a preceding stopping place of trains running over said road, for the purpose of being able to attend to his duties at said drawbridge without delay, when the same should be reached by said locomotive, according to the course of his said employment and in pursuance of his duties therein, was thrown from the track and thrown down the embankment of said railroad and thereby the said intestate was then and there instantly killed; that said intestate resided in Rutland, in said county of Rutland, and left surviving him a widow, the plaintiff, Luvia A. Lyman, and four children; and that said children constitute the next of kin of said intestate. Whereby the defendant became liable to an action for damages by force of the statute in such case made and provided, at suit of the plaintiff, as administratrix as aforesaid, for her benefit as widow of said intestate, and for the benefit of his said next of kin, to the damage of," etc.

Pleas, general issue:

"And for a further plea in this behalf the said defendant, by leave of court, etc., says that the said plaintiff ought not to have or maintain her aforesaid action thereof against the said defendant, because the defendant saith that at the time of the pretended injury in and by said declaration complained of, the said defendant was not in the possession of the railroad, engines, cars, or property in said declaration mentioned, nor controlling the same, nor the agents, servants, or employees engaged or employed on or about the same; but the defendant avers that, at the time aforesaid, and for a long time before and after, to wit, from the 1st day of January, 1874, continuously, down to the time of the beginning of this suit, said railroad, engines, cars, and property were in the sole and exclusive possession, management, and control, and each and all of the said agents, servants, and employees were in the sole and exclusive employment and control of the Central Vermont Railroad Company as receivers and managers of the Vermont Central and Vermont & Canada railroads, and property connected with and appertaining thereto, under and by virtue of a decree or order of the Honorable the Court of Chancery, within and for the County of Franklin, and State of Vermont, rendered on the 21st day of June, 1873, in a cause then pending in said court of chancery, entitled *Vermont & Canada Railroad Co. et al. v. Vermont Central Railroad Co. et al.*, and not otherwise.

"And this the said defendant is ready to verify. Wherefore the said defendant prays judgment, if the said plaintiff ought to have or maintain her aforesaid action thereof against the said defendant," etc.

Messrs. Noble & Smith, Stephen E.

Royce, and E. J. Ormsbee, for defendant:

The plea sets forth a perfect defense to the cause of action alleged in the declaration.

When the affairs of a railroad have passed into the hands of a receiver, who has exclusive charge of its management, possession of its property, and the employment of its operatives and employees, the receiver is liable (leave to sue him having been first obtained from the court by which he was appointed) for personal injuries sustained by reason of the negligent management of the road.

High, Rec. § 395; *Murphy v. Holbrook*, 20 Ohio St. 137; *Potter v. Bunnell*, Id. 159; *Ohio & M. R. R. Co. v. Anderson*, 10 Ill. App. 313; *Ohio & M. R. R. Co. v. Davis*, 23 Ind. 553; *Nichols v. Smith*, 115 Mass. 382; *Barton v. Barbour*, 104 U. S. 126 (Bk. 26, L. ed. 672); 23 Am. Law Reg. 590, note.

The receiver is thus liable, not personally, but in his official capacity; and the damages recovered are collectible only out of the funds held by him as receiver.

Camp v. Barney, 6 Thomp. & C. 622; *S. C. 4 Hun*, 373; *Hicks v. R. R. Co.* 18 Rep. 479; *Murphy v. Holbrook*, *supra*; *Klein v. Jewett*, 26 N. J. Eq. 474; *Jordan v. Wells*, 3 Woods, 527; *Kennedy v. R. R. Co.* 11 Cent. L. J. 89; *Davis v. Duncan*, 23 Am. Law Reg. 582.

It follows as a corollary from the above, and is so adjudged upon principle and authority, that since the receiver is thus liable for injuries resulting from his negligence to the same extent that the company itself might have been, the corporation is not liable for the negligent acts of the receiver, or his agents or employees.

High, Rec. § 396; *Pierce, R. R.* 285; *Ohio & M. R. R. Co. v. Davis*, *supra*; *Bell v. Indianapolis, C. & L. R. R. Co.* 53 Ind. 57; *Metz v. Buffalo, C. & P. R. R. Co.* 58 N. Y. 61; *Rogers v. R. R. Co.* 17 Cent. L. J. 290; *Davis v. Duncan*, *supra*; *Turner v. Hannibal & St. J. R. R. Co.* 74 Mo. 602.

The fact that the defendant was receiver may be given in evidence under the general issue, and constitutes a perfect defense.

Ohio & M. R. R. Co. v. Davis, 23 Ind. 553.

That fact, being pleaded in this case, stands admitted by the demurrer, and is conclusive of the plaintiff's right under the declaration.

Rogers v. Mobile & C. R. R. Co. 16 Rep. 536.

Nothing appears in the pleadings here to show that the defendant and the receiver are identical, and nothing even indicates or implies it, save the bare fact of identity in name. This, standing alone, would have only slight, if any, tendency to prove the fact.

Hardland v. Windsor, 29 Vt. 354.

In the case of a natural person, the law necessarily keeps up just as sharp a distinction between his personal liabilities and his liabilities incurred purely in a representative capacity, as if there were two persons instead of one.

The declaration is: "You were my master and I your servant. You were negligent," etc. The plea is: "I was not your master, and therefore could not be negligent, etc. The relation did not exist. You were the servant of A. B. receiver." The liability, if any, does not exist against any person or corporation,

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personally. It is simply a claim against a trust fund.

The above propositions are not at all in conflict with the decisions of this court in *Blumenthal v. Brainerd*, 38 Vt. 402, and *Newell v. Smith*, 49 Vt. 255.

Morse v. Brainerd, 41 Vt. 550, is not pertinent.

See High, Rec. 139; *Pierce, R. R.* 265; *Cardot v. Barney*, 63 N. Y. 281.

The declaration is bad in substance.

Pierce, R. R. 393; *Robertson v. New York & E. R. R. Co.* 22 Barb. 91; *Clark v. R. R. Co.* 15 Rep. 461.

It does not allege that the defendant owed any duty to plaintiff's intestate in respect of the running of locomotives or cars. It does not allege that the plaintiff's intestate was himself without negligence or fault, and in the exercise of reasonable care, or that he was himself ignorant of the defect or insufficiency in the roadbed or track which caused the injury. These were necessary allegations.

Maxfield v. R. R. 8 Am. Law Reg. 261; *Telfer v. Northern R. R. Co.* 3 Am. Law Reg. 665; *Wilds v. Hudson River R. R. Co.* 2 Am. Law Reg. 76; *Mangam v. Brooklyn City R. R. Co.* 1 Am. Law Reg. 631; *O'Brien v. Philadelphia, W. & B. R. R. Co.* 6 Am. Law Reg. 361; Id. 534; *Buzzell v. Lacomia Mfg. Co.* 48 Me. 113; *Shearm. & Redf. Neg.* § 94, note.

Mr. F. C. Swinington, for plaintiff:

The mere fact that the Central Vermont Railroad Company was acting as a receiver in chancery is no defense. From *Sprague v. Smith*, 29 Vt. 421, down to the present time, our courts have uniformly held that such a defense is not recognized to a suit in the common-law courts for the breach of any duty assumed by a receiver while acting as such.

Blumenthal v. Brainerd, 33 Vt. 402; *Morse v. Brainerd*, 41 Vt. 550; *Cutts v. Brainerd*, 42 Vt. 566; *Newell v. Smith*, 49 Vt. 255.

In *Newell v. Smith*, *supra*, when this question was last before this court, Judge Powers used this language, after stating the above proposition: "We have no occasion nor inclination to modify the doctrine heretofore announced by the courts upon this subject."

The courts of several other States have either followed the Vermont doctrine, or announced the same on this subject. Some of them are:

Paige v. Smith, 99 Mass. 395; *Ballou v. Farnum*, 9 Allen, 47; *Kain v. Smith*, 80 N. Y. 458; *Rogers v. Wheeler*, 43 N. Y. 596; *Murphy v. Holbrook*, 20 Ohio St. 137; *St. Joseph & D. C. R. R. Co. v. Smith*, 19 Kan. 225; 6 Rep. 331; *Allen v. Central R. R. Co.* 42 Iowa, 683; *Klein v. Jewett*, 26 N. J. Eq. 474; *Palys v. Jewett*, 39 N. J. Eq. 302; *Kinney v. Crocker*, 13 Wis. 80; *Hills v. Parker*, 111 Mass. 508; *Hopkins v. Connel*, 2 Tenn. Ch. 323.

Upon a careful examination of the above and other authorities upon this subject, it will be seen that they may be classified under at least three principal heads, viz.: (1) actions *ex contractu*; (2) actions *ex delicto*, for negligence of servants and agents; (3) actions for the personal wrong and negligence of the receiver himself. If the receiver can be held responsible in actions *ex contractu*; or, to go further, and hold him liable for the negligence of his servants and agents, as the above cases do, *a fortiori* he is

liable for his own personal wrong and negligence. That is this case.

3 Wood, R.R. 432; Jones, R. R. Sec. § 511; Cooley, Torts, 119; *Cardot v. Barney*, 63 N. Y. 281; *Camp v. Barney*, 6 Thomp. & C. 625; *Mersey Dock Cases*, 11 H. L. Cas. 443; *Duncan v. Findlater*, 6 Cl. & F. 901; *Hall v. Smith*, 2 Bing. 156.

This principle is admitted in *Barton v. Barbour*, 104 U. S. 126 (Bk. 26, L. ed. 672).

The protection the receiver is seeking is not properly made here; it is accorded to him only on his own application in the court of chancery appointing him. This privilege of protection, however, he can waive by appearing and pleading.

Newell v. Smith, 49 Vt. 255; *Blumenthal v. Brainerd*, *supra*; *Naumburg v. Hyatt*, 24 Fed. Rep. 901; *Jerome v. McCarter*, 94 U. S. 734 (Bk. 24, L. ed. 136); *Camp v. Barney*, *supra*.

The test is, not how the judgment was taken, but whether it is a claim that falls within that class of claims, costs, and expenses incident to the receivership. Possibly the receiver has conducted himself so negligently that he would not be entitled to be reimbursed out of the trust property.

Hopkins v. Connel, 2 Tenn. Ch. 323; *Kinney v. Crocker*, 18 Wis. 80; Jones, R. R. Sec. 527.

The relation of master and servant exists between a receiver and the employees. The fact that he is a receiver does not change this relation, or the law applicable thereto.

Jones, R. R. Sec. § 511; *Ballou v. Farnum*, 9 Allen, 47; *Murphy v. Holbrook*, 20 Ohio St. 137; *Kain v. Smith*, 80 N. Y. 458.

Powers, J., delivered the opinion of the court:

This is an action on the case for negligence in the operation of the Addison Railroad by the defendant, as lessee, whereby the plaintiff's intestate, an employee of the defendant, was killed.

The defendant filed the plea of the general issue, to which the *similiter* was answered, and a special plea to which there was a general demurrer.

The question for consideration arises upon the demurrer.

The substance of this plea is that the defendant was not at the time when, etc., in the possession or control of said railroad and the rolling stock of the same, nor in control of the servants and employees operating the same, but that the Central Vermont Railroad Company, as receivers and managers of the Vermont Central and Vermont & Canada railroads, and property connected therewith and appertaining thereto, under and by virtue of a decree or order of the Court of Chancery within and for Franklin County, rendered June 21, 1873, in a cause then pending in said court, entitled *Vermont & Canada R. R. Co. v. Vermont Central R. R. Co. et al.*, was at the time when, etc., in the sole and exclusive possession, management, and control of said railroad, its rolling-stock, and the servants operating the same.

There is some attempt made in the defendant's brief to claim that the defendant named in the declaration is a different person from the party set up as receiver. But if this refinement were possible it would not aid the defendant.

as in such case the plea would amount to the general issue, and this would acknowledge the jurisdiction of the court.

But we think the terms of the plea should have a reasonable construction; and its natural import is that the defendant named in the writ as a party primarily responsible, in fact, was a mere representative not personally answerable; as if A be sued generally and he pleads that he was administrator.

It is to be noticed that the plea does not deny the allegation in the declaration that the defendant was the lessee of the Addison road, and was operating such road as lessee, except argumentatively, which is not enough. The want of a denial is an admission of the fact alleged in the declaration that the defendant was such lessee and operator of the road as charged. "Every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse." Steph. Pl. 217.

This plea, upon the defendant's theory, is a plea to the jurisdiction. It attempts to set up reasons why the Rutland County Court has not jurisdiction over the defendant. In this posture the plea is too late in time. It was filed with a plea of the general issue, on which issue has been joined, whereas a plea to the jurisdiction is "the first plea in the regular order of pleading on the part of the defendant." Gould, Pl. chap. 5, § 18.

It is analogous to a plea in abatement; and if the defendant files any other plea, like the general issue, it is waived; as a plea of the general issue confesses jurisdiction. Gould, Pl. chap. 2, § 37.

As a plea to the jurisdiction, it is defective in that it professes to answer the cause of action as a bar, and concludes with a prayer for judgment if the plaintiff ought to have or maintain his action; whereas the matter set up does not meet the cause of action. The defendant does not attempt to say the plaintiff has no right to sue anywhere, but that she cannot sue where she attempts to. This is the scope and theory of the plea, as the defendant argues his case, though it is manifest that no sufficient allegations appear to warrant such claim. Giving to the plea all that the defendant claims for it, it amounts to this: The cause of action must be referred to the court appointing the receiver for trial and determination.

The plea does not aver that the Addison Railroad, and the rolling stock used thereon, is parcel of the receivership estate in the hands of the Franklin County Court of Chancery for administration through its receivers and managers, nor does it aver any prohibition upon the plaintiff's proceeding with her action in the Rutland County Court, but rests upon the mere proposition that the defendant has been appointed receiver of other railroads impounded in a cause depending in another court, and as such receiver is in possession and control of the Addison road. All this is consistent with the allegation in the declaration that the defendant is the lessee and operator of the Addison road, and such allegation is to be taken as true.

The same person who was the receiver of the other roads was the lessee of the Addison road, but this did not make the Addison road receivership property, nor expose it to administration as receivership estate by the Franklin County

Court of Chancery. The receiver acquired it by contract, not by decree of the court of chancery.

If the court of chancery consented that its receiver might step outside his proper functions as receiver of the Vermont & Canada and Vermont Central railroads and engage as a lessee in business foreign to the administration of the property in the hands of the court, he stands, as to such business and as to all persons employed by him or having business relations with him in the conduct of such foreign business, not as a receiver in the sense that he is therein an officer of the court, but as a party *sui juris*, acting as his own principal and upon his own responsibility. The order of the court, if any, sanctioning his engagement in such outside business, is available to him in the settlement of his accounts as receiver of the roads in the hands of the court, but not as the gauge of his responsibility to third persons dealing with him.

The case of *Kain v. Smith*, 80 N. Y. 458, is a well-considered case, and directly in point. There, as here, the plaintiff was an employee of the defendant, who was the lessee of the Ogdensburg & Lake Champlain Railroad, and a receiver of the Canada and Central railroads. The plaintiff was injured in the line of duty by defective machinery used in the operation of the leased road. The declaration charged the defendants as carriers of passengers and freight, and having in use in such business the defective machinery occasioning the plaintiff's injury. The defense set up there was substantially that urged here. The court, speaking of the defendant's relation to the injury, says, page 470: "He was not in possession of the Ogdensburg & Lake Champlain Railroad as an officer of any court, or by its authority. The court itself never had possession or control over it. He went into possession with his associates by virtue of a contract. He was permitted, not directed, by the court to make it, and this permission will serve him upon his accounting for his management of the Vermont Central road." Again: "Outside the State he stands as an individual liable for his negligence, whether he acts personally or through agents, alone or in company with others. He cannot be shielded by a description of his office or a declaration that he is acting in an official character."

If the defendant would be liable upon the facts in New York, he clearly would be in any jurisdiction.

But, pursuing the line of argument taken at the hearing before us, and giving the plea the scope it is claimed to have, we think that if the defendant had been in fact a receiver instead of a lessee of the Addison road, operating it under the orders of the court of chancery, then, having assumed the character of a common carrier of freight and passengers, it would be answerable for its torts in the management of the road to the same extent that the Addison Railroad Company would have been, in the same operation, to its employees, as well as third persons.

This court is already committed to this doctrine. In *Sprague v. Smith*, 29 Vt. 421, the defendant was sued for an injury to a passenger. The defendant was operating the road as trustee

for the bondholders. Defense was made that the trustee could not be made liable personally. Chief Justice Redfield, for the court, said: "And we can see no reason why the defendants are not liable to the same extent as the company would have been, and upon similar grounds to those upon which lessees or any others exercising the franchise of the company for the time must be; that is, that they are the ostensible parties who appear to the public to be exercising the franchise of the company. * * * The party having this independent control is in general liable for the acts of those under such control, whether of contract or tort."

In *Blumenthal v. Brainerd*, 38 Vt. 402, the defendants were sued for the loss of goods, two counts charging them as common carriers, and one as warehousemen. Defense was made that they were receivers in chancery of the railroads, in the operation of which the goods were lost, and that they were subject only to an accounting for the damage in that court, and could not be made liable in this action as common carriers. The court said: "A court of chancery will protect a person acting under its process or authority in the execution of a decree or decretal order, against suits at law, and will compel parties to apply to that court for relief. This protection is accorded by that court to its officers only on their application, and is granted by the chancellor in the exercise of his discretion; and it is to be presumed that it would be granted in any necessary or proper case for relief. 2 Story, Eq. Jur. Redf. ed. §§ 883 *a*, *b*, 891; 2 Dan. Ch. Perkins' 3d Am. ed. 1433. But we think that the mere fact that the defendants were acting as receivers under the appointment of the court of chancery cannot be recognized as a defense to a suit at law, for the breach of any obligation or duty which was fairly and voluntarily assumed by them, in matters of business conducted or carried on by them while acting as receivers."

In *Newell v. Smith*, 49 Vt. 255, the defendants were sued as common carriers for negligent delay in the transportation of goods. Defense was made that the defendants had connection only with goods as receivers in chancery. The court said: "The defendants were receivers in chancery of the property of the railroads employed in part in the transportation of the goods in question. In the operation and management of the roads they sustained to persons dealing with them the character of common carriers. They at all times might invoke the aid of the court of chancery in any matter affecting their duty or liability under their trusteeship; waiving this, they are amenable in the common-law courts to actions for negligence as carriers."

The doctrine is not peculiar to this State. In *Paige v. Smith*, 99 Mass. 395, the same defense was made to a claim for loss of goods entrusted to them as common carriers, and they were held liable. And in *Nichols v. Smith*, 115 Mass. 332, they were held in an action at law for the loss of wool in a depot under their control.

In *Ballou v. Farnum*, 9 Allen, 47, the plaintiff claimed damages for the negligence of a switchman on the Norfolk County Railroad.

The defendants were trustees, and denied that they managed the road in a personal capacity; but the court held them personally liable, as they were in control, exercising the franchise of the corporation and controlling all the servants employed in the conduct of the business. On the same ground like decisions were made in *Barter v. Wheeler*, 49 N. H. 9, and *Lamphear v. Buckingham*, 33 Conn. 237. In *Kinney v. Crocker*, 18 Wis. 80, the defendant, a receiver, was sued for the negligence of his servant. The court said: "A court of equity will, on proper application, protect its own receiver, when the possession which he holds under the order of the court is sought to be disturbed;" and again: "But in all these cases it is not a question of jurisdiction in the courts of law, but only a question whether equity will exercise its own acknowledged jurisdiction of restraining suits at law, under such circumstances, and itself dispose of the matter involved. It follows that although a plaintiff in such case, desiring to prosecute a legal claim for damages against a receiver, might, in order to relieve himself from the liability to have his proceeding arrested by an exercise of its equitable jurisdiction, very properly obtain leave to prosecute; yet his failure to do so is no bar to the jurisdiction of the court of law, and no defense to an otherwise legal action in the trial. There can be no room to question this conclusion in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the court of chancery, but only an attempt to obtain a judgment at law in a claim for damages." In this case the action was brought against the receiver himself, and the question of jurisdiction was the exact point in judgment.

In *Allen v. Central R. R. Co.* 42 Iowa, 683, suit was brought against the corporation whose property was in the hands of a receiver, for a trespass in ejecting a passenger from a train. Defense was made that the road was in the hands of a receiver. Some question was made whether the receiver after his appointment, a few days prior to the injury, had assumed control, but the trial court ruled that the action could not be maintained against the company unless leave to prosecute it had first been obtained from the court appointing the receiver, and this was the question for consideration in the supreme court. The court cites and quotes from *Kinney v. Crocker*, last above cited, and says: "This case, in our opinion, announces the correct doctrine."

That the objection is not a jurisdictional bar is generally, and it may be added almost universally, held (*Angel v. Smith*, 9 Ves. 335; *Chautauqua County Bank v. Risley*, 19 N. Y. 369; *Camp v. Barney*, 4 Hun, 873; High, Rec. § 398; cases *supra*; Jones, R. R. Sec. §§ 509, 510); and, on principle, why should the rule be otherwise? A receivership of a railroad is created, as in all other cases, as a provisional and *pro tempore* scheme for the preservation of the estate *pendente lite*. The scope of the receiver's duty is merely administrative. He is bound to manage the estate according to the rules of good husbandry,—good husbandry as applicable to the character of the estate he holds. If the property happens to be a railroad or other going concern, that for public reasons

or its own conservation or advantage must be kept in operation, and the receiver, with or without the credentials of the court, deems it advisable to lease other railroads or engage in other ventures foreign to the scope of his administrative duty to the estate he holds, and so must have employees, must create extended business relations with third persons, and must expose the persons and property of others, strangers to the receivership estate, to peril and loss,—in short, in addition to the function conferred by the court, must take on another character, as lessee, carrier, etc.,—then it is easy to see that in all action had in such other and self-assumed character, he is outside his proper function as receiver and inside his character as master and manager of a business voluntarily assumed, personally managed, and, so far as third persons are affected, to all practical intents experimentally his own. If the sanction of the court be had in advance, this impresses no new character upon him or the business he assumes, but merely promises indemnity to the hazards of the venture. So long as he holds the property impounded by the receivership, and administers upon it for the purposes for which he was appointed, so far he is a receiver in the true essence and spirit of the office, and as such is entitled to absolute immunity and protection. When he takes on another character, without the scope of his appointment and outside the tenor of the decree creating the receivership, he necessarily takes upon himself the burdens, liabilities, and responsibilities incident to the business he assumes. And these liabilities are enforceable in the common-law courts.

So far there seems to be no conflict in the cases, and the case at bar is precisely within this rule. We do not say that in this class of cases a court of equity has no right, under any circumstances, to interfere with proceedings at law to enforce such voluntarily assumed liabilities; but the circumstances warranting such interference would necessarily be of an extraordinary character, and, conceivably, could hardly exist.

But in the other class of cases, where the receiver, in the management of the receivership estate itself, needs the intervention of the court under whose decree he acts, there is no question, in proper cases, of its jurisdiction to act. In *Blumenthal's Case*, and *Newell's Case*, *supra*, and in *Morse v. Brainerd*, 41 Vt. 550, this court has affirmatively recognized this rule. But the intervention of the court of chancery is exercised only on the receiver's call for it (see cases above), and not at all upon any theory that the common-law court in which the receiver may be sued has no jurisdiction either over the subject-matter or the person of the receiver. "The court interferes on the principle of preventing a legal right from being enforced in an inequitable manner, or for an inequitable purpose." Kerr, Inj. 13.

And the only mode of interference is by action directed to the party, and not the court before whom the party is proceeding. The writ of injunction is the usual and proper process. "It is important to remember that in granting this relief equity does not pretend or assume to interfere with another court. The injunction is *in personam* merely. It is directed to the party, not to the court or the offi-

cers thereof. It is not, in other words, a writ of prohibition." Bisph. Eq. 459. "The writ of injunction by which proceedings at law are restrained, is not in the nature of a prohibition. In issuing injunctions courts of equity claim no supremacy over the ordinary tribunals. An injunction is addressed only to the individual, and is not directed to the court. Courts of equity in issuing the writ not only do not deny, but in fact admit, the jurisdiction of the ordinary tribunals." Kerr, Inj. 14.

So far it seems to be clear that the defense under this special plea does not go to the jurisdiction of the common-law court, but is of an equitable character that does not bar all remedy, but refers it to an equitable forum for enforcement.

So far as shown, *Barton v. Barbour*, 104 U. S. 126 [Bk. 26, L. ed. 672], is the only case that squarely upholds the defendant's contention. In all questions affecting rights under Federal cognizance the decisions of the Supreme Court of the United States are controlling upon State courts. In other cases its decisions are entitled to the highest respect.

In *Barton v. Barbour*, *supra*, the facts would be parallel with those in the case at bar provided it be assumed—what is not true—that the Addison road was part of a receivership estate, and the defendant had been sued as receiver.

In that case the defendant was sued in the District of Columbia, as receiver of a railroad in Virginia, for a personal injury received on said road. He filed a plea to the jurisdiction of the court, setting up his receivership of the road, and averred that the plaintiff had not obtained leave of the court appointing him receiver to bring and maintain the suit. It was held on demurrer to this plea by the majority of the court that the court had no jurisdiction.

Mr. Justice Woods states the question for decision as follows: "The defendant insists that the Supreme Court of the District of Columbia had no jurisdiction to entertain the suit *without leave of the court by which he was appointed*." The qualifying words in italics are made the hinge upon which the question of jurisdiction is made to turn. The learned judge continues: "It is a general rule that before suit brought against a receiver, leave of the court by which he was appointed must be obtained. *Davis v. Gray*, 16 Wall. 203 [Bk. 21, L. ed. 447], and cases there cited. * * * A suit, therefore, brought without leave to recover judgment against a receiver for a money demand is virtually a suit the purpose of which is, and effect of which may be, to take property of the trust from his hands and apply it to the payment of the plaintiff's claim without regard to the rights of other creditors, or the orders of the court which is administering the trust property. We think, therefore, it is immaterial whether the suit is brought against him to recover specific property, or to obtain judgment for a money demand. In either case, leave should be first obtained."

Again, as showing the reason for the rule, the court says: "If the court below had entertained jurisdiction of this suit, * * * it would have been an usurpation of the powers and duties which belonged exclusively to another court, and it would have made impossible of performance the duty of that court to distrib-

ute the trust assets to creditors equitably and according to their respective priorities."

The court thus explicitly lays down the rule that leave to prosecute must first be had, for the reason that otherwise the trust assets cannot be equitably distributed, and priorities will be disregarded.

What are the assets of the trust that are to be distributed among creditors according to their proper priorities? Fortunately the learned judge has answered this question in his opinion. He says: "It was said by the court in *Cowdrey v. Galveston, etc. R. R. Co.* 93 U. S. 352 [Bk. 23, L. ed. 950], that the allowance for goods lost in transportation and for damages done to property whilst the road was in the hands of the receiver, was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind, as well as the expenses incurred in their behalf, were paid." The learned judge then adds his own approval of this doctrine: "The claim of the plaintiff, which is against the receiver for a personal injury sustained by her while traveling on the railroad managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust, and must be adjusted and satisfied in the same way."

All will agree that the learned judge's definition of receivership expenses is correct. No fund can be available for distribution among the creditors of the trust except net income. All expenses of management and all expenses incidental to management must be paid before the rights of creditors attach to income.

It is conceded in *Barton v. Barbour* that, in the book-keeping of the receivership, compensation must be made to the plaintiff as part of the expenses of management before any adjustment of priorities is had or any debts of trust creditors paid. Her compensation for her injury is the same in amount, in the eye of the law, whether it be allowed in one court or another. What difference, then, does it make with the funds of the receivership whether the suit be in the courts of the District of Columbia or in the courts of Virginia? What difference would it make with the assets whether the plaintiff sued in the District of Columbia with leave of the Virginia court or without leave?

With all due respect to that court, it is submitted that some reason, other than its effect upon the rights of trust creditors, must be found for the rule that leave to prosecute is a condition precedent to the existence or exercise of jurisdiction in the common-law courts.

In weighing the force of the decision in *Barton v. Barbour*, it is to be remembered that the question arose upon a plea to the jurisdiction: and jurisdiction is denied for want of leave from the court of equity in Virginia to prosecute the suit. The learned judge does not favor us with the citation of any authorities holding that the jurisdiction of a common-law court has ever been held to be dependent upon the consent of a court of equity.

It is not surprising that Justice Miller felt constrained to give expression to his dissent from the position taken by the majority of the

court. Speaking of the contest between the courts of equity and the common-law courts in England, he says: "In the contests between these courts it was never claimed that the court of chancery could act directly upon the court of law, or that the latter was bound in any way to follow the decisions of the former. Nor could the chancellor direct his writ to the common-law court or its officers; but if it was determined to give any equitable relief in the matter pending in the law court, the injunction or other chancery process was directed to the suitor. Upon him alone was the power of the court exercised. In such a case as this, if the court of chancery was of opinion that the plaintiff was improperly interfering with the functions of the receiver, it could restrain him by injunction or punish him by attachment for contempt. * * * But I know of no principle or precedent whereby a court of law, having before it a plaintiff with a cause of action of which it has jurisdiction, and a defendant charged with an act also within the jurisdiction, is bound or is even at liberty to deny the plaintiff his lawful right to a trial because the defendant is a receiver appointed by some other court, and to leave the suitor to that court for remedy, when it is known that some of the most important guaranties of the trial to which he is entitled, and which are appropriate to the nature of his case, will be denied him." *Justice Miller* quotes with approval many of the cases cited *supra*, including *Sprague v. Smith*.

It is quite true that it has often been said by courts and text-writers that leave to prosecute must be had before instituting suit against a receiver in the common-law courts. But, like many other *dicta* with which the books abound, this proposition has doubtless been accepted upon trust and promulgated without giving its import careful consideration.

If a plaintiff in a suit at law is enjoined and the injunction afterwards removed, he does, in a practical sense, have leave to prosecute his suit; and it is not improbable such procedure gave rise to the notion that leave to prosecute is an essential prerequisite.

The case of *Palys v. Jewett*, 82 N. J. Eq. 302, is cited, and although the court repeats the proposition above referred to, still the whole drift of the reasoning shows that it rests on no solid foundation in reason. In that case the court of chancery had entertained a suit for damages occasioned by the negligence of the servants of the defendant, a receiver of a railroad. On appeal, *Chief Justice Beasley* sharply reprobates the notion that a court of chancery can try such a question, and maintains that a court of law with a jury is the only tribunal that can properly determine it. In the course of his opinion he says that power exercised by the court of chancery was to prevent the taking of the receivership property from the receiver, and to prevent baseless litigation against him, and that this is accomplished by requiring leave to prosecute the action at law from the chancery court. He adds that such leave will be granted, not *ex gratia*, but *ex debito iustitie*. In the light of this case, leave to prosecute the action at law accomplishes the same purpose as the dissolution of an injunction restraining the prosecution.

If a court of chancery cannot properly try

an action for negligence, and leave to institute it will be granted as matter of legal right, it would seem that a rule requiring a plaintiff to go through the meaningless ceremony of applying for a privilege that he already by right possesses to a court powerless in itself to give him relief in the premises, has no substantial ground to rest upon.

This case, in its reasoning, upholds the conclusions which we reach in the case at bar.

Upon the whole, we think it is demonstrably clear that the defense set up in the case at bar does not go to the jurisdiction of the common-law courts; and we reaffirm the doctrine announced in *Blumenthal's Case*, 83 Vt. 402, and in *Newell's Case*, 49 Vt. 255, and by the other cases and authorities cited, that the defense is one that the receiver can only make by invoking the interference of the court of chancery with the party prosecuting him in the common-law court.

The defendant further insists that the declaration is bad in substance, but we think it sufficient. It is not necessary to allege in the declaration affirmatively that the plaintiff was without negligence, or that he was ignorant of the insufficiency of the roadbed and track, or the particulars in which the road was insufficient. It does sufficiently allege the duty of the defendant, its breach, and that the intestate was injured by reason of this breach of duty while he was in the line of his duty as an employee.

The liability of the master for injuries to his servant is well expressed in *Davis v. Central Vt. R. R. Co.* 55 Vt. 84, and this declaration covers all the essential elements involved in a right of recovery as there defined.

The pro forma judgment of the County Court, sustaining the demurrer and adjudging the special plea insufficient, is affirmed, and the case remanded, with an order that the defendant answer over.

E. G. and S. C. GREENE
v.

Thomas LAVANDER.

When a contract for board at an agreed price per week is not for a specified time beyond one week, and terminable at the end of any week, the boarder is entitled to a deduction for an absence extending one or more weeks. The contract is not entire except for one week.

(Franklin—Filed August 1, 1887.)

BOOK account. Heard on an auditor's report, April Term, 1886, Franklin County, Royce, *Ch. J.*, presiding. Judgment for defendant. *Reversed.*

The account of the plaintiffs was allowed by the auditor at \$1,657.13, and that of the defendant at \$1,676.35.

The case appears in the opinion.

Messrs. Farrington & Post, for plaintiffs:

This was not an entire contract, and was not for any specified time. A reasonable deduction should be allowed for the absence of Mrs. Greene.

Wilson v. Martin, 1 Denio, 602; *Spencer v. Halstead*, Id. 606; *Ramey v. Holcombe*, 21 Ala. 567; *Booth v. Tyson*, 15 Vt. 515; *Phelps v. Paris*, 39 Vt. 511; *Kelly v. Bradford*, 83 Vt. 35; *Swift v. Harriman*, 80 Vt. 607; *Brackett v. Morse*, 23 Vt. 554.

Messrs. Noble & Smith, for defendant:

The contract was entire. The plaintiffs could rescind at any time when Mrs. Greene was absent, but they did not. Greene continued to occupy the rooms, use the fuel, and receive the board. None of these things were contracted for separately.

Griffin v. Tyson, 17 Vt. 35; *Clark v. Baker*, 5 Met. 452.

Again, the consideration was single.

Young & Conant Mfg. Co. v. Wakefield, 121 Mass. 91; *Winn v. Southgate*, 17 Vt. 355; *Davis v. Maxwell*, 12 Met. 286; *Baker v. Higgins*, 21 N. Y. 397.

Ross, J., delivered the opinion of the court:

The only question in contention is whether the plaintiffs are entitled to a deduction from the charges of the defendant, specified in items numbered 19, 81, and 37. These items are for board, rooms, fuel, and lights furnished by the defendant to the plaintiffs, E. G. Greene and wife, and agreed to be adjusted in this action. The auditor has found that the board, rooms, fuel, and lights for Mr. Greene and his wife were furnished under an agreement by E. G. Greene to pay for the same \$12 per week. It is not found that the contract was for any specific time, beyond one week. The rooms were occupied by Mr. Greene, without any

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other or further agreement, from May 24, 1879, to April 10, 1881. During that time Mrs. Greene was absent forty-three whole weeks. The auditor has found that, unless controlled by the contract as an entire contract, a reasonable price for the board of Mr. Greene for the forty-three weeks, including the use of the rooms, fuel, and lights, is \$9 a week, and he submits to the court to determine whether, on these facts in substance, the defendant shall be allowed \$12 or \$9 per week for the forty-three weeks. On the facts reported, Mr. Greene could have terminated the contract at the end of the first or any other week; so could the defendant. This renders the contract an entire weekly contract only, or a contract from week to week. It was a contract for the board of both Mr. Greene and his wife. Being a contract for a week, and terminable at the end of any week, absences during the week, once entered upon under the contract, gave the plaintiffs no right to a deduction from the contract price. But the contract did not include the board of Mr. Greene alone. It was an entire weekly contract only for the board, rooms, fuel, and lights furnished to Mr. Greene and his wife. The board for himself alone, with the use of the rooms, fuel, and lights was not covered by the contract, or any contract. The defendant therefore was entitled to recover a reasonable compensation for his board alone thus furnished. The auditor has found \$9 per week to be such reasonable compensation.

The judgment of the County Court is reversed, and judgment rendered on the report for the plaintiffs to recover \$136, with interest and costs.

CONNECTICUT.

SUPREME COURT OF ERRORS.

STATE of Connecticut

v.

John NYMAN.

1. From time immemorial, in this jurisdiction, **each party to every cause in the superior court has had the privilege of being heard by two counsel; therefore the statute** (Gen. Stat. p. 81, § 9), that "in no trial before the superior court shall counsel occupy more than one hour in argument, unless the court shall, on motion for special cause before the commencement of such argument, allow a longer time," **means that each party may occupy two hours in argument, without previous request to the court.**
2. It is quite immaterial whether the two hours shall be occupied by one counsel or by two; and if by two, whether in equal or unequal proportions. **The practice is to divide the time into unequal portions by agreement between themselves.** This is within the reason and spirit of the statute.

(Hartford—Filed July, 1887.)

INDICTMENT for murder in the second degree; tried in Superior Court in Tolland County before Stoddard, J., and a jury. Verdict guilty; appeal by defendant. *Reversed.*

The case is fully stated in the errors alleged and in the finding of the court below, as follows:

Fourth. The court erred in admitting to the jury the parol testimony of the coroner of the several alleged dying declarations of the deceased, as it appeared from the coroner's testimony that they were taken down in writing by him at the time they were made and were signed by the deceased, and that such written statements were present in court; because such written statements were the best evidence of what such declarations in fact were. * * *

Eighth. The court erred in stopping the senior counsel for the defendant in his argument of said case to the jury after he had occupied one hour and in overruling said counsel's claim for more time for argument, thereby depriving the accused of his constitutional right to be heard by counsel.

Ninth. The court erred in overruling the said senior counsel's claim that, as his assistant had only occupied one half hour in his argument to the jury, he, the said senior counsel, was entitled to the fraction of his said assistant's hour unused, in accordance with his understanding and agreement with his said assistant before the commencement of said arguments, and in accordance with the practice of the court in that county; thereby abridging the defendant's said constitutional right to be heard by counsel.

Tenth. The court erred in not allowing the defendant's counsel reasonable time to argue said cause to the jury, and thereby depriving

him of his constitutional right to be heard by counsel.

Eleventh. The court erred in refusing to charge the jury as requested by the counsel for the defendant, that the testimony of the dying declarations of the deceased having been admitted by the court, it was in the province of the jury to determine from the evidence whether said declarations were dying declarations of the deceased.

Twelfth. The court, in connection with and in respect to the aforesaid claim, erred in charging as follows:

"There is another class of evidence in this case, concerning which I am asked to charge the jury,—the dying declarations. In the first place the defense say that the question of the admissibility of these declarations is one for the jury to determine as a final thing; that the rule of law is so that in the first instance the court determines if the evidence is admissible, and then the jury, having heard the evidence, shall determine whether these declarations are, within the rule of law, dying declarations or not. I do not so understand the rule of law as it prevails in Connecticut. The court determines the admissibility of the evidence, and the credibility of the evidence is to be determined wholly by the jury,—for said charge tended to mislead the jury, and denied their right to consider the question whether the alleged declarations of the deceased offered in evidence were dying declarations, and for that reason entitled to credibility.

Finding of the Court Below.

On trial of the said case the State offered certain material declarations of the deceased on the ground that they were dying declarations.

It appeared that the fatal wound was received about 11 o'clock in the night, and within an hour or two thereafter said declarations were made to the coroner of the county. The deceased was at this time apparently, and was believed to be, in a moribund condition; and the deceased fully believed that death would almost immediately take place, and made such statements and declarations with the expectancy of almost immediate death, and with no hope of surviving. The declarations were admitted against the objection of the prisoner, and the prisoner duly excepted. After the wound was sewed up and stimulus had been administered, the deceased rallied and lived until the following evening at about 8 o'clock.

In the afternoon of that day the deceased began to fail rapidly from his rallied condition superinduced by the stimulus administered, and was soon in a dying condition. That condition was evident, and was fully realized by the deceased. He expected death momentarily, and had no hope or expectation of life. He then repeated to the coroner the substance, but in greater detail, of the statements and declarations heretofore made to the coroner. These were testified to by said coroner. During the testimony of the coroner in reference to these dying declarations, it appeared that the statements were reduced to writing by said coroner at the time they were made; and the witness being asked if he had the written

statement with him, replied that he had, and thereupon, being asked what the deceased said, made a motion as if to take the written statement from his pocket. The counsel for the prisoner said that the written statement was not admissible, and the court directed the witness to give the statement of the deceased from memory.

Upon the cross-examination the coroner was questioned as to the manner of taking the statement of the deceased. On the redirect, the witness was asked, "You say you reduced this to writing. Did you read over the writing to him?" Witness answered, "The second time I did; I didn't the first time." Q. Before he signed it? A. Yes; I put him under oath first; I put him under oath twice.

Mr. Hunter, counsel for the defense, then said, "I object to this testimony, that he put him under oath and took his statement." The court said, "I don't see any objection to his putting him under oath. I think I ought to say to the jury that the admissibility of the testimony does not depend upon his putting him under oath, but it does depend upon its being a dying declaration." Counsel for the defense did not at any time ask for said written statement, nor for permission to examine it, but did cross-examine the witness as to variances between said written statement and the testimony of the witness. And the defense was understood by the court as objecting to the production of said written statement as evidence, and for that reason alone the said written statement was not laid before the jury. The State was willing to lay the statement in. The contents of said written statement were not laid in except so far as they were called for by the defense upon cross examination.

The only rulings adverse to the defense in relation to these dying declarations were: (1) ruling in said dying declarations; (2) permitting the witness to state as one fact, accompanying the making of said dying declarations, the fact that he administered an oath to the deceased.

Said coroner was an attorney at law, and assisted in the trial of this case.

During the argument counsel for the prisoner claimed, and asked the court to rule and charge the jury, that the inquiry as to whether the declarations, claimed to be dying declarations, came within the rules of law appertaining to that species of evidence so as to render them admissible, should be left to the jury. The court refused so to charge, but told the jury that the admissibility of that evidence rested with the court, and its credibility with the jury.

No application to extend the time for argument beyond one hour for each counsel was made. The senior counsel for the accused, when he had occupied something over one hour, was stopped by the court, and thereupon claimed the right to indefinite time. The court ruled that he was confined to one hour. Counsel then claimed that, as his associate had not occupied a full hour in argument, he was entitled to the fraction unused. The court overruled that claim. Then counsel asked the indulgence of the court for five minutes, which was granted; and thereupon counsel took more than the time so granted and stopped voluntarily.

Messrs. Dwight Marcy, and John L. Hunter, for defendant, appellant:

1. If the statement of the deceased was committed to writing, and signed by him, at the time it was made, it has been held essential that the writing should be produced, if existing, and that neither a copy nor parol evidence of the declarations could be admitted to supply the omission.

1 Greenl. Ev. ¶ 161; 2 Russ. Cr. 763; Roscoe, Cr. Ev. 34; *Reaz v. Gay*, 7 C. & P. 230; *Trowter's Case*, 8 P. Geo. I., B. R. 12 Vin. Abr. 118, 119; *Leach v. Simpson*, 1 L. & Eq. 58; 5 M. & W. 309; 7 D. P. C. 13; 3 Jur. 654; *State v. Cameron*, 2 Chaud. 172; 2 Hill, 619.

In the case of *People v. Hodgdon*, 55 Cal. 72, the written statement was admitted as evidence of the declarations; but in that case the declarations were held inadmissible upon the ground that the statement on its face disclosed the fact that they were not made under a sense of impending death.

Where the confirmatory witness in such case testified that the principal witness, who was deaf and dumb, had, more than a year after the commission of the alleged offense, committed to her in writing the substance of what she had now testified; and that such confirmatory witness did not know where the writing was,—it was held that there was not sufficient proof of loss to dispense with the production of the writing, and consequently that evidence of its contents was inadmissible.

State v. De Wolf, 8 Conn. 93.

So in this case, the alleged declarations having been committed to writing and signed by the deceased, and it appearing that the written statement was in existence and present in court, no other evidence of those declarations was admissible.

The prisoner in a capital case must be considered as standing on all his rights. He cannot be considered as waiving anything, could his counsel do it. They possess neither the power nor the right. It is the humane principle to consider the prisoner as standing upon all his rights, and waiving nothing upon the score of irregularity.

People v. McKay, 18 Johns. 218; *Nomaque v. People*, Breese, 109; *Cancemi v. People*, 18 N. Y. 123; *State v. Tuller*, 34 Conn. 290.

The ninth section of article 1 of the Constitution of the State, provides that in all criminal prosecutions the accused shall have a right to be heard by himself, and by counsel; * * * and in all prosecutions by indictment or information, a speedy trial by an impartial jury.

Section 21 of the same article provides that the right of trial by jury shall remain inviolate.

"The argument of a cause is as much a part of the trial as the hearing of evidence. It is a right in his defense secured by the law of the land, of which a citizen cannot be deprived."

Meredith v. People, 84 Ill. 480.

In *Word's Case*, 3 Leigh, 744, a criminal case, where the evidence was all on the side of the Commonwealth, and was unimpeached, and the trial court was of the opinion that the testimony was clear and distinct as to the fact charged, and that it would not be varied by argument of counsel, it was held by the general court of Virginia that it was not in the discretion of the

court to prevent the counsel of the accused from arguing the question of fact before the jury, and that it was the right of every party accused with crime to be heard by counsel on his whole case.

In *White v. People*, 90 Ill. 117, the court says the plaintiffs in error had an undoubted right, under the very bill of rights itself, and by the law of the land, to defend by counsel, and to insist such counsel should have reasonable opportunity to discuss before the jury both the facts and the law of the case.

The right of argument is only valuable as it will afford an occasion to impress and influence the tribunal to which it is made.

This can only be done by a process of reasoning—by a presentation of points, and considerations addressed to the understanding and experience.

The limitation should not, in any criminal prosecution, be such as would deprive the prisoner of the right given him by the law to make his defense before the jury, and to be heard by his counsel on his whole case.

We also cite *People v. Keenan*, 18 Cal. 581; *Williams v. State*, 90 Ga. 867; *Hunt v. State*, 49 Ga. 255; *State v. Collins*, 70 N. C. 241; *Weaver v. State*, 24 Ohio St. 584; *State v. Hoyt*, 47 Conn. 518.

Messrs. Bill & Phelps, for the State:

As to the fourth error assigned, the finding is that this ruling was made in compliance with the claims of the accused. The attorney for the State offered to put in the written statements. They were objected to by counsel for the defense. The latter did not ask for the written statements nor for the privilege to examine them, but did cross-examine the witness as to variances between such statements and the testimony of the witness.

The prisoner, or his counsel for him, may waive any objection in a case not capital.

State v. Tuller, 84 Conn. 281.

As to the eighth, ninth, and tenth assignments of error (in substance, that the court erred in limiting the arguments of counsel, in not allowing one attorney for the defense that portion of time allotted to his associate which he failed to occupy, and in not allowing the defendant's counsel reasonable time to argue said cause to the jury, and thereby depriving him of his constitutional right to be heard by counsel), the statute (Gen. Stat. p. 61, § 9) provides that "in no trial before the superior court shall counsel occupy more than one hour in argument, unless the court shall, on motion, for special cause, before the commencement of such argument, allow a longer time."

The Act includes criminal as well as civil proceedings. The Legislature has the constitutional right to regulate and impose conditions upon the constitutional guaranty that the accused shall have the right to be heard by counsel.

The Act does not limit the time to one hour, but only requires that counsel before the commencement of the arguments, if they wish for more than the prescribed time, shall ask for it.

No application, in the present case, was made by counsel for an extension of the time beyond the hour.

If counsel had anticipated the need of more

time they could, and doubtless would, have asked for it. The omission to do so was a waiver of the claim for more time than that legally allotted.

Beyond the limitations of the statute the court has the right to restrict in a reasonable degree the argument of counsel.

State v. Hoyt, 47 Conn. 519, 535.

There are no facts found to show that the time allotted was not ample.

In the absence of anything to the contrary, it will be presumed the time prescribed was reasonable.

The fact, which appears from the finding, that one of the counsel for defense did not occupy all the time to which he was entitled, is an indication that the case did not demand an unusual length of time.

As to the eleventh error assigned (that the "court erred in refusing to charge the jury, as requested by the counsel for the defendant, that the testimony of the dying declarations of the deceased having been admitted by the court, it was in the province of the jury to determine from the evidence whether said declarations were dying declarations of the deceased"), counsel did not so request the court to charge, but asked the court to "rule, and charge the jury that the inquiry as to whether the declarations claimed to be dying declarations came within the rules of law appertaining to that species of evidence, so as to render them admissible, should be left to the jury." The court told the jury that the "admissibility of that evidence rested with the court and its credibility with the jury."

This was manifestly correct. For a long time past it has been, and is at present, the rule.

1 Greenl. Ev. § 160; Whart. Am. Cr. L. § 681, p. 682; 2 Russ. Cr. p. 761; *Commonwealth v. Casey*, 65 Mass. 417.

Pardee, J., delivered the opinion of the court:

This is an indictment for murder in the second degree. The jury found the defendant guilty, and he appeals, assigning, with other reasons, the following: "That the court erred in stopping the senior counsel for the defendant in his argument of the case to the jury after he had occupied one hour, and in overruling his claim for more time for argument, thereby depriving the accused of his constitutional right to be heard by counsel. Also in overruling the senior counsel's claim that, as his assistant had occupied only one half hour in his argument to the jury, he, the senior counsel, was entitled to the fraction of his assistant's hour unused, in accordance with his understanding and agreement with him before the commencement of the argument, and in accordance with the practice of the court in that county; thereby depriving the defendant of his constitutional right to be heard by counsel. Also in not allowing the defendant's counsel reasonable time to argue the cause to the jury, and thereby depriving him of his constitutional right to be heard by counsel."

The finding upon this point is as follows: "No application to extend the time for argument beyond one hour for each counsel was made. The senior counsel for the accused,

when he had occupied something over one hour, was stopped by the court, and thereupon claimed the right to indefinite time. The court ruled that he was confined to one hour. Counsel then claimed that as his associate had not occupied a full hour in argument, he was entitled to the fraction unused. The court overruled that claim. Then counsel asked the indulgence of the court for five minutes, which was granted, and thereupon counsel took more than the time so granted, and stopped voluntarily."

The statute provides that "in no trial before the superior court shall counsel occupy more than one hour in argument, unless the court shall, on motion, for special cause, before the commencement of such argument, allow a longer time." Gen. Stat. p. 61, § 9.

From time immemorial, in this jurisdiction, each party to every cause in the superior court has had the privilege of being heard by two counsel; therefore the statute means that each party may occupy two hours in argument, without previous request to the court.

Of course, the sole purpose of the statute is to secure the more speedy despatch of judicial business. Therefore it is quite immaterial whether the two hours shall be occupied by one counsel or by two; and if by two, whether in equal or unequal proportions. The practice has generally prevailed on the part of counsel to divide the time into unequal portions, by agreement between themselves, and such division has been acquiesced in by the court in the absence of previous formal request. When, therefore, in the case at bar, the senior counsel, after the commencement of his argument, asked the court for permission to occupy the fraction of an hour not used by his associate, he was without the letter of the statute, but he was within the reason and spirit of it, and within the interpretation sometimes put upon it by trial courts.

It is best, if possible, to take from a man every reason for believing that he has been deprived of any right in making his defense against a criminal charge, especially if it involved his liberty for life.

There is error in the ruling of the court, and a new trial is granted.

In this opinion the other Judges concurred.

ÆTNA NATIONAL BANK

v.

Nelson HOLLISTER.

1. The defendant executed to the plaintiff bank a bond which recited that "whereas, the Connecticut Valley Railroad Company were depositors of money in, and customers and dealers with, said Ætna Bank, and have and are expected to make their checks and drafts * * * upon said bank;" and agreeing, "in consideration of the premises and such dealing," that the railroad company would pay and make good any balance and interest due or to become due at any time, and that in default thereof the obligors would pay the same and save the bank harmless from "all

loss, cost, and damage by reason of any such drafts, or overdraft or drafts, and such indebtedness, without any notice of any kind," etc. *Held*, that under such bond, the defendant obligor was liable to the bank for an indebtedness of the railroad company to the bank on account of accommodation notes, made by a third party for the use of the company and discounted for it by the bank, under such circumstances that the money received thereon was a loan by the bank to the company, and the liability of the company therefor was not simply that of an indorser.

2. Following the defendant obligor's name in the body of the bond were the words, "Treasurer of the Connecticut Valley Railroad Company," and, on the theory that there was an ambiguity on the face of the instrument, extrinsic evidence was resorted to to ascertain whether the bond was the bond of the defendant or of the railroad company, and the trial court found that issue in favor of the plaintiff, and the defendant did not appeal; while, on the issue as to whether the bond covered the plaintiff's claim, the trial court found in favor of the defendant, and the plaintiff appealed. On the appeal the defendant claimed that if there was error in the trial court's holding that the plaintiff's claim was not covered by the bond, there was another error in holding that the bond was the personal obligation of the defendant, and that the meaning of the bond is of no consequence if the real party who gave it is not brought into court. *Held*, that this was calling upon the appellate court to reverse an erroneous judgment not appealed from, in order to save an erroneous judgment appealed from; that if this can ever be done, the error ought to be manifest as matter of law, and, if there entered into the judgment not appealed from any element of fact upon which it may have been based (as in the present case), it ought not to be and cannot be disturbed.

(Hartford—Filed July, 1887.)

APPEAL by plaintiff from a judgment of the Superior Court for Hartford County in favor of defendant in an action upon an indemnity bond. *Reversed*.

The facts and questions presented are stated in the opinion.

Messrs. H. Willey and C. J. Cole, for plaintiff, appellant:

The court will take judicial notice of the general practices and customs of banks and banking.

Merchants Nat. Bank v. Hall, 83 N. Y. 338.

"The words of a contract of guaranty ought to be taken as strongly against the guarantor as the sense of them will admit."

Rapelye v. Bailey, 5 Conn. 149.

It is claimed by the defendant that the balance named in the bond is limited to a balance

created by a check drawn by the railroad company when there was nothing to its credit, and paid by the bank; that is to say, that the bond only covers drafts which were, at the time they were made, technical overdrafts. But there is no such limitation in the bond, and none can be implied.

Hudson v. Whiting, 17 Conn. 487, 490.

Therefore this clause of the bond is broad enough to cover every balance growing out of the banking business.

The taking and discounting of the Arnold & Clark notes, for the purpose of enabling the railroad company to pay coupons, did not discharge the overdraft of \$5,086.87 then existing.

Dougal v. Cowles, 5 Day, 511; *Davidson v. Bridgeport*, 8 Conn. 474; *Bell v. Porter*, 9 Conn. 23; *Fischer v. Holly*, 10 Conn. 478; *Freeman v. Benedict*, 37 Conn. 559; *Merrill v. Kenyon*, 48 Conn. 320.

The notes of Arnold & Clark were accommodation notes. The railroad company was the true principal. It procured them to be discounted at the plaintiff bank. They were payable in terms at the plaintiff bank. Under such circumstances the notes were drafts upon the bank.

Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 88; *Mandeville v. Georgetown Union Bank*, 9 Cranch, 9 (18 U. S. bk. 3, L. ed. 689); *Muench v. Valley Bank*, 11 Mo. App. 144; *Quincy Union Bank v. Tutt*, 5 Mo. App. 342; *Home Bank v. Newton*, 8 Ill. 568; *Jourdane v. Lefevre*, 1 Esp. 66; *Egerton v. Fulton Nat. Bank*, 48 How. Pr. 217; *Kymer v. Laurie*, L. J. 18 Q. B. 218.

Mr. A. P. Hyde, for defendant, appellee:

Loomis, J., delivered the opinion of the court:

The complaint is founded upon a bond, dated July 11, 1870, given by the defendant to indemnify the plaintiff bank against loss by reason of its dealings with the Connecticut Valley Railroad Company.

The bond and condition was as follows:

Know all men by these presents that we, James C. Walkley, of Hartford in the State of Connecticut, and Nelson Hollister, of said Hartford, Treasurer of the Connecticut Valley Railroad Company, are holden and firmly bound jointly and severally unto the Ætna National Bank of Hartford in the penal sum of \$40,000 to be paid to them or their certain attorney, successors, or assigns. To the which payment well and truly to be made and done, the said obligors do jointly and severally bind themselves, their heirs, executors, and administrators, and each and every of them, for and in the whole, firmly, by these presents.

Signed with our hands, and sealed with our seals, at Hartford, this 11th day of July, A. D. 1870.

The condition of this obligation is such that, whereas the Connecticut Valley Railroad Company are depositors of money in, and customers and dealers with, said Ætna Bank, and have and are expected to make their checks and drafts, by their treasurer or otherwise, upon said bank, and their account has been and is expected to and may be, at some time

or times, or from time to time, overdrawn, and said railroad company has and may hereafter become and be indebted to said bank by reason of the payment by said bank by such drafts or overdrafts; and whereas the obligors herein have heretofore agreed, and do hereby undertake and agree to and with said bank, and in consideration of the premises and such dealing, that said railroad company shall and will, upon demand, pay and make good any balance and interest which has or shall at any time, or from time to time become and be due from them to said bank,—and in default thereof that they, the said obligors, will, upon demand, pay and satisfy the same, and indemnify and save said bank harmless from and against all loss, cost, and damage by reason of any such drafts, or overdraft or drafts, and such indebtedness, without any notice of any kind of such overdraft or drafts or indebtedness being required or previously given to said obligors by said bank, or suit instituted against said railroad company; it being understood and agreed that the aforesaid undertaking and agreement on the part of said obligors shall be a continuing guaranty to said bank until the same is withdrawn or recalled by a written notice to said bank, and that no notice of any kind need be given or suit brought for the purpose of fixing the liability of said obligors or any of the parties to said bank.

“Now, if said obligors shall and do well and truly abide by and perform their said agreement, promise, and undertaking, and on demand pay and satisfy any and all such balance or balances and indebtedness, and indemnify and save said bank harmless from and against all loss, cost, and damages by reason of any such draft, drafts, overdrafts, and indebtedness of said railroad company to said bank, then the above and foregoing obligation shall be void, otherwise in full force and virtue.

N. Hollister, Treas. [L. s.]
James C. Walkley. [L. s.]

The finding would seem to establish the fact that at the commencement of this suit the Connecticut Valley Railroad Company owed the plaintiff bank \$9,792.67, being the amount originally credited to the railroad company on account of the accommodation notes of Arnold & Clark, which were discounted by the bank for the benefit of the railroad company, and renewed from time to time, but never paid.

The question for review is whether the obligation of Hollister is broad enough in its terms and meaning to embrace such an indebtedness. The defendant claims that his liability is restricted to such drafts as were, at the time when they were presented, technical overdrafts. While the argument for such a construction as given by the learned counsel had much plausibility, yet we think a broader meaning may be fairly given to the language employed.

The first recital in the condition of the bond mentions the fact that “the Connecticut Valley Railroad Company are depositors of money in and customers and dealers with the said Ætna Bank, and have and are expected to make their checks and drafts and overdrafts upon said bank” from time to time.

Then follows the agreement of the obligors "in consideration of the premises and such dealing," first, that the railroad company would "on demand pay and make good any balance and interest due or to become due at any time" (obviously by reason of such dealing), "and, in default, that the bondsmen will, upon demand, pay and satisfy the same and indemnify and save harmless said bank from and against all loss, cost, and damage by reason of any such drafts, or overdraft or drafts, and such indebtedness, without any notice of any kind," etc.

Had it not been the intention to extend the scope of the bond beyond what at the time would be technical overdraft, the general words "and such indebtedness" would not have been added.

Had the parties contemplated a single transaction, the strict construction claimed might apply, but they evidently had in view a long course of dealing, and the ordinary and regular mode of business between a bank and its large and regular custom. It must have been contemplated that the railroad company would deposit, not only money, but mercantile paper of all kinds, and obtain credit therefor before it could be known whether the amount represented by the paper would ever be paid to the bank.

In expressly providing in the bond "that no notice of any kind need be given or suit brought for the purpose of fixing the liability of the said obligor, or of any of the parties to said bank," the parties must have referred to commercial paper which the bank might hold, against which checks might be drawn, and in relation to which notice or a previous suit might be a prerequisite to a recovery, unless dispensed with.

We cannot doubt that the parties contemplated that some of the credits to be given to the railroad company by the bank for commercial paper might have to be charged back for nonpayment, and that drafts paid out of such credits might afterwards become overdrafts within the meaning of the bond.

In such case the customer must be presumed to understand that credit is given him in advance upon the implied condition that the paper discounted will be paid and that in case of nonpayment it may be charged back.

Suppose a slight draft drawn by the railroad company on a third party, payable to the order of the bank and credited to the railroad company in advance of acceptance, and checked out by the latter. If, subsequently, the draft should be dishonored, would it be any more just or reasonable to hold the bank to the original entries because it gave a fictitious credit, than it would if the deposit had been worthless bank bills and the credit had been given upon the supposition that the bills were good? If, then, we concede that by the terms of the bond the parties contemplated that the funds credited should all be appropriated and drawn out by means of the checks or drafts of the railroad company, and that the defendants' liability should depend on there being an actual overdraft, we still insist that the question must be determined, not by the state of accounts at the time the check may have been presented and paid,

but (by the true balance) upon a final revision of the accounts, after eliminating all fictitious credits.

But we are here confronted with an objection which, if sound, will prevent the application of the above principle to the case at bar.

It is claimed there was no liability at all on the part of the railroad company respecting these notes of Arnold & Clark, except as indorsers, which was a contingent and not an absolute liability.

But it is found that these notes were merely accommodation notes obtained of the makers upon a special guaranty that they should not be required to pay them, and the money on them was asked for in order to meet a pressing obligation of the railroad company, viz., to pay the coupons of their first mortgage bonds and to save the credit of the company. The transaction could not be regarded merely as a sale of the notes of Arnold & Clark to the bank, but it was to all intents and purposes, a loan of money by the bank to the railroad company. *City Bank's Appeal* (Conn.), 8 New Eng. Rep. 349.

But it is said that, even if the debt in question was covered by the bond, the plaintiff bank by its conduct has released the defendant from liability.

There is no doubt about the general doctrine invoked by the defendant, that diligence and the utmost good faith are required to be observed by a party claiming against a surety, unless it is otherwise provided.

But in this case the court has in terms negatived the charge of laches in failing to collect the notes unless it can be inferred from other facts found; and it cannot be so inferred, because the bond itself in express terms dispenses with all the ordinary prerequisites of diligence, notice, demand, or previous suit which might otherwise be necessary in order to subject the surety, and the guaranty was made a continuing one until withdrawn or recalled by a written notice to the bank. There is no pretense there was ever any such withdrawal or notice, nor did the defendants ever make any suggestion, request or inquiry, concerning the matter, so far as the plaintiff is concerned.

The conduct of the plaintiff bank, in paying, on the 28d of November, 1876, to the receiver of the insolvent railroad company the trifling balance then appearing to the credit of the company; the taking of a small real-estate security from Arnold on the 19th day of March, 1877, when at the same time he had three or four thousand dollars worth of other real estate; the fruitless suit against Clark brought in May, 1877, and an unsuccessful suit against the Charter Oak Life Insurance Company in October, 1879; the taking of small sums from Walkley, from time to time, and applying them on the notes, and the delay in finally revising the account against the railroad company until April, 1883, and then for the first time notifying the defendant, Hollister, of the purpose to hold him liable on the bond, are not easily to be explained, as no reasons are suggested upon the record. These things would seem to indicate great reluctance to proceed against the defendant, and might naturally be supposed to indicate a possible want of confidence

in the claim against him. Nevertheless, in view of the strong provisions of the bond, we do not think the above facts constitute a legal defense. It does not appear that the defendant was misled to his prejudice by anything done or omitted on the part of the plaintiff, and the necessary elements of an estoppel against the maintenance of the suit are wanting.

But it is further claimed that if there was error in holding that the claim of the plaintiff was not covered by the provisions of the bond, there was another error in holding that the bond was the personal obligation of the defendant instead of the bond of the railroad company, and that the meaning of the bond is of no consequence if the real party who gave it is not brought into court. But the decision upon the construction of the bond was against the plaintiff, who appealed to this court; while upon the question who gave the bond, the judgment was wholly against the defendant, who did not appeal. So that we are called upon to reverse an erroneous judgment not appealed from, that we may thereby save an erroneous judgment that was appealed from.

It is quite unusual to apply the principle under such circumstances. Still we do not mean to say that it cannot be done. But the error ought to be manifest as matter of law, and if there entered into the judgment any element of fact upon which it may have been based, it ought not to be and cannot be disturbed. In this case the parties in effect conceded that, upon the question whether the bond in suit was the bond of Hollister or that of the railroad company, there was an ambiguity on the face of the instrument sufficient to justify a resort to extrinsic evidence; and the court heard the parties in regard to it, without the suggestion of any objection on the part of the defendant. Indeed, the second defense distinctly raised such an issue of fact, and presumably the defendant assumed the burden of proof on that issue.

The court distinctly found that issue for the plaintiff, and found certain special facts applicable. Among them were these: "The draftsman of the bond added the words 'Treasurer of the Connecticut Valley Railroad Company,' to the name and residence of the defendant in the bond, as descriptive, merely, of the person who was to sign it.

There was no evidence that the defendant had any power, by his signature as treasurer, or otherwise, to bind the company by an instrument of this description, and I find that he had no such power.

This we must regard as conclusive. The defendant however, even here, in effect, asks us to reverse another ruling, without bringing the question up by appeal. He says the judgment was a nullity because, on its face, it shows there was no evidence at all to base it upon. The finding is, there was no evidence that the defendant had any power to bind the company, and then the court adds: "I find that he had no such power." The two things are not necessarily inconsistent, but may well stand together, for there might have been no evidence to show affirmatively such power, while, on the other hand, there might have been much evidence to negative its existence.

CONN.

There was error in the judgment complained of, and it is reversed.

In this opinion the other Judges concurred.

Harmanus M. WELCH, Treasurer of New Haven County,

vs.
Arthur MCKANE *et al.*

1. Section 5 of "An Act to Regulate and Restrain the Sale of Spirituous Liquors," approved May 9, 1883, provides that "whenever a person so licensed shall be convicted of a violation of any of the provisions of part 6 of this Act, and no appeal is pending, said bond shall thereupon become forfeited, and the treasurer of said county shall, in his own name, institute a suit upon said bond for the benefit of said county; and upon due proof of said conviction the court before which said suit is brought shall render judgment in favor of said treasurer for the entire amount of said bond, with costs." Under this statute it is clear that the conviction of the principal constitutes a breach of the bond.
2. The statute does not in any way violate the constitutional guaranty of due process of law.
3. The parties entered into a contract obligation, in view of the provisions of the statute by which both principal and surety in the bond are made liable upon the conviction of the principal, provided there is no appeal.

(New Haven—Decided February 4, 1887.)

ACTION on bond given to the treasurer of New Haven County by defendants, McKane as principal, and Tynan as surety, upon license to principal to sell intoxicating liquors, for the due observance by him of the requirements of the statute with regard to the sale of liquors by licensed persons; brought in the District Court of Waterbury. Appeal to the Superior Court by the defendants from a judgment of the District Court for the plaintiff upon a demurrer to the complaint. By that court reserved for advice. *Judgment affirmed.*

The case appears in the opinion.

Messrs. J. O'Neill and T. Donohue, for appellants:

The Act of 1883 provides that where a person licensed to sell liquor has been convicted of a violation of the statute regulating such sale, his bond shall be forfeited; and that in a suit on the bond, "upon due proof of such conviction, the court shall render judgment for the entire amount of said bond, with costs." The defendant McKane was so convicted, and the plaintiff relies wholly upon proof of that conviction for his right of recovery on the bond. That cannot be conclusive evidence against defendant Tynan,—especially as he is a surety, favored in the law.

The Legislature cannot restrain a party from setting up a good defense to an action against him.

Coolley, Const. Lim. 370.

The Constitution provides that "the right of trial by jury shall remain inviolate;" and that "no person shall be deprived of life, liberty, or property without due process of law."

The province of the court is usurped by this statute, which provides what shall be proof of a conviction.

Wynehamer v. People, 18 N. Y. 444; *People v. Lyon*, 27 Hun, 180.

The defendant Tynan can prove that McKane did not keep open on Sunday; but this statute silences the effect of his evidence.

Legislation may make certain facts *prima facie* evidence of another fact (*Hand v. Ballou*, 12 N. Y. 543; *Howard v. Moot*, 64 N. Y. 262; *Commonwealth v. Williams*, 6 Gray, 1); but the courts hold that this *prima facie* case may be repelled by the circumstances, or by other proofs (*Commonwealth v. Wallace*, 7 Gray, 222; *Commonwealth v. Rove*, 14 Mass. 47).

The Legislature may prescribe rules for the admission of evidence, but cannot compel the trial court to hold it conclusive without regard to that court's conviction or judgment.

We have no quarrel with the rule that judgments bind parties and privies. In the criminal case the State and McKane were the parties. Tynan, the other defendant here, was not a party to that complaint. He was not a privy. He did not promise in the bond that he would be bound by any judgment which might be rendered against McKane for keeping open on Sunday; nor did he promise that he would pay this bond of \$300 in case McKane should be convicted; nor did he agree that in case McKane should be convicted, the judgment of conviction should be conclusive against him in an action on the bond. Tynan must be allowed to show: (1) that he did not sign the bond; (2) that no license was issued to McKane; (3) that McKane did not keep open on Sunday.

This statute cannot be said to be a police regulation. The Legislature may absolutely prohibit the sale of intoxicating liquor, and may confiscate the same, for this is a police regulation; but it may not absolutely prohibit the sale of butter, for this is not a police regulation.

People v. Marx, 99 N. Y. 377.

Messrs. G. E. Terry and C. A. Colley, for appellee:

"If parties should enter into a contract in view of a statute then existing, its provisions might properly be regarded as assented to and incorporated in the contract, and therefore binding upon them.

Cooley, Const. Lim. 445.

The condition of the bond is that McKane "shall comply with all the provisions of part 6 of the Act," and the question of noncompliance has been heard by a court of competent jurisdiction, and a jury has found, by a verdict of guilty, that he has not complied with the Act; and the Legislature has simply enacted that that question shall not again be litigated in this action, but that the former judgment upon it shall be conclusive. The principles laid down in the case of *Levick v. Norton*, 51 Conn. 461, apply to and decide this case.

This court has held that it is within the power of the Legislature to prescribe what shall be considered presumptive evidence in the trial of any cause.

State v. Cunningham, 25 Conn. 203.

In *Commonwealth v. Burns*, 9 Gray, 132, the court held that the provision of the statute that "three several sales of intoxicating liquors should be sufficient evidence of a violation of the law against common sellers" was constitutional. The Legislature had full power to enact the provision of the statute under consideration.

Loomis, J., delivered the opinion of the court:

This action is brought to recover for the breach of a bond given to the county treasurer by the defendants, McKane as principal and Tynan as surety, to secure on the part of McKane, a liquor licensee, the performance of the requirements of the statute regulating the sale of intoxicating liquors by licensed persons.

The complaint alleges the application of McKane for a license, the tender of the bond in suit duly executed by the defendants, the granting of the license to sell spirituous and intoxicating liquors at a place specified; and that afterwards, at a criminal term of the superior court, held at Waterbury on the last Tuesday of September, 1884, the defendant McKane was duly prosecuted for, and convicted of, keeping open his saloon in violation of one of the provisions of part 6 of the Act relating to the sale of spirituous and intoxicating liquors, making, by reference, a copy of the conviction and proceedings therein a part of the complaint.

To this complaint the defendants demurred, upon the grounds that the conviction of McKane in the criminal suit was not conclusive, and that the facts stated would not entitle plaintiff to recover.

The Waterbury District Court, where this suit was first brought, held the complaint sufficient, and rendered judgment for the amount of the bond. The defendants appealed to the superior court, upon the ground that there was error in holding the judgment of the criminal court conclusive, and in deciding that the Legislature had power to determine the weight of evidence in a judicial proceeding. The superior court reserved the questions for this court.

The right to recover upon the bond in suit is predicated upon "An Act to Regulate and Restrain the Sale of Spirituous Liquors," approved May 9, 1883, § 5 of which provides that "whenever a person so licensed shall be convicted of a violation of any of the provisions of part 6 of this Act, and no appeal is pending, said bond shall thereupon become forfeited, and the treasurer of said county shall, in his own name, institute a suit upon said bond for the benefit of said county; and, upon due proof of said conviction, the court before which said suit is brought shall render judgment in favor of said treasurer for the entire amount of said bond, with costs."

Under this statute it is clear that the conviction of the principal constitutes a breach of the bond. The undertaking of the surety is that his principal shall not be guilty of violating the statute. And it would seem more just and reasonable, even toward the surety, that the guilt of the principal would be established in a criminal prosecution, where he would have the benefit of a reasonable doubt and other ad-

vantages that would be denied him in a mere civil proceeding. The question as to the guilt of the principal might be decided differently in the two proceedings, occasioning great complexity and difficulty in administering the law.

But we concede that this reasoning, founded upon inconvenience, does not meet the objection that the statute, in making conviction in the criminal proceeding conclusive as to the breach of the bond, transcends the limits of valid legislation. Does the statute, then, in any way violate the constitutional guaranty of due process of law, which requires not only that a party shall be properly brought into court, but that he shall have the opportunity, when in court, to establish any fact which, according to the usages of the common law or the provisions of the Constitution, would be a protection to him or his property?

We are prepared to answer the question in the negative, for the reason that this is a case where the parties entered into a contract obligation in view of the provisions of the statute as to what should constitute a breach of the bond and give the right to sue upon it. In this way the provisions of the statute became part of the contract, so that both principal and surety in the bond are made liable upon the conviction of the principal, provided there is no appeal.

In confirmation of this position we cite the following authorities, where the same principle was applied to cases arising under statutes providing for the taking of certain bonds or security, and which authorize judgment to be rendered against both principal and surety upon mere motion, without notice or process: *Lewis v. Garrett's Admr.* 6 Miss. 484; *Chappee v. Thomas*, 5 Mich. 53; *Gildersleeve v. People*, 10 Barb. 35; *Philadelphia v. Commonwealth*, 52 Pa. 451; *Whitehurst v. Colsen*, 53 Ill. 247; *Pratt v. Donovan*, 10 Wis. 378.

We think also the principles laid down by this court in *Levick v. Norton*, 51 Conn. 461, may apply. In *Quintard v. Knoedler*, 58 Conn. 485, 1 New Eng. Rep. 464, it was held that a verdict which fixed the liability of the principal (there having been no appeal) was a breach of the bond. The counsel for the accused claimed that the verdict must be followed by a sentence or judgment, but did not suggest a doubt that the latter would establish conclusively a breach of the bond. In the case at bar, final judgment was rendered and was satisfied on the part of the accused, so that there could have been no appeal.

One part of the argument in behalf of the surety, Tynan, seems to assume that he was denied the right to contest the execution and delivery of the bond and the granting of the license, but the special demurrer did not raise these questions; but these facts were admitted, as they were alleged in the complaint and not demurred to. The defendants could, of course, contest these facts, and also the fact that the principal had been convicted, but, as to the latter fact, it must be determined by the record.

The Superior Court is advised that there was no error in the judgment of the District Court.

In this opinion the other Judges concurred.

APPEAL OF Matsey B. DICKERSON,
et al. from Probate.

1. A motion to the probate court for an appeal from an order of distribution under a will complies with the requirement of the statute, that appellants must appear to have suffered pecuniary injury, where it is shown in the motion that two of the appellants are heirs at law of the testatrix, and legatees under her will, and that another is assignee of an heir at law, and they all aver that they are aggrieved by the order of the probate court, which sets to appellee all the real estate owned by the testatrix in a particular locality at the time of her death.
2. Since to the statute which provided that "any person having power to dispose of real estate by will or testament may, by such will or testament, devise such real estate not owned by him at the time of making the same, but acquired afterwards," was added the provision that "every devise purporting to be a devise of all the real estate of the testator shall be construed to convey all the real estate belonging to him at his decease, unless it shall clearly appear by the will that he intended otherwise," it is immaterial when the testator in fact wrote that he bequeathed all his real property, for the statute declares the date to relate to the time of his death, and all contemplation, and possibility even, of after-acquired property are barred out; unless, when making the will the testator has therein clearly manifested his intention that it shall speak of the day of its execution. Without such intention appearing, all after-acquired real estate will pass under the devise.
3. Where a will made in 1856, the testatrix dying in 1885, contains a devise of all real estate within specified geographical territory to one, of all else in the world to others,—the bequests exhaust all possibilities of ownership, and the will speaks for the testatrix as of the moment of her death; and the statute causes her to republish it on the last-named day, and the bequests include all the real estate owned by her at the time of her death.

(Fairfield—Filed July, 1887.)

A PPEAL to the Superior Court of Fairfield County from so much of an order of the Probate Court as distributed to Gershom B. Bradley all the real estate of testatrix Sarah Williams. The Superior Court reversed the portion of said order appealed from, and thereupon said Bradley appealed to this court. *Decision of Superior Court reversed.*

The facts and questions presented are stated in the opinion.

Messrs. Levi Warner and Goodwin Stoddard, for Gershom B. Bradley:

This appeal should have been dismissed on

motion. There is nothing in the records of the probate court, or in the appeal to the superior court, showing that the appellants, or either of them, had any pecuniary interest in the matter of the appeal.

Swan v. Wheeler, 4 Day, 187; *Saunders v. Denison*, 20 Conn. 521; *Deming's App.* 34 Conn. 201; *Norton's App.* 46 Conn. 527.

The real estate in Westport purchased by the testatrix after the execution of her will is not intestate estate.

Stat. Comp. 1875, p. 368.

The first change in the law of this State in relation to the effect of a will upon real estate acquired after the will was made, was by a statute passed in 1831, which was as follows: "Any person having power to dispose of real estate by will or testament may, by such will or testament, devise such real estate not owned by him at the time of making the same, but acquired afterwards."

This Act gave the power of devising such estate, leaving the question whether in fact devised one of construction.

In 1848, as appears from the Compilation of 1849, p. 346, there was added this provision: "And every devise, purporting to be a devise of all the real estate of the testator, shall be construed to convey all the real estate belonging to him at his decease, unless it shall clearly appear by the will that he intended otherwise."

The Act of 1848 gave a rule of construction. The claim that the statute does not apply to this will, because there is in this will no one devise purporting to convey all the real estate, cannot be sustained.

The word "devise," as used in the statute, means "will."

Bouv. L. Dict. Devise; *Hill. Exrs. & Surr.* p. 56; 6 *Greenl. Real Prop.* p. 3; 1 *Swift, Dig.* p. 134; *Swinton v. Bailey*, 38 *Eng. R.* 79.

By this statute the Legislature has said: "If a man by his will devises all his real estate, all the real estate owned by him at his decease shall pass by the will, unless it shall clearly appear from the will that he intends otherwise."

To give this statute the construction contended for by the other side, is to assume that the evil which the Legislature was intending to remedy existed only where there was an attempt to dispose of all the real estate by a single clause or devise; or, that the Legislature intended to provide one rule for the construction of wills where the testator devised all his real estate by one clause, and another rule where he devised it all by two clauses; or that the statute was intended to give a man the right to devise after-acquired real estate provided he did it by a single clause of his will, but not otherwise. There does not seem to be any good reason for either assumption.

The after-acquired real estate passed by the second clause of the will to G. B. Bradley. The language of our statute is slightly different from the English statute, but the object of the two statutes is the same and should receive the same construction.

1 *Vict. chap. 26*, § 24, cited; 3 *Jarm. Wills*, p. 797; *Dickinson v. Dickinson*, L. R. 12 Ch. Div. 22; *Smalley v. Smalley*, 49 L. T. N. S. 662; *Bell v. Towell*, 18 S. C. 94; *Edwards v. Warren*, 90 N. C. 604; 22 N. H. 484; 6 Md. 487; *Cushing v. Aylwin*, 12 Met. 169; *Wait v.* 450

Belding, 24 Pick. 129; *Kimball v. Ellison*, 128 Mass. 41; *Canfield v. Bostwick*, 21 Conn. 553; *Gold v. Judson*, Id. 622.

Messrs. E. M. Lees and R. E. De Forest, for Matsey B. Dickerson *et al.*

Pardee, J., delivered the opinion of the court:

Sarah Williams made a will in 1856. She then owned real estate in the towns of Westport and Easton. She subsequently acquired real estate in the towns of Westport and Norwalk. She died in 1885, owning all of this real estate. By her will she devised in fee to Gershom B. Bradley all her real estate in Westport, the remainder of her real and personal estate to him with other devisees. The probate court ordered all of the real estate in the town of Westport, owned by the testatrix at the time of her death, to be distributed to him. Two of the heirs at law and legatees, and an assignee of another heir at law of the testatrix, appealed from so much of said order as distributed to Gershom B. Bradley all the real estate owned by the testatrix at the time of her death. The appellee, or defendant, Gershom B. Bradley, moved the superior court to dismiss the appeal for reasons as follows, viz.: Because it does not appear from said appeal, or from the record of the court of probate in said cause, that the appellants, or any of them, have any interest in or right to prosecute said appeal in this court; or that the order of distribution complained of by them, and from which they have appealed, is injurious to them, or either of them; and because it is not alleged, and does not appear from said appeal or otherwise, that the order of distribution so appealed from is not according to the will of the said Sarah Williams, deceased, and according to law. The court denied the motion; and, upon hearing, decreed that so much of the order of the probate court as ordered all of the real estate owned by the testatrix at the time of her decease in the town of Westport to be set to Gershom B. Bradley be reversed and set aside; and that all the real estate acquired by the testatrix after the execution of the will should be distributed as intestate estate.

Gershom B. Bradley, the defendant, appealed to this court for these reasons, viz.: (1) that the court erred and mistook the law in refusing to dismiss said appeal upon the motion of the appellee as of record, and for the reasons therein stated; (2) that the court erred in rejecting the evidence offered to prove that, after the making of the will, and after the testatrix acquired the Burns property, she told the said Gershom B. Bradley that she had given to him this Burns property, and that she had given to him all her real estate in the town of Westport, and that she read to him the second clause in the will, to show that she had given it to him; (3) in adjudging and decreeing that the real estate situated in said Westport, and acquired by the testatrix after the making of said will, did not pass by said will to said Gershom B. Bradley; (4) in finding, from the facts proven in the case, that all the real estate acquired by the testatrix after the execution of the will is intestate estate, and ordering the same to be distributed as such; (5) that the

court erred and mistook the law in reversing the decree of the court of probate.

The statute gives the right of appeal from any decree of the probate court to any person aggrieved thereby; that is, to any person who will thereby suffer pecuniary injury; but it must appear in his motion to the probate court for an appeal that he will thus suffer. Two of the appellants aver that they are heirs at law of the testatrix, and legatees under her will; another, that he is assignee of an heir at law. All aver that they are aggrieved by an order of the probate court which set to Gershom B. Bradley all of the real estate in the town of Westport owned by the testatrix at the time of her death. Under our rules of practice in the probate court this was a sufficiently explicit averment that, if the order complained of had not been passed, a portion of the land in Westport would have been set to them. This meets the requirement of the law. The appeal was well taken.

By the common law of this State prior to 1831, and of England prior to 1837, a devise of all real estate did not carry such as the testator acquired after the date of his will. A bequest of all his personal property carried all owned by him at the time of his death. In this State, in 1831, a statute provided that "any person having power to dispose of real estate by will or testament may, by such will or testament, devise such real estate not owned by him at the time of making the same, but acquired afterwards." In 1848 the following provision was added, viz.: "And every devise purporting to be a devise of all the real estate of the testator shall be construed to convey all the real estate belonging to him at his decease, unless it shall clearly appear by the will that he intended otherwise." In 1837, in England, a statute provided "that every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Of the English statute this court said, in *Gold v. Judson*, 21 Conn. 623, in 1852, as follows, viz.: "This statute was passed to get rid of the principle in their law that a will spoke from its date as to real estate; for, by their law, no real estate passed by a will but what the testator had when he made his will; but as to his personal property, the law of England and of this State now is, and has ever been, otherwise. We have a statute in relation to real estate substantially like the English statute above referred to." Therefore by these statutes, in this State and in England, the distinction in this regard between the devise of real estate and the bequest of personal property was abolished; and in the opinion of this court, above cited, the statutes of the two jurisdictions are of the same import, and for the same purpose, and are to receive the same interpretation. Previous to the enactment of our statute, no matter when the testator in fact wrote that he bequeathed all of his personal property, the law said that he so wrote at the last moment of his life. Of course all contemplation—and possibility even—of after-acquired property were barred out. Since the statute, the same has been true of a devise of real es-

tate,—there can be no contemplation—or possibility even—of subsequent acquisition. This is true, unless, when making his will, the testator has therein manifested his intention that it shall speak of the day of its execution.

In *Doe v. Walker*, 12 Mees. & W. 591, the testator devised all his land in Great Bowdon. Subsequently to the execution of the will he acquired additional land in that parish. Held, that the devisee took the after-acquired land. Speaking of the English statutes, the vice-chancellor said: "These show that one great purpose of the Legislature in these enactments was to abolish and put an end to the old law which prevented a testator from devising real estate which he might acquire by title accruing subsequent to the date of making and executing his will. In that respect the policy of the New Wills Act seems to have been to assimilate the law of wills disposing of real estate, so as to accord with the law of wills as to personal property. * * * But it is because the language of wills is so much in the present tense, and used as speaking of the time of the date and making of the will, that the Act of Parliament has, as to real or personal estate, enlarged their interpretation beyond the present tense, and declared that the will is to speak as if executed immediately before the testator's death."

In *Re Portal & Lamb*, L. R. 80 Ch. Div. 55, Lindley, L. J., said: "If a testator devises all his lands in the parish of B, and then makes a residuary devise of all his other lands, the former devise will carry all other land which he may subsequently acquire in that parish, under § 24 of the statute, unless there is an intention to the contrary."

In *Smalley v. Smalley*, 49 L. T. N. S. 662, the testator devised "all my freehold land and my two cottages * * * at Clowstop; * * * also my five leasehold houses." Subsequently he acquired other freehold property at Clowstop, of which he died possessed. Held, that the devisee took the whole.

In *Dickinson v. Dickinson*, L. R. 13 Ch. Div. 22, the testator devised to his son all his leaseholds situated at C, charged with payment of mortgages and annuities. At the date of the will he was possessed of two leaseholds at C, one subject to a mortgage, the other to an annuity. He subsequently acquired other leasehold property at C. Held, that the after-acquired leasehold passed to his son.

In *Cushing v. Aylwin*, 12 Met. 169, the testatrix, by will made in 1834, devised all her property. In 1840 she acquired land. She died in 1841, not having republished her will. Held, that the devisee took the whole.

In *Wait v. Belding*, 24 Pick. 129, a testator devised to his two sons "the whole of my land and buildings lying and being within the town of Hatfield." He made a codicil afterwards, which was held to be a republication of the will; and it was also held that other lands acquired by the testator in the interval between the date of the will and the codicil passed to the two sons by the will. It was said by Chief Justice Shaw, in delivering judgment: "By the Revised Statutes it is provided that a will shall embrace after-acquired real estate, as well as personal, when such is the intent of the testator. These statutes do not

affect this will. I only allude to them by way of illustration. Suppose this will had been made after the Revised Statutes, and the question should be whether the estate now in controversy passed by this devise. There seems to be no doubt that it would; the description being general of all the lands in Hatfield, without limitation as to the time of acquisition."

The statute in Massachusetts provides that "any estate, right, or interest in lands, acquired by the testator after making his will, shall pass thereby in like manner as if possessed at the time of making the will, if such clearly and manifestly appears by the will to have been the intention of the testator." Gen. Stat. chap. 92, § 4.

In *Redfield on Wills*, 885, it is said: "General devises and bequests seem to have been universally construed to include all which was in the power of the testator to dispose of; which, as the law now stands in most American States, will embrace all the testator's estate, whether real or personal, at the time of his decease."

In *1 Jarman on Wills*, 5th Am. ed., from 4th Lond. ed. 605, speaking of the English statute, it is said: "By the combined effect of the third and twenty-fourth sections of the statutes, it is evident that a general devise of real estate (or of the testator's real estate in a given county or parish) will operate upon all the property of that description to which the testator may happen to be entitled at his decease." And on page 602, note 4, it is said: "In most of the States there has been enacted some statute more or less perfectly equivalent to that of 1 Vict. chap. 26," and cites the statute of Connecticut.

In *1 Redfield on Wills*, 4th ed. 886, it is said: "Under statutes giving the testator power to dispose of all his estate, both real and personal, of which he may be possessed at his decease, it has been held that a general devise of all the testator's estate in a particular town or county or other place, will embrace all of which he dies possessed within those limits."

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Moreover, if we should interpret the statute in the narrowest and most literal sense, we shall find that in the will under consideration the testatrix has used apt and sufficient words for the disposition of all her real estate. The testamentary disposition of the whole may be by one devise to one devisee; or by several devises of parts to as many devisees. It is only necessary that either the single devise, or the aggregated effect of several, shall exhaust all possible interest in and right to the testator's real estate.

The will in question contains, first, a devise of all the real estate belonging to the testatrix in the town of Westport to Gershom B. Bradley; second, a devise to several devisees of the remainder of her real estate,—the testamentary disposition of all real estate within specified geographical territory to one, of all else in the world to others. Of course, together, they are all inclusive; they exhaust all possibilities of ownership. The will literally meets the requirement of the statute that it shall be a devise purporting to be a devise of all the real estate of the testatrix. And there is neither sentence nor word even, indicating her intent to stamp the date of execution upon the devise. She has placed no bar to the full operation of the statute. She has allowed it to speak for her as of the moment of her death; and, read as of that moment, doubt as to the construction is impossible. The statute carried forward and continued in force her intent to give to Gershom B. Bradley all the real estate which she owned in Westport from the day of the execution of her will to that of her death, and in effect causes her to republish it on the last-named day. After the date of the will she lived many years, in presumptive knowledge that the statute would give this effect to what she had written, unless she should be at pains to prevent it, and she did not prevent it.

There is error in the judgment of the Superior Court in reversing the decree of the Probate Court appealed from.

RHODE ISLAND.

SUPREME COURT.

Henry A. GARRETT

v.

Isaac SHOVE *et al.*

A bond on appeal from a justice of the peace, which does not contain the name of any obligee, is void, and will render the attempted appeal ineffectual, and will not prevent the issuance of execution, or imprisonment of the judgment defendant on execution.

(Providence—Decided May 25, 1887.)

ON plaintiff's exceptions to the Court of Common Pleas in an action of trespass for false imprisonment. *Overruled.*

The appeal bond in question was as follows:

Know all men by these presents, that I Henry A. Garrett, as principal, and — as surety, both of Pawtucket, in the county of Providence, State of Rhode Island, etc., stand holden and firmly bound unto — of said Pawtucket, in the full and just sum of \$50, for the payment of which sum we bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents.

The condition of the above obligation is such that whereas, at the Justice Court of the Town of Pawtucket, holden in said town on the 11th day of August, A. D. 1885, in said county, recovered judgment of said court against the above-named Henry A. Garrett in an action then and there commenced by the said W. H. Conway and by him prosecuted, for the sum of \$6.90 debt, and cost of suit (including appeal bond), taxed at \$3.25; from which said judgment the said defendant hath appealed to the next term of the court of common pleas, to be holden at Providence, in and for said county of Providence, on the first Monday of December next ensuing the date hereof. Now, therefore, if the said Henry A. Garrett, executors and administrators, or any of them, shall prosecute the said appeal with effect, at said court of common pleas, or, in default thereof, shall well and truly pay all lawful costs that shall or may arise or accrue to the said W. H. Conway by reason or means of said appeal, then the above obligation to be null and void; otherwise to be and remain in full force and virtue.

Signed with our hands and sealed with our seals, at Pawtucket, this 17th day of August, A. D. 1885.

Signed, sealed, and delivered in presence of } Henry A. Garrett.
[L. s.]

The facts are further stated in the opinion. Messrs. Charles F. Ashton and Edward D. Bassett, for plaintiff.

Messrs. J. P. Gregory and W. W. Blodgett, for defendants:

No appeal bond was filed in the justice court. The paper which was filed on August 17, 1885, and which is relied upon as an appeal bond, did not contain the name of any person as obligee. The bond was fatally defective.

R. I.

Putnam v. Boyer, 140 Mass. 235, 1 New Eng. Rep. 527.

It is of the essence of a bond to have an obligee as well as an obligor; it must show upon its face to whom it is payable.

Graham v. Holt, 8 Ired. 802; *Phelps v. Call*, 7 Ired. 262.

The defect cannot be supplied by showing a delivery to a particular person.

Graham v. Holt, *supra*.

A blank signed, sealed, and delivered, and afterwards filled up as an official bond, without redelivery, is not binding upon parties signing.

Gilbert v. Anthony, 1 Yerg. (Tenn.) 69; *Wynne v. Governor*, 1 Yerg. (Tenn.) 149; *Perminier v. McDaniel*, 1 Hill (S. C.) 267.

A bond delivered, with a blank left for insertion of amount, is not the deed of the party signing; nor will it become so unless there is a redelivery thereof after the blanks have been filled by someone properly authorized.

Williams v. Crutcher, 5 How. (Miss.) 71; *Barden v. Southerland*, 70 N. C. 528.

Per Curiam:

This is an action for trespass for false imprisonment, against Isaac Shove and Edward M. Blodgett. In 1885 Shove was the justice, and Blodgett the clerk, of the Justice Court of Pawtucket. In July of that year, one W. H. Conway began an action of assumpsit in said court against Henry A. Garrett, the plaintiff in this case, for the sum of \$6.90, and August 11, following, judgment was rendered in said court for Conway, for \$6.90 debt and \$3.25 costs. Garrett claimed an appeal, and on August 17, which was Monday, filed in said court a paper purporting to be an appeal bond. The paper is signed by Garrett, but names no obligee in what was intended for the obligatory part, though the condition, which is also partly defective, is otherwise in form a proper condition for an appeal bond in such a case. On August, 18, 1885, said justice court issued execution in such case against said Garrett, on which he was arrested. This arrest is the ground of the present action. The case comes before us on exceptions from the court of common pleas, in which court the plaintiff was nonsuited for the reason, among others, that the appeal bond was void, and consequently no appeal was taken; and, if no appeal was taken, execution was rightly issued.

We are of the opinion that the nonsuit was proper. It is of the essence of a bond to have an obligee as well as an obligor. *Phelps v. Call*, 7 Ired. 262, 264. There is no obligee in this bond, unless the court can, by construction, fill the blanks in the obligatory part. There is no description or designation in the obligatory part which enables us to do this. It is only by reference to the condition that we can form a conjecture even as to who could be the proper obligee. We know of no principle which would authorize us to insert the name of such obligee, when the obligor himself has omitted it. To do so would be to make a bond for the obligor which he has not made for himself. The bond, as signed, obligates the obligor to nobody, either by name or description, or any other designation.

Exceptions overruled, and judgment of the Court of Common Pleas affirmed, with costs.

PETITION OF Henry BULL and Martha S. Cozzens *et al.* FOR AN OPINION of the Court.

The owner of two separate adjoining estates, known as the E and G estates, conveyed the E estate by a deed which covenanted that no edifice or obstruction of light should ever be erected on the side of the dwelling-house conveyed, towards the G estate, within the distance of eleven feet. Thereafter the then tenants of the G estate purchased the E estate, and executed a mortgage thereon which conveyed the premises "with all the rights and easements," with the reservation that "these grantors are at liberty to release to the heirs of G any restriction in former deeds against erecting any edifice or obstruction of light within eleven feet of the north side of a portion of the buildings;" said mortgage also contained a power of sale, which authorized the mortgagee to sell and convey the mortgaged premises absolutely and in fee simple. Under this power, after condition broken, the assignee of the mortgage sold the mortgaged premises to B; meanwhile the mortgagors occupied both estates and put up a building on the eleven-foot strip, and thereafter executed to the heirs of G a release of all restrictions on building on or obstructing the eleven foot strip. On a case submitted to ascertain whether, after B's demand that the obstructions be removed, the owner of the G estate could maintain them,—*Held*:

(a) That the power reserved to the grantors in the mortgage was extinguished by the sale for breach of condition.

(b) That B, the purchaser of the mortgaged estate, was entitled to have it with the rights and easements appurtenant to it as they existed when the power of sale was given.

(c) That it could not be inferred from the occupation of the eleven-foot strip by the mortgagors that they had renounced their rights and easements in said strip, as they were at the time in possession of both estates.

(d) That B was therefore entitled to have the structures on the eleven-foot strip removed.

(Newport—Decided May 21, 1887.)

CASE stated for an opinion of the Court under R. I. Pub. Stat. chap. 192, § 23.

Henry Bull owns an estate on Thames Street, in Newport, known as the Engs estate, and Martha S. Cozzens *et al.* own the next estate on the north known as the Gould estate. A strip of land eleven feet in width separates the estates. In 1799 William Vernon, who then owned both estates, conveyed the former to William Engs, Jr., and in his deed covenanted "for myself, my heirs and assigns, to and with the said William Engs, Jr., his heirs and assigns, that no edifice or obstruction of light shall ever be erected on the north side of said dwelling-house to the distance of eleven feet

extending northerly from said dwelling-house as it now stands, and that the said William Engs, Jr., his heirs and assigns, shall have free egress and regress to the north side of said dwelling-house for the purpose of repairing the same, and that the clappingboard of said north side of said dwelling-house shall not be damaged by piling wood or any other thing against it, nor shall the spout for catching rainwater be damaged or disturbed or removed excepting by the said William Engs, Jr., or his heirs or assigns, and it shall be at the option of said William Engs, Jr., to maintain the spout or to let the water drop from the eaves of said north side." The dwelling-house spoken of stood on the Engs estate, along the south side of the eleven-foot strip.

In 1870 William C. Cozzens, George Cozzens, and Henry W. Cozzens, then tenants of the Gould estate, purchased the Engs estate, and mortgaged the latter by a deed of mortgage which conveyed the premises "with all the rights and easements," and contained the reservation: "It is understood, however, that these grantors are at liberty to release to the heirs of Isaac Gould any restriction in former deeds against erecting any edifice or obstruction of light within eleven feet of the north side of a portion of the buildings," and also providing that the "jet on the north side of said building is continued only by consent of said heirs, without prejudice to the land covered by said projection other than specified in this deed;" and also contained a power of sale which authorized the "mortgagee, his executors, administrators, or assigns, to sell, * * * and in his or their own names, or as the attorney of the grantor, * * * to convey the same absolutely and in fee simple to the purchaser or purchasers accordingly."

Under the powers in the mortgage deed, and after condition broken, the assignee of the mortgagee in 1877 sold and conveyed the mortgaged premises to Henry Bull. Meanwhile the mortgagors occupied both estates, and put up a building on the eleven-foot strip. William C. Cozzens died in December, 1876. In 1884 George Cozzens, Henry W. Cozzens, and the heirs and administrators of William C. Cozzens executed to the heirs of Isaac Gould and their successors in title to the Gould estate a release of all restrictions on building or obstructing the eleven-foot strip.

This case was submitted to ascertain whether, after Bull's demand that the obstructions on the strip should be removed, the owners of the Gould estate could maintain them.

Mr. F. B. Peckham, for Henry Bull:

Suppose that some power was reserved, it could only be executed by all three of the donees—the three mortgagors. It was not conferred on their heirs or assigns, nor on the survivors of them, nor on any person save themselves. When a power is given to two or more, all the donees must join in the execution of it unless the contrary is expressed.

2 Washb. Real Prop. 3d ed. 614.

But it may be urged on the other side that this power was one conferred on several persons as a class, so that the survivors might execute so long as more than one of them remained.

Id. 615.

As we understand it, such class must be composed of trustees or persons having some official character of that kind. It is believed that only one instance of a class not so composed can be cited,—that mentioned by Coke (Co. Litt. 118). There the donees were five sons-in-law, named generally, and four survivors of them acted. The power was conferred by will, and Coke says, explaining the exceptional character of the case, "The words of a will in a benign interpretation are satisfied in the plural number, albeit that they had but a bare authority."

At present we are not considering a will. It is pertinent to observe, however, that many if not all of the decisions favoring this survivorship relate to powers created by will, and rest largely upon the more liberal rules which govern the construction of wills.

But the language before us for interpretation clearly signifies that the three mortgagors must all join in the act of release, and by a deed quickly following if not contemporaneous with the mortgage.

Under the language creating the power here discussed, no continuance of it beyond the sale by the mortgagee, and the consequent loss by the mortgagors of everything which led to their appointment as donees, can be upheld. That sale put an end to the authority of the survivors if they ever had any. It was an incident beyond which no execution of the power could ever be made by all or any portion of the donees.

Mr. William P. Sheffield, for Martha S. Cozzens *et al.* :

I. One question is that, inasmuch as Bull and his ancestors in title have substantially closed their building from light and air on its north side, is he in a condition to complain of the Gould heirs and grantees for obstructing the light and air?

II. It does not appear that the erection on the passageway across the alley obstructs either the light or air to Bull's building or that the same in any way interferes with spouts from his building, or his right to paint or repair his building, and the question is if, in the presence of these facts Mr. Bull can complain of what has been done. See *Walker v. Worcester*, 6 Gray, 550.

III. The covenant in the deed was not a grant, and so far as it related to the erection of any building on the space, it was limited only to such erections as would obstruct the light entering the Bull building. Bull and his ancestors, having erected a blank wall to their building and thus by their own acts shut out the light from their building, have thereby waived their right to any advantage from this covenant.

It is a well-settled law that an easement may be extinguished by parol.

See *Dyer v. Sandford*, 9 Met. 395.

If so, a portion of it may be extinguished by the acts of the parties.

The owner of a dominant estate may make such changes in his estate as to renounce easements in a servient estate.

Pope v. Devereux, 5 Gray, 409.

When there was a condition in a deed to keep up a fence, the removal of the fence by an intermediate owner of the dominant estate

operated as an extinguishment of the condition.

See 4 Cush. 184.

IV. The power to release these incumbrances reserved in the mortgage under which Bull claims is to be construed as a regrant of that power to the mortgagors and therefore to be liberally construed, as between the mortgagors and the assignees of the mortgagees.

Durfee, Ch. J., delivered the opinion of the court:

Our opinion is that the power reserved to the grantors in the mortgage deed mentioned in the case stated, if it did not sooner determine by the death of one of the grantors, was extinguished by the sale for breach of condition. The deed conveyed not only the lot described, but also, together with it, "all the rights and easements," and therefore conveyed "the rights and easements" attached to the lot by the covenant given by William Vernon in his deed of 1799. The premises, however, were mortgaged subject to the power reserved; and, we are inclined to think, continued subject to that power so long as the mortgage was outstanding, unless the power became extinct by the death of one of the grantors. But the mortgage was not only subject to the power reserved to the grantors; it was also coupled with a power given by the grantors to the mortgagee or his executors, administrators, or assigns. The latter power authorized the mortgagee, his executors, administrators, or assigns, on breach of condition, to sell the mortgaged premises and "convey the same absolutely and in fee simple to the purchaser." The power covers the rights and easements appurtenant to the lot as well as the lot itself. It was executed before any attempt was made to execute the power reserved. It is well settled that a conveyance under such a power is the conveyance, not only of the mortgagee or assignee executing it, but also, and even more properly, the conveyance of the mortgagor himself. 4 Kent, Com. * 327; 2 Jones, Mort. § 1897; *Woonsocket Institution for Savings v. American Worsted Co.* 13 R. I. 255.

The conveyance under the power, therefore, may be treated as if the mortgagors themselves had made it directly to the purchaser, and had paid off the mortgage out of the purchase money, reserving the surplus to themselves. The question is whether it would be competent for them, after doing so, to exercise the power reserved to them in the mortgage deed. We think that it clearly would not, since such an exercise of the power would be derogatory to their own grant. 1 Sugd. Powers, 56.

We are also of opinion that the buildings erected on the eleven-foot strip is an infringement of the rights, privileges, and easements secured to the Engs estate by the Vernon covenant of 1799, and that it is none the less an infringement because it was erected by the mortgagors, it having been erected after the mortgage, which was duly recorded. The power annexed to the mortgage was a power coupled with an interest, and it entitled the assignee of the mortgage, to sell the estate as it existed when it was given, discharged from any subsequent incumbrance or alienation cre-

ated otherwise than by an exercise of the power reserved. 2 Jones, Mort. § 1654. The purchaser is therefore entitled to have the estate with the rights and easements appurtenant to it as they existed when the power of sale was given.

Moreover, we do not think that it could be inferred, even against the mortgagors themselves, if they were still the owners of the Engs estate, from their use of the eleven-foot strip, that they had renounced their rights and easements in said strip; for when they erected the structure across said strip, they were in possession of both estates, using both together, so that neither was for the time being dominant and neither servient, the easements and servitudes appertaining to them being temporarily suspended. Washb. Easem.* 517.

Our decision is that Henry Bull, purchaser under the power of sale, is entitled to have the structure now built across the eleven-foot strip removed, and that it will be the duty of the owners of said strip to remove it when requested to do so by said Bull.

George H. WASHINGTON

Edward D. BASSETT and Joseph H. Brown.

1. The power of sale in a mortgage provided that the mortgaged premises before selling, should give "twenty days' notice" of sale in some newspaper printed in Providence. The notice was printed in a daily newspaper on seven days only, at intervals, during twenty days preceding the sale. *Held*, that this was not sufficient; that the provision as to notice meant a continuous notice for twenty days.
2. It seems, however, that if the mortgagee had, in good faith, selected a weekly or semi-weekly, instead of a daily, paper, the insertion of the notice continuously in each issue of such paper for the designated period would have fulfilled the requirement.

(Providence—Decided July 16, 1887.)

BILL to redeem a mortgage and for an account. *Decree for complainant.*

The question presented and the facts connected are stated in the opinion.

Messrs. Charles M. Salisbury and Charles H. Page, for complainant.

Messrs. Edward D. Bassett and Fred-eric Hayes, for respondents.

Stiness, J., delivered the opinion of the court:

The defendant Bassett sold to the defendant Brown a lot of land in Providence, under a power of sale contained in a mortgage deed of which Bassett was the assignee. After the sale, the complainant, a judgment creditor of the mortgagor, bought the mortgagor's interest in the land at the execution sale, under a levy which had been made before the mortgage sale took place. The complainant brings this bill to redeem, claiming that there has been no valid sale under the power contained in the

mortgage, because the requirement of the power—"first giving twenty days' notice of such sale in some one of the public newspapers printed in said 'city of Providence'"—has not been complied with.

The mortgage sale took place August 12, 1885. The notice was published in the Evening Mail, a daily newspaper printed in Providence, seven times, viz.: July 22, 25, 29; August 1, 5, 8, and 11. The question is whether such a publication of the notice satisfies the requirement of the power. We do not think it does. The evident purpose of the requirement is to secure ample notice of the sale, for the mutual advantage of the mortgagor and mortgagee. The mortgagee is allowed to select the newspaper in which he will give the notice, but the extent of the notice is definitely expressed. It must be "twenty days' notice." We think the fair and natural interpretation of that phrase is that the notice is to be continuous, in the paper selected, for twenty days.

The defendants contend that, inasmuch as the notice covered a period of twenty days, it was "twenty days' notice;" but if seven insertions in a daily paper, covering the time, is to be held equivalent to twenty days' notice, why would not two,—say on the first and last days of a period of twenty days,—or even one, twenty days before the sale? If anything less than a continuous notice is sufficient, we do not see why one or the other of these would not also be sufficient. The defendants say that even this complies with the literal construction of the terms of the power, but that is not enough, if the construction be crafty or technical. Such powers should be construed as people generally, who have to do with them, would be likely to understand them, and we think that the use of the word "days" would suggest to the ordinary mind a continuous daily notice, if it be in a daily paper.

In *Stine v. Wilkison*, 10 Mo. 75, 96, "twenty days' previous notice" of the time of sale was required. One notice was published in a daily newspaper twenty-one days before the sale, and after that the notice was published less than twenty times in another paper, which was a weekly reprint of the daily. This was held to be insufficient notice. The court says: "Would one publication of a notice by a sheriff of an intended sale of real estate under execution, made in a newspaper twenty days before the day of sale, be held to be a compliance with the requisition of the statute, which directs him to give twenty days' previous notice of the time, etc., by an advertisement in some newspaper printed in the county, etc.? We apprehend that such is not the general understanding, nor the practice in the country, but that such notices are continued to be published until the day of sale." This case is cited by the court with apparent approval in *German Bank v. Stumpf*, 73 Mo. 811. See also *Laffer v. Armstrong*, 4 Iowa, 482.

In *Kellogg v. Carrico*, 47 Mo. 157, the deed required thirty days' notice. The publication covered a period of thirty-four days, and appeared in each daily issue of the paper, there being no issue on Sundays. Held that the Sunday omissions did not vitiate the notice. See also *Cushman v. Stone*, 69 Ill. 516.

In *Weld v. Rees*, 48 Ill. 428, where the lan-

guage of the deed was "after publishing a notice in a newspaper published in the city of Chicago ten days before the day of such sale," it was held that one insertion, ten days before the sale, was sufficient, because the language seemed to exclude the idea that the notice should be continuous, as only one notice and one paper, and that ten days before the sale are spoken of. If "notice for ten days" had been required, the court says there might be question as to its sufficiency. *Jenkins v. Pierce*, 98 Ill. 646, was a similar case. In *Muskingum Valley Turnpike Co. v. Ward*, 18 Ohio, 120, it was held that where a law required "at least sixty days' notice" of the time and place of payment of an installment to the stock of a corporation, a single notice given sixty days before the time was sufficient. This interpretation, however, is put by the court upon the grounds that a continuous notice was not intended, because in other Acts where the Legislature meant to require a continuous notice, more explicit terms had been employed, and that the manifest object of the notice was to give stockholders a reasonable time to prepare to meet the demand; hence that it must be a complete notice "at least sixty days" before the payment. *Andrews v. Ohio & M. R. R. Co.* 14 Ind. 169, is precisely similar.

In *Harris, Petitioner*, 14 R. I. 637, this court held that where the statute requires a notice to be published "in some public newspaper for four successive weeks," it is enough if the notice be published weekly, even though it be in a daily paper. See also *Thurston v. Miller*, 10 R. I. 358. There are numerous cases to this effect, and they proceed upon the principle that where the period is a certain number of weeks, such a notice is continuous from week to week, which is all that is required. Upon the same principle we must conclude that, where the period is a certain number of days, the notice must be continued from day to day, upon such days as the paper is published. Of course the selection of the paper must be made in good faith; but if, as in *Leffler v. Armstrong*, *supra*, it be properly made in a weekly or semi-weekly paper continuously and in every issue, for the designated period, the requirement is fulfilled.

Our conclusion is that the notice of the mortgage sale in this case did not conform to the terms of the power, and that the complainant is entitled to redeem.

John SHEPARD

v.

Gustavus TAYLOR et al.*

1. When a legal and an equitable estate in realty, coming through different persons, unite in the same holder, it is the course of the legal estate, not that of the equitable, which determines whether the holder of both does or does not have an ancestral estate under the Rhode Island canons of descent. Pub. Stat. R. I., chap. 187, § 6.

2. A devised to his son B, in trust for an-

other son, C, certain realty, giving B power to appoint a successor in the trust and to convey the realty to C or his heirs when B might think proper. C died and his son, C, junior, inherited the equitable estate. B conveyed the legal title to C, junior, and C, junior, died under age and without issue. *Held*, that the legal title did not come to C, junior, by descent, gift, or devise; that the estate of C, junior, in the realty was not an ancestral estate; and that the mother of C, junior, inherited the realty from him.

(Providence—Decided December 30, 1885.)

BILL of interpleader.

Heard before Durfee, Ch. J., Matteson and Stiness, JJ.

The facts are stated in the opinion.

Mr. John Doran, for complainant.

Mr. Nathan W. Littlefield, for respondent Martha O. Taylor.

Mr. James Tillinghast, for other respondents.

Stiness, J., delivered the opinion of the court:

John Taylor devised an interest in real estate, in Providence, to his son, William H. Taylor, in trust for the use and benefit of another son, Alexander, and his heirs; with power to appoint a successor, by will or otherwise, for the support of the trust, or to convey the estate to said Alexander or his heirs when he might think proper. Alexander died leaving, besides his widow, a son, Alexander, to whom the trustee subsequently conveyed the estate by deed in fee. Alexander, junior, died in May, 1882, a minor and leaving no issue. The complainant, lessee of the estate, files this bill of interpleader to determine his liability for rent, whether to Martha O. Taylor, mother of Alexander, junior, who claims as his heir at law; or to the other respondents, who claim that this is ancestral estate to which, under our statute, they are entitled as "the kin, next to the intestate, of the blood of the person from whom such intestate came or descended." As Alexander, junior, had the absolute title to the estate, upon his death it vested in his mother as his heir at law, unless it was ancestral estate, in which case it vested in his paternal kindred. The simple question to be determined, then, is whether the estate came "by descent, gift, or devise from the parent or other kindred of the intestate." This involves two inquiries: (1) How did Alexander, junior, acquire his title? (2) What is the rule to be followed when this is ascertained?

During the life of his father the title subsisted in two parts: the legal title in the trustee; the equitable title in the father. Upon the death of Alexander, senior, unquestionably his son took the equitable title by descent. When the trustee conveyed the legal title to him, what was the nature of the title thus acquired? Clearly, it was not a title by descent, for it did not come to him from parent or kindred by operation of law. Neither was it a title by devise. Alexander, junior, was not named in the will, nor was there any limitation in his favor, beyond that which showed the devise of an

* A reargument of this case is pending, the result of which will be duly reported. [Ed.]

equitable fee to his father. Upon a conveyance by the trustee, the father could have disposed of the entire estate without reference to the son. Whatever rights the son had under the will were simply those which he acquired by inheritance of his father's equitable estate. The legal estate was devised to the trustee, with a discretionary power. The conveyance of the legal title by the trustee was not a gift. Of course the word "gift" is not used in the statute in its ancient and technical application to the creation of an estate tail (2 Bl. Com. *316), but with the common and broader meaning of a voluntary conveyance (3 Washb. Real Prop. 8d ed. 305.) In this sense, however, there was no gift of the legal estate from the grandfather to Alexander, junior. It did not go to him, but to the trustee; and the trustee might have conveyed it to Alexander, senior, had he chosen to do so. There was no direction to convey the estate to Alexander, junior. It might never have been conveyed to him and yet the trust under the will have been fully performed. The deed to Alexander, junior, was the act of the trustee, not the act of the testator. Alexander's rights were determined by his inheritance of the equitable estate, to which the conveyance of the legal estate, by the trustee, was incident. It cannot, then, be said that the legal estate came to him by gift from the grandfather through the conveyance by the trustee. Was it a gift by the trustee? This cannot be maintained, for the deed was made in consideration of the execution of the trust and the equitable claim of the grantee in the estate. The trustee could not, at that time, have disposed of it to any other person, without a breach of his trust. It was not, therefore, a voluntary conveyance.

It appears, then, that Alexander, junior, had the equitable title by descent and the legal title by purchase otherwise than by gift or devise. In such a case what is the rule of descent?

Cases upon this point are not numerous, but they are sufficiently clear.

In *Goodright v. Wells*, 2 Doug. 771, Lord Mansfield puts the question "whether, when a *cestui que trust* takes in the legal estate, possesses under it, and dies, the legal and equitable estate shall open on his death, and be severed for the different heirs." He then says: "No case has ever existed where it has been so held; none where the heir at law of one denomination has, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination, who would have taken the equitable estate, if that and the legal estate had not been united. On principle it seems to me impossible; for the moment both meet in the same person, there is an end of the trust." It was therefore held, in this case, the legal estate in fee having descended from the mother and an equitable interest in fee from the father, that the equitable title merged in the legal title and that the whole estate should follow the line of descent of the legal title. *Wade v. Paget*, 1 Burr. C. C. 363; also in 1 Cox, 74. In *Selby v. Alston*, 3 Ves. Jr. 339, where the equitable title descended *ex parte paterna*, and the legal title *ex parte materna*, and united in the same person, the Master of the Rolls, afterwards Lord Alvanley, citing *Wade v. Paget*, said: "There Lord Thurlow lays down a universal

proposition, to which I am inclined to accede, that where the estates unite, the equitable must merge in the legal. That was the principle of the opinion of the judges in *Goodright v. Wells*, and, upon consideration, I am inclined not to lay any restriction upon or to narrow it in any respect; but to hold that by whatever means, whether by conveyance or otherwise, a person obtains the absolute ownership at law of the estate, though he acquired that by an equitable title, and both either come together or are afterwards united in him, the legal will prevail; the equitable is totally gone for the purpose of being acted upon by any person in this court. Therefore, that being to be laid down universally, this demurrer must be allowed against the plaintiff claiming as heir *ex parte paterna*."

Upon this authority Chancellor Kent, in *Nicholson v. Halsey*, 1 Johns. Ch. 417, holds that this rule may now be "laid down as a settled principle." According to this rule, the legal title to the estate in question is the controlling title. As that title did not come to Alexander Taylor, junior, by descent, gift, or devise from his parent or other kindred, it must descend and pass to his mother, according to the provisions of R. I. Pub. Stat. chap. 187, § 1.

Decree accordingly.

Matteson, J., concurred.

Henry L. ALDRICH

o.

City of PROVIDENCE.

Where a petition for the assessment of damages for land taken by the city of Providence for a park, under chapter 431 of Public Laws of 1884, is dismissed, the defendant (the city) is entitled to costs.

(Providence—Decided August 2, 1887.)

PETITION for assessment of damages for land taken by the city of Providence for a park. On defendant's motion for judgment for costs, on dismissal of petition. *Motion granted.*

The city of Providence, by special statute (Pub. Laws 1884, chap. 431), was authorized to take, for the purpose of a public park, an old burying-ground, in the west part of the city, by filing in the city clerk's office a description of the land, and a statement that the same was taken pursuant to the provisions of the Act, signed by the mayor, upon the filing of which the fee simple of the land vested in the city; and the statute then provided that, "if any party shall agree with said city for the price of his land so taken, the same shall be paid to him forthwith by said city. Any person entitled to an estate in any part of the land so taken, who cannot agree with said city for the price of the land, in which he is interested as aforesaid, so taken, may, within two years from the filing of the description and statement referred to in the preceding section, apply by petition to the Supreme Court in the County of Providence, setting forth the taking of his land, and praying for an assessment of dam-

ages by a jury. Upon the filing of said petition the said court shall cause notice, * * * and may proceed, after such notice, to a trial thereof, and such trial shall determine all questions of fact relating to the value of such land and the amount thereof; and judgment shall be entered upon the verdict of such jury, and execution may issue therefor."

But the statute contained no provision whatever as to costs, the above being the whole provision as to the proceeding in court.

The general statute (Pub. Stat. chap. 17, § 1) provided: "In civil cases at law the prevailing party shall recover costs except where otherwise specially provided."

By agreement the petition was heard by the court, the jury trial being waived. At a former hearing the petitioner claimed to own one quarter of the fee of the land, subject to a deed which had been given of it as platted into lots by the original owner to be used "for the sole purpose of a burial ground;" but the court had decided that this deed carried the entire fee, and that therefore the petition must be dismissed; and the city's motion now was for costs.

Mr. Ames M. Van Slych, for the city.

Mr. James Tillinghast, for the petitioner:

The right to costs at law is purely statutory; and proceedings in eminent domain for other purposes under special statutes are not within its general statute as to costs "in civil causes;" and in such proceedings no other costs can be given except such as are provided for in the particular statute under which the proceeding is had.

Ree v. Gardner, 6 Ad. & El. 112; *Corrigall v. London & B. R. Co.* 5 M. & G. 219; *Commonwealth v. Carpenter*, 3 Mass. 268; *Hampshire & H. C. Co. v. Ashle*, 15 Pick. 496; *Commonwealth v. Boston & M. R. Co.* 3 Cush. 55, 56; *New Haven & Northampton Co. v. Northampton*, 102 Mass. 116; *Williams v. Taunton*, 126 Mass. 287; *Gifford v. Dartmouth*, 129 Mass. 135; *Hamlin v. New Bedford*, 143 Mass. 192, 8 New Eng. Rep. 319; *Philadelphia, G. & N. R. R. Co. v. Johnson*, 3 Whart. 274; *Herbert v. Railroad Co.* 9 Watts, 272; *Meller v. Easton & A. R. R. Co.* 37 N. J. L. 222. See also *Re Cherry's Settled Estate*, 31 L. J. Eq. N. S. 351; *Re Charity Schools of St. Dunstan-in-the-West*, L. R. 12 Eq. 537; *People v. Gilmore*, 88 N. Y. 626.

The court (no opinion or rescript filed) gave judgment for the defendant for costs.

STATE of Rhode Island

v.

George F. NOLAN.

1. The offense of selling liquor in violation of Pub. Laws, chap. 596, § 8, the punishment for which is a fine and imprisonment in the county jail for ten days, is not an "infamous crime" within the meaning of the provision of the Constitution that "no person shall be held to answer for any capital or otherwise infamous crime, unless on pre-

sentment and indictment by a grand jury.

2. Jurisdiction of offenses, under said § 8, punishable by fine and imprisonment is, by implication, conferred upon the district courts by said chapter 596, although the statute which confers jurisdiction upon district courts, in general terms, limits it to cases punishable by fine or imprisonment.

3. A complaint, under said § 8, charging that the defendant did "offer to sell, sell, and suffer to be sold," is not bad for duplicity.

(Newport — Decided May 5, 1887.)

EXCEPTIONS to the Court of Common Pleas. Overruled.

The defendant was complained of under Pub. Laws, chap. 596, § 8,* for selling liquor. The complaint was in the form prescribed by § 15* of that chapter, with the addition of the allegation "to be used as a beverage."

The history of the case and the questions presented are stated in the opinion.

Messrs. E. Gorman and Patrick J. Galvin, for defendant.

Mr. Edwin Metcalf, Atty-Gen., for the State.

Stiness, J., delivered the opinion of the court:

The complaint in this case was made to the justice of the district court of the first judicial district. The warrant was issued by him, and the defendant, having been brought before, and adjudged guilty by, said court, appealed to the court of common pleas. In the appellate court the defendant moved to dismiss the complaint and appeal because the district court had no jurisdiction of the case. The motion was overruled, and the defendant comes to this court upon exceptions.

One of the grounds upon which the lack of jurisdiction is urged is that the Constitution provides that "no person shall be held to answer for any capital or otherwise infamous crime unless on presentment and indictment by a grand jury." He claims that the words, "infamous crime," mean a crime which involves an infamous penalty, or one punishable by loss of life, liberty, or limb; and hence, that every offense punishable by a sentence of imprisonment is included within the term "infamous crime."

The meaning of these words has frequently been passed upon by courts; sometimes in regard to jurisdiction, as in this case, but chiefly in regard to the disqualification, at common law, of witnesses who have been convicted of crimes deemed infamous. Certain crimes, as treason, murder, and other felonies, have always been deemed infamous; and formerly crimes for which ignominious and personally degrading punishments were inflicted were also deemed infamous. Since punishments of this character have been generally abandoned, there has been some diversity of decision as to the

*See these sections set out in full in *State v. Kane*, 3 New Eng. Rep. 143.

scope of the words "infamous crime." Some courts have held that it is to be determined solely by the character of the crime, and not by the punishment. *People v. Whipple*, 9 Cow. 707; *United States v. Baugh*, 4 Hughes, 501; *S. C.* 1 Fed. Rep. 784; *Commonwealth v. Dame*, 8 Cush. 384; *United States v. Block*, 4 Sawy. 211; *United States v. Yates*, 6 Fed. Rep. 861; *United States v. Field*, 21 Blatchf. 330; *United States v. Brockius*, 3 Wash. C. Ct. 99. See also Whart. Cr. Ev. § 368; 1 Bish. Cr. L. § 972; 1 Greenl. Ev. §§ 872, 873.

In other cases it is held that, although imprisonment has become the common form of punishment, it is still to be regarded, to some extent at least, in determining a question of jurisdiction; for since the consequences of statutory offenses are often equally serious with those of felonies, the constitutional right of presentment by a grand jury is equally important, and should therefore be held to be equally guaranteed. *Ex parte Wilson*, 114 U. S. 417 [Bk. 29, L. ed. 89]; *Jones v. Robbins*, 8 Gray, 329.

In both these cases the point decided is that a crime punishable by imprisonment for a term of years, at hard labor, is an "infamous crime;" and in each case a distinction is recognized between such crimes and minor offenses punishable by sentence to a jail or house of correction.

The statute of the State of Rhode Island (Pub. Stat. chap. 248, § 36) is: "Unless otherwise provided, every person sentenced to imprisonment for a term of one year or more shall be imprisoned in the State prison, and there kept at hard labor; and every person sentenced for a less term than one year shall be imprisoned in the county jail in the county where he shall have been convicted, or in the State workhouse and house of correction, unless sentenced by the supreme court or court of common pleas to be imprisoned in the jail in some other county."

Whatever difference of opinion may exist as to the infamy of the former, we know of none in regard to the latter, class of offenses.

The power of police and justice courts to impose sentences of imprisonment in penal institutions, upon complaints, for petty crimes and misdemeanors, saving of course a right of trial by jury on appeal, seems to have become established by common consent. The administration of criminal law would be cumbersome indeed if every offense punishable by imprisonment could only be prosecuted upon indictment. In some cases it might be very oppressive; for a person unable to give bail might be obliged to suffer confinement, awaiting the action of a grand jury, for a longer time than the term of his sentence would be; for example, in a case like this one, where the sentence could only be imprisonment for ten days.

In *United States v. Maxwell*, 3 Dill. 275, upon an information charging violations of the revenue laws, the defendant's motion in arrest of judgment, upon the same ground that is urged in this case, was overruled. Judge Dillon said: "The words 'infamous crime' have a fixed and settled meaning. In a legal sense they are descriptive of an offense that subjects a person to infamous punishment or prevents his being a witness. The fact that an offense may be, or

must be, punished by imprisonment in the penitentiary does not necessarily make it, in law, 'infamous.'"

The usage in this State accords with the doctrine there expressed. Before the adoption of the Constitution, justices of the peace were authorized to impose sentences of imprisonment not exceeding one month for certain offenses. *R. I. Laws*, Dig. 1822, pp. 148, 149. Immediately after the Constitution was adopted, the jurisdiction was extended to all offenses punishable by imprisonment in a county jail not exceeding three months. *Id.* Dig. 1844, p. 103. It has remained substantially the same ever since.

We are of opinion that the words "infamous crime," as used in the Constitution, do not include every offense punishable by imprisonment, and that the motion to dismiss for want of jurisdiction in the district court, upon this ground, was rightly refused.

A second reason urged in support of the motion is that the statute which confers jurisdiction upon district courts, in general terms, limits it to cases "punishable by fine not exceeding \$20, or by imprisonment not exceeding three months; and of all other criminal matters which are or shall be declared specially to be within the jurisdiction of such courts by the laws of the State, which shall be legally brought before such court." *R. I. Pub. Laws*, chap. 593, § 20, May 27, 1896.

As the punishment for the offense set forth in this complaint is a fine of \$20 and imprisonment for ten days, it is contended that this is not included under an authority to fine or imprison, and that special jurisdiction is not given to the district court.

The same question, under statutes similarly expressed, was before the court in *State v. Fletcher*, 13 R. I. 522. While it was there held that jurisdiction of offenses punishable by fine and imprisonment was not conferred upon justice courts by a statute giving such courts jurisdiction of offenses punishable by fine or imprisonment, it was also held that provisions similar to those contained in §§ 15 and 30 of the present Act did confer jurisdiction by implication. To this it may be added that this Act, like those which preceded it, allows appeals to the court of common pleas by any person convicted before a district court; and, under similar jurisdictional provisions, the authority of justice and district courts and of the court of common pleas on appeal, have uniformly been recognized since 1875, when fine and imprisonment were first combined in the penalty for illegal sales of liquor. We think, therefore, that this Act intended to give, and does give, jurisdiction to district courts of offenses under § 8.

A motion to quash upon the ground of duplicity, because the complaint charges that the defendant did "offer to sell, sell, and suffer to be sold," was also made and overruled, and exception taken.

In *State v. Wood*, 14 R. I. 151, this court states the rule in such cases to be that, where several cognate acts are forbidden disjunctively, the complaint or indictment may ordinarily charge them all conjunctively in a single count. It is said in *State v. Schweiter*, 27 Kan. 499-506: "The rule is well settled that where the statute makes either of two or more distinct

acts, connected with the same general offense and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when each shall have been committed by different persons and at different times, they may, when committed by the same person and at the same time, be coupled in one count as constituting all together but one offense. In such cases the several acts are construed as so many steps or stages in the same affair, and the offender may be informed against as for one combined act in violation of the law, and proof of either of the acts mentioned in the statute and set forth in the information will sustain a conviction."

So, in *Commonwealth v. Eaton*, 15 Pick. 278, an indictment charging the defendant, in one count, with offering to sell, and selling, a lottery ticket, was not bad for duplicity. The court says: "On conviction he will be only liable to one penalty. * * * It is true that an offer to sell, without selling, a ticket, is an offense by the statute; but an offer to sell and actually selling is but one offense. A sale *ex vi termini* includes an offer to sell."

The following cases in which counts charging distinct acts have been held not to be bad for duplicity, further illustrate the rule: "illegal sale and illegal keeping" (*Commonwealth v. Foss*, 14 Gray, 50); "unlawfully keep, offer for sale, and sell" bad milk (*Commonwealth v. Nichols*, 10 Allen, 199); "unlawfully did expose and keep for sale" (*Commonwealth v. Curran*, 119 Mass. 206; *Commonwealth v. Dolan*, 121 Mass. 374. See also *United States v. Hull*, 4 McCrary, 272; *Commonwealth v. Miller*, 107 Pa. 276).

The case of *State v. Corwell*, 3 R. I. 284, as reported, seems to hold that selling and suffering to be sold are distinct offenses; but it is evident, from the authorities relied on by the court, that the point decided was that a charge of several matters in the disjunctive, either one of which would sustain the complaint, and to this extent therefore distinct offenses, was bad for uncertainty, and that the several charges, joined by the copulative "and" would not be objectionable.

We think the motion to quash was properly overruled.

The letter offered in evidence was properly excluded for want of identification as the letter of the witness.

Exceptions overruled.

STATE of Rhode Island
v.

Thomas MURPHY.

1. Under § 1 of the Act for the Suppression of Intemperance, passed May 27, 1886 (Pub. Laws, chap. 596), prohibiting the keeping of intoxicating liquors for "sale and delivery," the keeping of prohibited liquors for sale, to be used as a beverage, is inimical to the statute only when the keeper intends not only to sell, but also to deliver as well as sell, within this State.

2. To keep prohibited liquors to be used as R. I.

a beverage within this State, is to keep them for sale in violation of said § 1, whenever the keeper intends to sell them in the mode of sale which includes delivery, and such a keeping is punishable under § 9 of the Act, which provides a penalty for any keeping for the purpose of sale which is in violation of any of the provisions of the Act.

3. Hence, held, that a complaint under said Act, which charges that the defendant, "without lawful authority," kept, etc., certain prohibited liquors, "with intent to sell the same in this State to be used as a beverage, against the statute," etc., necessarily imports that he kept them for sale in that mode of sale which includes delivery, and is (in connection with § 15 of the Act, prescribing a form of complaint) good, and sufficiently informs the accused of the nature of the accusation.

4. Where a complaint is in a form declared by statute to be sufficient, the words "against the statute," etc., may be read as a part of the charge, if the charge without them would not set forth the offense with completeness.

(Newport—Decided June 11, 1887.)

EXCEPTIONS TO THE COURT OF COMMON PLEAS. Overruled.

Statement by *Durfee, Ch. J.*:

Complaint and warrant issued against the defendant from the District Court of the First Judicial District for keeping for sale intoxicating liquors. After being adjudged guilty, he appealed to the court of common pleas, where he moved that the complaint be quashed for uncertainty; and on the dismissal of his motion brought the case by exceptions into this court. April 8, 1887, this court requested counsel to submit briefs on the question "whether, within the meaning of R. I. Pub. Laws, chap. 596, § 1, keeping 'for the purposes of sale and delivery within this State' differs from keeping 'for the purposes of sale within this State;'" and if so, whether any punishment is prescribed by said chapter for keeping "for the purposes of sale and delivery."

The statutory provisions in question are printed in *State v. Duggan*, Index Z, 17 *et seq.*, 3 New Eng. Rep. 137; [and in *State v. Kane*, Index Z, 10-13, 3 New Eng. Rep. 143].

Messrs. Charles E. Gorman and William P. Sheffield, Jr., for defendant.

Mr. Edwin Metcalf, Atty-Gen., for the State:

1. The motion to quash seems to have been properly overruled under authority of decisions by this court, sustaining the statutory form of complaint.

State v. Beswick, 13 R. I. 211, 215; *State v. Higgins*, Id. 330, 331; *State v. Doyle*, 11 R. I. 574, 575. See also *State v. Kane*, Index Z, 10-13, 3 New Eng. Rep. 143.

2. This court has already decided that a justice of the peace has jurisdiction over the offense described in Rev. Stat. chap. 78, § 16; that is, the illegal sale of ale, etc.

State v. Crogan, 6 R. I. 40, 42.

That section is substantially the same as Pub. Laws, chap. 596, § 8, and the law then regulating the jurisdiction and procedure of justice courts (Pub. Stat. chap. 220, § 2) was identical with Pub. Laws, chap. 598, § 2, defining the jurisdiction of district courts.

There is no apparent reason why the decision in *Crogan's Case* should not apply in all respects to a complaint for violation of chap. 596, § 9, charged against this defendant.

Durfee, Ch. J., delivered the opinion of the court:

The defendant is complained of for keeping intoxicating liquors for sale in Newport, on August 20, 1886. The complaint is made under Pub. Laws, chap. 596, of May 27, 1886. The first section of chap. 596 enacts: "No person shall manufacture or sell, or suffer to be manufactured or sold, or keep or suffer to be kept on his premises or possessions or under his charge, for the purposes of sale and delivery within this State, any ale, wine, rum, or other strong or malt or intoxicating liquors, or any mixed liquors a part of which is ale, wine, rum, or other strong or malt or intoxicating liquors, to be used as a beverage." The complaint charges that the defendant, "without lawful authority, did then and there keep and suffer to be kept on his premises, and in his possession, and under his charge, ale, wine, rum, etc., with intent to sell the same within this State, to be used as a beverage, against the statute and the peace and dignity of the State."

The case comes up on exceptions for the refusal of the court of common pleas to quash the complaint, "because no offense nor crime is alleged therein with the certainty required by law."

The only objection made to the complaint is that it does not follow the prohibitory clause above recited in that it omits the words "and deliver" after the words "with the intent to sell." The complaint follows in this respect the form given in § 15 for prosecutions under chap. 596, § 9. Section 9 enacts: "If any person shall keep, or suffer to be kept, on his premises or possessions, or under his charge, for the purposes of sale, in violation of any of the provisions of this Act, any ale, wine, rum, etc., * * * he shall be fined \$20 and be imprisoned in the county jail ten days." It prescribes punishment for an unlawful keeping. It will be observed that it omits the words "and delivery" after the words for the "purposes of sale." In *State v. Kane*, Index Z, 10-13, 3 New Eng. Rep. 143, we remarked upon the omission; and, assuming that § 9 was intended only to prescribe punishment for the offense of keeping created by § 1, expressed the opinion that if the words were not necessary in § 9 to make it effectual, they were likewise not necessary in the complaint to make the complaint sufficient.

It has occurred to us since then that § 9 is capable of a broader construction, for the words "in violation of any of the provisions of this Act" may be regarded as qualifying, not all the preceding words of the section, but only the words immediately preceding, to wit, "for the purposes of sale." Such a construction would make the offense of keeping co-extensive with the offense of selling, which, under the Act, may be committed without de-

livery, and in several ways. There are considerations which favor such a construction; but § 9 so construed would indirectly create as well as punish the offense, and would completely supersede the clauses of § 1 which create the offense of keeping, because, as so construed, it is broader in its terms. Upon the whole, we think the construction which we assumed in *State v. Kane* to be correct, without having any other occur to our minds, is the more natural and reasonable. No one has questioned it and we adhere to it.

The attorney-general contends that a sale imports delivery as an essential part of it, and that therefore the words "and delivery" add nothing to the meaning and may be treated as pure pleonasm. Generally, without doubt, indeed we may say almost invariably, a sale involves delivery or is completed only by delivery; but occasionally, in exceptional cases, the sale is completed without delivery, as for instance where the article bought is specific and is retained for the purchaser by the seller. In such a case the title passes, and if the article is lost by fire before delivery, the loss falls upon the purchaser. We think therefore that the words "and delivery" must be held to have been inserted by way of limitation so as to make the keeping of the prohibited liquors for sale within this State, to be used as a beverage, inimical only when the keeper intends not only to sell, but also to deliver as well as to sell, within this State.

Two questions arise under this construction. The first is whether § 9, seeing that it omits the words, can be held to prescribe a punishment for the offense. Of course it is our duty to construe the section so as to give effect to it, if we can reasonably. We think we can so construe it. We have seen that though sales may be made without delivery, they almost always include delivery, and consequently to keep the prohibited liquors for the purposes of sale within this State, to be used as a beverage, is to keep them for sale in violation of § 1, whensoever the keeper intends to sell them in the mode of sale which includes delivery. It follows that such a keeping is punishable under § 9, for that section extends to any keeping for the purposes of sale which is in violation of any of the provisions of chapter 596.

The second question is whether the complaint is sufficient in point of certainty. The defendant contends that a complaint, to satisfy the rules of criminal pleading, should set forth specifically everything which it is necessary for the government to prove to establish the offense charged. Doubtless this is the common-law rule, subject to some exceptions. The sufficiency of the complaint here is not determinable by common-law rules. The complaint here is in the form given in § 15, except that it inserts the words "to be used as a beverage" immediately before "against the statute," etc., in which respect it is better than the form given. Section 15 provides that the form, if substantially followed in prosecutions under § 9, shall be sufficient in law to fully and plainly describe the offense. The complaint is therefore sufficient unless § 15 is unconstitutional. The Constitution (art. 1, § 10) declares that in all criminal prosecutions the accused shall enjoy the right "to be informed of the nature

and cause of the accusation." Section 15 violates this provision if the complaint which it sanctions fails to inform the accused of "the nature and cause of the accusation," but not otherwise. The technical precision of the common-law rule is not exacted. Now we have seen that the offense of unlawful keeping can be committed in only one way, namely, by keeping the prohibited liquors for the purposes of sale and delivery, to be used as a beverage; and that a sale, though it may be made without delivery, almost always includes delivery as an essential part of it. The complaint against the defendant is not simply that he kept the liquors for sale in this State, to be used as a beverage, but that he so kept them "without lawful authority" and "against the statute," which necessarily imports that he kept them for sale in that mode of sale which includes delivery. The complaint, therefore, if these phrases may be taken as a proper part of the charge, does inform the accused of the nature and cause of the accusation; and, as the offense can be committed in only one way, informs him with absolute certainty.

Can these phrases be taken as a proper part of the charge? We think they can. Even at common law there are offenses which may be charged in terms which require a resort to the statute or common law for a discovery of the particular acts by which the offenses are committed. Thus, it is sufficient to charge the following offenses in general terms without specifying what was done by the accused to commit them, to wit, the offenses of being "a common barrator" (*Commonwealth v. Davis*, 11 Pick. 432); "a common scold" or "a common seller without a license" (*Commonwealth v. Pray*, 13 Pick. 359); "a common railer or brawler" (*Stratton v. Commonwealth*, 10 Met. 217); and "a common nightwalker" (*State v. Russell*, 14 R. I. 506).

So the offense of keeping and maintaining "a place or tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors" may be charged in those words. Though what is an illegal sale or an illegal keeping can only be learned by consulting the statute law,—a law which is subject to frequent change; so that a sale or keeping which is illegal to-day may not be so to-morrow, or may not have been so at some earlier time. *Commonwealth v. Kimball*, 7 Gray, 828, 832, and note; *Commonwealth v. Kelly*, 12 Gray, 175.

So liquors which are not actually intoxicating may be properly complained of as intoxicating under a statute which declares them intoxicating within its meaning. *Commonwealth v. Timothy*, 8 Gray, 480.

The foregoing cases show that even at common law the courts are inclined to apply the rules with some accommodation at least in the prosecution of the minor statutory offenses.

In 1850 an Act was passed by the Legislature of Vermont "relating to innkeepers and grocers, and regulating the traffic in intoxicating drink." It prescribed a penalty of \$20 for selling without license in quantities exceeding twenty gallons, and a penalty of \$10 for selling less quantities without a license, and provided that any offender guilty of more than one distinct offense might be prosecuted and subjected to all such penalties at the same time.

It also provided a form of indictment or complaint for all prosecutions, the charging part of which was simply that, at the time and place laid, the respondent "became a dealer in intoxicating liquors without having license therefor in force, contrary to the form of the statute," etc. The supreme court of the State held that one act of selling made a man a dealer under the Act, and that, under an indictment in the form given, a man might be convicted of selling at different times and be subjected to distinct penalties. "We have no doubt," says the court, "the Legislature intended this form should be used, whether the amount sold was over or under twenty gallons, and the form does not require that fact to be averred in the indictment." To the objection that the form was in conflict with the provision of the Constitution, that "in all criminal prosecutions the accused shall have the right to demand the cause and nature of the accusation," the court replied: "We think this complaint fully apprises the accused of the cause and nature of the accusation, though it may not of the extent of the penalty for which the government may go; nor do we think that to be necessary. The penalty results as a consequence of the offense, and is not a part or parcel of the offense itself." To the objection that the complaint was bad because the court could not tell what penalty to inflict upon conviction, the answer of the court was that, upon a general conviction, the penalty must be for a single sale and the lesser offense, and that if a larger penalty were asked, the government must have a special verdict returned, showing the extent of the conviction, which, said the court "would preserve the rights of the accused and enforce the law according to its spirit and provisions." The court thought it was no objection to the complaint that it was bad at common law, provided that it was not repugnant to the Constitution. It says: "Though we may not fully approve the form of the complaint which the Legislature has prescribed, yet we are not for that cause to repudiate the law, provided its provisions can be carried out, and the substantial rights of all persons preserved." *State v. Comstock*, 27 Vt. 553. See also *State v. Freeman*, 27 Vt. 523; *State v. Rowe*, 43 Vt. 265.

These Vermont cases go much further than it is necessary to go to support the form of complaint used here, since, as we have seen, the offense of illegal keeping under our statute can be committed in only one way and is subject to only one punishment.

At common law the offense complained of must be fully set forth in all its essential particulars, independently of the concluding words "against the statute," etc., the office of those words being to show that the offense is statutory. 2 Hale, P. C. 170; 2 Hawkins, P. C. chap. 25, § 110.

The rule is technical, and we see no reason why, where the complaint is in a form declared to be sufficient by statute, the words may not be read as a part of the charge, if the charge without them would not set forth the offense with completeness. *State v. Kane*, Index Z, p. 10, 3 New Eng. Rep. 143.

Our conclusion is that the exceptions must be overruled, and the cause remitted for sentence.

Exceptions overruled.

Stephen W. THORNTON, *Appt.*,

v.

Mary BAKER.

On appeal from a decree of the probate court of any town, allowing or refusing probate to a will, the question whether the testator was resident in that town, so as to give the court appealed from jurisdiction, is a matter which can be brought before the supreme court by appeal, and which that court can try and determine, and if it determine that the testator was resident in such town, and enters a decree on the merits affirming the decree of the lower court, its determination is conclusive on all persons who are parties to it in all the courts of the State, unless it be set aside by the court itself on petition for a new trial.

(Kent—Decided July 9, 1887.)

APPEAL from the Court of Probate of the town of Warwick on appellant's motion to dismiss the appellee's petition to the Probate Court. *Motion granted.*

The facts are stated in the opinion.

Mr. Dexter B. Potter, for appellant, upon motion to dismiss:

The petitioner now says in effect: "I stated to the Probate Court of Coventry and to your honors that my deceased husband was a resident of Coventry at the time of his decease, and but for that statement neither said probate court nor your honors would have heard my cause; but my first representation in that matter was untrue, and because of its untruth I now demand that you hear my cause again." She is legally estopped from taking such a position.

Whenever a party seeks the aid of a court of justice to enforce his rights, and submits his case and objections to the decision of a court, and invites it to decide upon them, and makes no objection to the jurisdiction until after the court has heard and adjudicated, he is estopped from subsequently objecting to its decision and the proceedings taken thereon.

1 Herm. Estop. p. 451, § 889, citing *Ela v. McConihe*, 35 N. H. 729; *Hines v. Mullins*, 25 Ga. 696; *Brown v. Haines*, 12 Ohio, 1; *Mandeville v. Mandeville*, 35 Ga. 243; *Harbin v. Bell*, 54 Ala. 389.

This court has said in *People's Savings Bank v. Wilcox*, Index X, 88, 1 New Eng. Rep. 818, that a decree of a probate court can be attacked collaterally, but this court has not yet said that its own decree can be attacked collaterally, especially where, in order to do so, the party seeks to contradict her own record, solemnly made, and upon which record so made by her she asked the court to adjudicate. Notwithstanding the case of *People's Savings Bank v. Wilcox*, *supra*, the case of *Schultz v. Schultz*, 60 Am. Dec. 335, notes, 353, 354, still must be the law so far that a party is concluded upon the probate of a will, and upon a necessary averment presented and made by herself, and which averment was necessarily found true by the court, because without such finding the court could not have proceeded.

As to offering the same will for probate a

second time, see also *Redmond v. Collins*, 27 Am. Dec. 208.

It is said in the note to *Fisher v. Bassett*, 88 Am. Dec. 227, note on pp. 241-243, that "the current of authority is opposed" to the idea that a decree of a probate court having jurisdiction of the subject-matter can be attacked collaterally. After the decision in *Holyoke v. Haakins*, 5 Pick. 20, opening the decree of a probate court to attack collaterally, the general court passed a statute destroying that doctrine.

Certainly the doctrine that the decree can be attacked collaterally ought not to be extended to a case like the one at bar leaving out for the moment the question of estoppel.

In Reply.

It is not necessary to enter into the discussion of "special and limited" jurisdictions further than to say that the Probate Court of Coventry had jurisdiction of the "subject-matter" of wills and of their probate. That was sufficiently general for all the purposes of this matter.

Saying that this is in the nature of a proceeding *in rem* (to probate a will) amounts to nothing. Mary Baker brought the *rem* into court and the matter was adjudicated so far as she is concerned. The court adjudicated the legal status of the *rem*, and *res judicata* and estoppel apply just as in any other or personal action. Neither could the decree be collaterally attacked.

See *Waple, Proceedings in Rem*, and cases cited; also *State v. McGlynn*, 20 Cal. 234; *Bal-low v. Hudson*, 18 Gratt. 672; *Broderick's Will*, 21 Wall. 503 (88 U. S. bk. 22, L. ed. 599); *Jones v. Williams*, 31 Ark. 175; *Brock v. Frank*, 51 Ala. 85.

These cases proceed, of course, upon the theory that the court had jurisdiction; but as Mary Baker is estopped upon that question, the court practically as to her did have jurisdiction.

Mr. John J. Arnold, for appellee.

Durfee, Ch. J., delivered the opinion of the court:

Joseph Baker died November 17, 1884, leaving a written instrument, dated March 27, 1883, purporting to be his will. Shortly after his death Mary Baker, his widow, who was named as executrix in said instrument, offered it for probate in the Probate Court of Coventry, alleging in her petition for probate that said Joseph "at the time of his death was a resident of said Coventry." After hearing, the court entered a decree refusing to admit said instrument to probate, from which decree said Mary took an appeal to this court. This court, after hearing, affirmed the decree of the Probate Court of Coventry, and likewise expressly adjudged said instrument not to be the will of said Joseph. The decree of this court was entered October 5, 1885. In July, 1886, Mary Baker petitioned the Court of Probate of Warwick for the probate of said instrument as the will of said Joseph, alleging in her petition that said Joseph, at the time of his death was a resident of said Warwick. The appellant, Thornton, being present at the Warwick court, brought the decrees of the Court of Probate of Coventry and of this court to the attention of the Warwick court, but the latter court ac-

ertheless took jurisdiction, and, after hearing, entered a decree, in which it adjudged and decreed that said Joseph "at the time of his decease was an inhabitant and resident of said Warwick," and that said instrument was his last will and testament, and that, as such, it be approved, allowed, and ordered to be recorded. From this decree said Thornton took an appeal to this court, assigning for reasons of appeal, among others, that said instrument and all matters connected with probate thereof are *res judicata*, and that said Mary is estopped by her previous action in the Court of Probate of Coventry, and in this court, from prosecuting her present petition. The case is before us now upon his motion, based upon said reasons, that her petition be dismissed.

Mary Baker, the appellee, resists the motion, and contends that it cannot be granted consistently with our decision in *People's Savings Bank v. Wilcox*, Index X. 88, 1 New Eng. Rep. 818.

In that case Holder N. Wilcox applied to the Court of Probate of Tiverton for administration on the estate of his niece, Mary A. Wilcox, describing her as "late of Tiverton, deceased." He was appointed administrator without hearing, no one opposing. Subsequently one George A. Sayer applied to the Probate Court of Providence for appointment as administrator, alleging that Mary A. Wilcox was a resident of that city when she died, and was appointed. Admittedly, she did in fact reside in Providence when she died. The court held the second appointment good and the first void, because the Court of Probate of Tiverton had no jurisdiction. The second applicant could not be held to be estopped by the allegation of jurisdictional facts in the first application, because he had nothing to do with making it.

The case at bar is different. In the case at bar the two applications were both made by Mary Baker. In the first she alleged that the deceased was resident in Coventry when he died, and thus led the Court of Probate of Coventry to assume jurisdiction of her application, and try it on its merits. In the second she alleged that the deceased was resident in Warwick, and petitioned the court of Warwick to try the same question which she had previously submitted to the Court of Probate of Coventry, claiming that the decision of the latter court was void because the deceased was not, as she had alleged in her application to the latter court, resident in Coventry when he died. No precedent is cited for such a proceeding, and it certainly seems as if a party ought not to be permitted twice to belie himself. And see the following cases cited by the appellant: *Ela v. McConihe*, 35 N. H. 279; *Hines v. Mullins*, 25 Ga. 690; *Brown v. Haines*, 12 Ohio, 11; *Mandeville v. Mandeville*, 35 Ga. 243; *Harbin v. Bell*, 54 Ala. 389.

"Consent of parties," says the Supreme Court of the United States in *Pittsburgh, C. & St. L. R. Co. v. Ramsey*, 22 Wall. 322, 327 [89 U. S. bk. 22, L. ed. 828, 824], "cannot give the courts of the United States jurisdiction, but parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such admission." After a court has acted judicially on such an admission or declaration,

it seems as if the party making it should be debarred from denying it for the purpose of attacking the judgment dependent thereon. *Turner v. Billagram*, 2 Cal. 520; *Miltimore v. Miltimore*, 40 Pa. 151; *Potter v. Adams*, 24 Mo. 159; *Lovelady v. Davis*, 38 Miss. 577. We do not find it necessary, however, to determine this point in order to decide this case.

As we have seen, Mary Baker took an appeal from the Probate Court of Coventry to this court, and here prosecuted her petition to final judgment, wherein the decree of said probate court was affirmed, and the instrument offered for probate was adjudged not to be the will of Joseph Baker. It is true the decree of this court does not expressly adjudge that Joseph Baker was resident in Coventry at his death, but where jurisdiction depends upon the finding of a particular alleged fact, the exercise of jurisdiction implies the finding of that fact. *Erwin v. Lowry*, 7 How. 172 [48 U. S. bk. 12, L. ed. 655]; *Wyatt's Admr. v. Steele*, 26 Ala. 639.

The decree, then, which we are asked to disregard is a decree not simply of the Court of Probate of Coventry, but also of this court,—the court of last resort,—the supreme court of the State. The statute (R. I. Pub. Stat. chap. 192, § 25) declares: "The supreme court shall be the supreme court of probate, and shall have cognizance and jurisdiction of all matters brought before it, by appeal or otherwise, from any court of probate which is or shall be established by law." The statute (R. I. Pub. Stat. chap. 181, § 5) provides that the supreme court, on appeal from a probate court, "may allow amendments to be made in the papers filed, * * * to supply any deficiency, or correct any errors;" and that it "may proceed without reference to the order, judgment, or decree of the court of probate, * * * to enter such judgment as the justice of the case may require."

These provisions are exceedingly comprehensive. They evince a purpose to make the supreme court the final arbiter of all probate matters. They confer jurisdiction not simply over matters which are within the jurisdiction of the court appealed from, but also over all matters which may be brought before the court appealed to, "by appeal or otherwise." Jurisdiction is authority to try and determine, and therefore if on appeal from the probate court of any town, allowing or refusing probate to a will, the question whether the testator was resident in that town at his death, so as to give the court appealed from jurisdiction, is a matter which may be brought before this court on appeal,—it is a question which this court may try and determine; and, this court being the court of last resort, if it determines that the testator was resident in the town, and enters a decree on the merits affirming the decree of the lower court, its determination is conclusive on all persons who are parties to it in all the courts of the State, unless it be set aside by the court itself on petition for new trial. Now we do not suppose there can be any doubt but that said question is a matter which can be brought before this court by appeal. It is one of a class of questions which in practice have always been considered open for

trial on appeal and as grounds of appeal. The practice is supported by authority. *People v. Ferria*, 36 N. Y. 218; *Hearn v. Culberth*, 10 Tex. 216; *United States v. Nourse*, 6 Fel. 470 [31 U. S. bk. 8, L. ed. 467].

There is no reason why these provisions should not be broadly construed agreeably to their apparent design, and every reason why they should be so construed; for if there be any matter in which finality of decision is peculiarly important, that matter is the settlement of estates. But if the view contended for by *Mary Baker* be correct, no such finality is attainable. After one decree affirming that of the Court of Probate of Coventry, disallowing the will of March 27, 1883, *Stephen W. Thornton* applied to the same court for the probate of an earlier will. Probate was granted and appeal taken (*Baker v. Probate Court of Coventry*, Index Z. 15, 3 New Eng. Rep. 263), so that there are now two appeals pending before this court, one from the Probate Court of Warwick for admitting the will of 1883 to probate, and the other from the Court of Probate of Coventry for admitting the earlier will to probate; and if the view contended for by *Mary Baker* be correct, both appeals may go to trial before different juries and result in verdicts and judgments affirming the decrees appealed from. In that event we shall have three decrees entered by the supreme court, to wit, decrees affirming the first and second decrees of the Court of Probate of Coventry, and a decree affirming the decree of the Court of Probate of Warwick. Which of the three will it be our duty to treat as authoritative?

One reason which weighed heavily with us in *Peoples Savings Bank v. Wilcox*, *supra*, was that the court of probate of the several towns may assume jurisdiction and proceed to exercise it without any actual notice to parties in interest, the only notice required being notice by publication or posting, which may never come to their knowledge, since they have no reason to be on the lookout for notice from a court having no jurisdiction. This reason does not hold on appeal, for the appellant is required to cite the adverse parties, and if he fails to do so, either from accident or because of their absence from the State, the court is authorized to provide for notice to them, and also, as we have seen, to make such amendments to the papers as may be necessary to a thorough trial of the cause.

We decide that *Mary Baker* is concluded by the decree of this court, entered October 5, 1885, affirming the decree of the Court of Probate of Coventry, disallowing the will of *Joseph Baker* of March 27, 1883; for though it was not formally adjudged in that decree that *Joseph Baker* was resident in Coventry at his death, it was virtually so adjudged by the court deciding the case on the merits. The residence was alleged in the petition, and therefore, if not actually proved to the satisfaction of the court, it must have been either expressly or tacitly admitted; and, as we have seen, such decision as between the parties is as effectual as positive proof.

A decree may be entered annulling the decree of the Court of Probate of Warwick, and dismissing the petition.

Motion granted.

William GROSVENOR *et al.*
v.

William E. BOWEN.

1. Estates limited in default of appointment by the devisee for life are to be considered as vested in the tenants in remainder during the continuance of the power of appointment, subject to be divested by the execution of the power.
2. The devisee for life, having the power of appointment, may release it to the tenants in remainder, or may extinguish it by joining with them in a deed of the property; and such deed will convey the fee.

(Providence—Decided July 2, 1887.)

BILL in equity for specific performance of a contract for the purchase of land. *Performance decreed.*

The facts are stated in the opinion.

Mr. James Tillinghast, for complainants:

The demurrer in this case raises the single question whether the complainant *Mason* can in any way release, surrender, or extinguish the power of appointment (which he has under his wife's will) over the remainder in fee of the fourth part of the estate devised to him for life. It will be seen that the question is not whether such a power is destroyed by a conveyance of the life estate. If there were ever any doubt as to this, it may be conceded that it is now settled that it is not.

Haswell v. Haswell, 2 De G. & J. 461; *Alexander v. Mills*, L. R. 6 Ch. App. 124; *Hardaker v. Moorhouse*, L. R. 26 Ch. Div. 417; *Cooper v. Slight*, L. R. 27 Ch. Div. 565; *Leggett v. Dornmus*, 25 N. J. Eq. 122; 2 Washb. Real Prop. 3d ed. 306, 307; *Tiedeman*, Real Prop. § 561.

Nor is it whether *Mr. Mason* alone can make a marketable title to this one-fourth part of the estate—the case suggested by *Mr. Sugden* in his work on Powers, vol. 1, p. 262. But it is as first stated, whether such a power can be released or surrendered and thereby extinguished; and it is submitted upon principle and authority that it may be.

It is plainly a general power in gross. It creates no trust; it imposes no duty; and it is essentially a power for the devisee's own benefit; for, although being exercisable only by will, he cannot exercise it directly for his own personal use; yet he may under it appoint the estate to his family or heirs or any other beneficiary, and either in fee or otherwise as he chooses; and it is entirely at his own option whether to exercise it or not. And that such a power may be released, and thereby extinguished, has been the settled doctrine from the earliest times.

1 Sugd. Powers, 89, citing *Albany's Case*, 1 Rep. 110 b; Co. Litt. 265 b; Wms. Real Prop. 311; *Isaac v. Hughes*, 39 L. J. Eq. N. S. 379.

Indeed, the cases go further and hold that even a power to a life tenant to appoint or charge the estate to or for his children may be released.

West v. Birney, 1 Russ. & M. 431; *Smith v. Death*, 5 Madd. 371; 1 Bligh, 15; *Bickley v. Guest*, 1 Russ. & M. 441.

Mr. Edward C. Dubois, for respondent:

The respondent's objection to said title is that the complainant John J. Mason, having under the will of his wife only a life estate in said real estate, with power of appointment by his last will and testament, can convey to said defendant no more than his life estate; that he cannot by deed exercise his said power of appointment, as a power of appointment by will cannot be executed by deed or by any act to take effect in the lifetime of the donee of the power (*Whaley v. Drummond*, Ch. East. T. 1745; 1 Sugd. Powers, 256; *Ward v. Amoy*, 1 Curt. C. Ct. 419; *Porter v. Thomas*, 23 Ga. 467; *Moore v. Dimond*, 5 R. I. 121); and that he cannot by deed extinguish said power so that the heirs at law of his wife can convey their remainder by said deed.

"Whether a person having a life estate with a power, collateral or in gross, to appoint, can exercise the power after having parted with his life estate, has been made a question. The better opinion would seem to be that the power is not destroyed."

4 Kent, Com. 12th ed. p. 346 *et seq.*; and see 2 Washb. Real Prop. 598; Tudor, Lead. Cas. 294; Burt. Real Prop. 176; 2 Greenleaf's Cruise, Real Prop. 288; Sugd. Powers, 262.

A power of disposal by will does not enlarge an interest in donee of power beyond what is expressly limited.

Ward v. Amoy, 1 Curt. C. Ct. 419.

A tenant for life with a power of appointment as to the reversion, or of revocation as to a remainder, may execute his power, though he may have aliened his own life estate.

2 Washb. Real Prop. 598.

A power, technically speaking, is not an estate, but is mere authority enabling a person, etc., to dispose of an interest in real property vested either in himself or in another person.

Burleigh v. Clough, 52 N. H. 267, approved in *Rhode Island Hos. Tr. Co. v. Commercial Nat. Bank*, 14 R. I. 625.

If, following the above reasoning, it is true that in this case Mr. Mason, by his wife's will, took two things,—an estate for life and a power of disposal,—independent of each other, how can he extinguish his power by sale of the realty? And if his power is not extinguished, it still exists for him to exercise, and remains during his life a cloud upon said title.

Darfee, Ch. J., delivered the opinion of the court:

This is a suit by the complainants, claiming to be owners of a lot of land in East Providence, to enforce the specific performance of a contract with them by the defendant for the purchase of said lot. The suit is amicable, the defendant being willing to perform his contract if the complainants can make a good title in fee simple. The bill, which is demurred to, sets forth the title as follows, to wit: The estate formerly belonged in fee simple to Rosa Ann Grosvenor, who died intestate, leaving five children, who inherited it subject to the curtesy of her surviving husband. One of said children died intestate without issue, so that his share descended to the others. Another of said children, to wit, Alice G. Mason, wife of John G. Mason, died later, leaving a will by which she devised all of her real estate R. I.

which she inherited from her mother to said John for life, and upon his decease to such person or persons and upon such limitations and conditions as he might by his last will and testament name, limit, and appoint, and in default of such appointment, to her own heirs at law. The heirs at law of Mrs. Mason are William Grosvenor, Jr., Rosa Ann Grosvenor, and James B. M. Grosvenor, who, together with William Grosvenor, surviving husband of Rosa Ann Grosvenor, deceased, and said John G. Mason, devisee for life under the will of said Alice, are the parties complainant in this suit. The entire estate is in them if those of them who are the heirs at law of Mrs. Mason took vested remainders under her will,—no question being made but that the interest inherited by Mrs. Mason from her deceased brother descended upon her death to her surviving brothers and sisters,—and therefore they can make a clear title to the defendant if John G. Mason, devisee for life and donee of the power of appointment under the will, can release the power or can extinguish it by joining with the other owners in a conveyance of the lot in fee simple.

Upon the question whether estates limited in default of appointment are to be considered as vested or contingent during the continuance of the power, there has been some diversity of decision. In *Lovies's Case*, 10 Rep. 78, decided in 1614, and in *Walpole v. Conway*, Barnardiston, Ch. 153, decided in 1740, such remainders were held to be contingent; but later, in *Cunningham v. Moody*, 1 Ves. 174, 1748, they were held to be vested, subject to be divested by the execution of the power; and in *Doe v. Martin*, 4 T. R. 39, the latter view was affirmed after great consideration upon elaborate arguments, and Chancellor Kent says "the doctrine is now definitely settled, and it applies equally to personal estate." 4 Kent, Com. 324; also *Osbrey v. Bury*, 1 Ball & B. 53. We think the estate in remainder vested in the heirs at law of Alice G. Mason, subject to be divested by the execution of the power given to John G. Mason.

We think it was competent for John G. Mason to release the power to the tenants in remainder, or to extinguish it by joining with the other complainants in a deed conveying the bargained lot to the defendant in fee simple, and therein releasing the power to him. "Powers relating to the land," says Mr. Cruise, "whether appendant or in gross, may be destroyed by a release to any person having an estate of freehold in possession, remainder, or reversion in the lands to which the power relates. For where powers are given to a person having an estate or interest, either present or future, in the land, the exercise of them is considered as a species of property advantageous to him; and there is no reason why he should not be allowed to part with, or exclude himself from, the benefit of it." 4 Greenleaf's Cruise, chap. 19, § 4, citing *Digges's Case*, 1 Rep. 174 a. See also *Albany's Case*, 1 Rep. 110 b. The power held by Mason is a power in gross.

Mr. Sugden says: "A present power not simply collateral may be extinguished by release to anyone who has an estate of freehold in the land in possession, reversion, or remain-

der, and thereby the estates which were before defeasible or chargeable by the power are by such release made absolute." Sugd. Powers, 89, citing *Albany's Case*, 1 Rep. 110 b, and 2 Co. Litt. 265 b.

Of course, if the life tenant having the power can release it to the tenant in remainder, he can also release it to the latter's grantee; and if he can do this, there is no reason why he cannot join with the tenant or tenants in remainder in a deed conveying the entire estate and therein release the power to the grantee. *D'Wolf v. Gardiner*, 9 R. I. 145.

In *West v. Berney*, 1 Russ. & Myl. 431, decided in 1819, the Vice-chancellor, Sir John Leach, reviews the precedents, and on the strength of *Albany's Case* and *Leigh v. Winter*, Jones, W. 411, decides that such a power can be released by the donee who is tenant for life, where he himself is the grantor or settlor of the estate, and expresses the opinion that it may equally be released if he is grantee simply, "because his release must be to him who takes subject to the power, and the exercise of the power would be inconsistent with the release, which is a species of conveyance affecting the land." He also held that such a power is not a trust, even when it is to appoint to particular persons, as children, it being optional with the donee to exercise it or not. And see *King v. Mellang*, 1 Vent. 225; *Smith v. Death*, 5 Madd. 371.

In *Horner v. Swann*, 1 Turn. & R. 420, an estate was devised to A for life, and after her death to such of the testator's children living at his death as A should appoint, and in default of appointment to the children equally, with survivorship in case of any dying under twenty-one. A and the three surviving children, all over twenty one, contracted to sell the devised estate, and upon a bill for specific performance the question was whether the power could be released or extinguished and Sir Thomas Plumer, *M. R.*, decreed specific performance. See also *Osbrey v. Bury*, 1 Ball & B. 58; 4 Kent, Com. 347.

We think the complainants are entitled to specific performance.

Edward D. BASSETT *et al.*

v.

Henry B. FRANKLIN *et al.*

1. The Act of May 20, 1707 (4 R. I. Colonial Records, 24), did not directly convey to the then town of Providence any property in the waters and banks

within its borders, but only authority to appropriate them by improvements
2. Hence, where no such appropriation has occurred, the present city of Providence, or those holding under it, have no such title to such waters, etc., as will support ejectment.

(Providence—Decided July 16, 1887.)

TRESPASS and ejectment. Heard by the court, jury trial being waived. *Judgment for defendants.*

Statement by the Court:

The plaintiffs, lessees of the city of Providence, under an indenture of lease dated April 27, 1886, acknowledged April 28, 1886, and recorded May 21, 1887, brought this action against the defendants, who had erected and were occupying a building over the bed of the Mooshasuck River, just north of Railroad Crossing Street, in the city of Providence. The action was begun in the court of common pleas and came to this court on appeal.

Messrs. Edward D. Bassett and John M. Brennan, plaintiffs, *pro se.*

Messrs. Arnold Green and William B. Beach, for defendants, contended:

1. Lease taken when defendants were in possession; hence plaintiffs could not sue; only lessor could bring the action.

2. Neither lessor nor plaintiffs owned or ever did own the *locus* in question.

3. The statute of 1707 had no application, for the town of Providence never occupied or filled the *locus* which up to 1829 was like flowed land.

Per Curiam:

The court is of the opinion that the plaintiffs have not shown by evidence documentary, and other which they have submitted, that they have, or that the city had when they took their conveyance from it, any title to the premises in suit. The court thinks that the Act of May 28, 1707 (4 R. I. Colonial Records, p. 24), referred to by the plaintiffs, did not directly convey to the then town of Providence any property in the coves, creeks, rivers, waters, and banks within its borders, but only authority to appropriate them or portions of them "by building houses, warehouses, wharves, laying out lots," or by other improvements "as the body of the freeholders and freemen" or a "major part of them" might see fit "for their most benefit;" and it does not appear that the premises in suit have ever been so appropriated.

Judgment for the defendants, for costs.

MAINE.

SUPREME JUDICIAL COURT.

George O. BAILEY

v.

Inhabitants of BELFAST.

In an action to recover damages to a horse by reason of an alleged defect in a way, the defendant may show the character of the horse as to gentleness, and may also show the character of the horse, as to shying and bolting, for more than a year prior to the injury.

(Waldo—Decided June 29, 1887.)

ON exceptions and motion to set aside the verdict, by the defendants. *Sustained.*

An action to recover damages to the plaintiff's horse, on the 12th day of March, 1885, by reason of an alleged defect in Church Street, in the defendant city.

At the trial the defendants offered to show the general character of the horse at the time of the accident, and it was excluded.

They also offered evidence as to shying and bolting, by the horse, on occasions more than one year prior to the accident, but the presiding justice restricted such evidence to a period of one year immediately preceding the accident. The verdict was for the plaintiff for \$356.58.

Mr. Joseph Williamson, for defendants:

In *Whitney v. Leominster*, 136 Mass. 25, the court held that evidence of the character as well as of the habits of the horse was admissible.

Although the rule laid down in *Maggi v. Cutts*, 123 Mass. 535, that the limit of time within which the misbehavior of a horse may be proved must depend largely upon the discretion of the presiding judge is not controverted, we submit that the restriction of evidence upon the point to a time within one year immediately preceding the time of the cause of action should be revised. "It may be safely laid down as a general rule," is the language of the opinion in *Chamberlain v. Enfield*, 43 N. H. 356 (having its exceptions, no doubt), "that neither horses nor men change their character, their habits, or their manners in six or eight months."

In *Todd v. Rowley*, 8 Allen, 51, which was also an action to recover for an injury sustained by reason of a defective way, on the 11th of June, 1861, the defendants, after introducing evidence tending to prove two instances of the horse's shying before the time of the accident, were permitted to show many similar instances afterwards, up to March, 1863, comprising a period of a year and nine months. Upon exceptions by the plaintiff the ruling was sustained.

So in *Maggi v. Cutts*, 123 Mass. 535, before cited, which was tort for injuries caused by an obstruction in the highway, placed there by the defendant, evidence of the character and habits of the plaintiff's horse for two years before was held admissible.

So in *Donnelly v. Fitch*, 136 Mass. 558, where the plaintiff claimed to have been injured by the running of the defendant's horse, evidence

was allowed that, about a year and a half before the accident, the horse had been frightened and had run away.

In *Chamberlain v. Enfield*, before cited, reference is made to *Cross v. Wilkins*, 43 N. H. 382, and cases cited, in one of which, *Thornton v. Campton*, 17 N. H. 338, it was held that a sale of certain land in March, 1816, was admissible to show its value in April, 1814; thus, by implication, establishing two years at least within which evidence was legitimate.

The defendants introduced an ordinance providing that no person shall immoderately drive any horse, with a sleigh, through the street where the accident occurred. Such an ordinance is binding, and has force of statute law within the limits where applicable.

Baker v. Portland, 58 Me. 208.

When it appears that such an ordinance existed, the plaintiff must show that he was not violating it. On that issue the plaintiff has the burden of proof, and, failing to sustain that burden, he must fail in his action.

Tuttle v. Lawrence, 119 Mass. 276.

The explicit statement of intelligent and impartial witnesses, whose credibility there is no reason to doubt, is entitled to confidence and belief, in preference to any conflicting assertion of the plaintiff.

Andrew v. Spurr, 8 Allen, 415.

It is clear that the damages were not estimated upon any legal principle. Where such is the case, the verdict should be set aside.

Ellsworth v. Central R. R. Co. 34 N. J. L. 98;

Paulmier v. Erie R. R. Co. 34 N. J. L. 151.

Where the amount of damages is matter of opinion, merely, the fact that the jury have fixed them at a greater or less sum than any of the witnesses is not a ground for a new trial.

12 Pick. 547.

Here was no matter of opinion; the amount was certain, fixed, definite.

The judgment of a jury is to govern only where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation.

Worster v. Canal Bridge, 16 Pick. 541.

So where the foundation of the action is a breach of contract, and the damages are capable of estimation, if there is a glaring deficiency, justice requires that the case shall be revised.

Taunton Mfg. Co. v. Smith, 9 Pick. 11.

"A new trial," remarks Judge Sedgwick, "will not be granted on the ground that from the small amount of damages the jury must have come to a compromise, unless from the circumstances of the case it is evident that there has been a total refusal on the part of the jurors to discharge their duty, and the verdict is necessarily wholly inconsistent."

Sedg. Dam. 767.

In an action for malicious prosecution, where undisputed evidence conclusively showed that the plaintiff had incurred reasonable expenses in his defense, exceeding \$50, and the jury assessed damages at \$5, it was held error to deny his motion for a new trial.

Wauke v. McLellan, 51 Wis. 484.

So, in an action for professional services, the only testimony as to the value of the services was that they were worth not less than a certain sum. Held, that a verdict for a less sum must be set aside.

Hood v. Ware, 34 Ga. 328.

It may be argued that no cause exists for setting aside a verdict, because an improper deduction from the plaintiff's damages has been made, if the plaintiff does not object. But if the verdict is manifestly wrong, it is immaterial which side should originate the motion for vacating it. Frequently the defendant asks that a verdict may be set aside for excess. "There seems to be no reason why the case of too small damages should not be governed by the same principles as excess of damages."

6 Dane, Abr. 247.

Mr. William H. Fogler, for plaintiff:

Whether the misconduct of the horse is such as to be regarded as the true and proximate cause of the injury, in any given case, is to be governed by the extent of such misconduct.

Aldrich v. Gorham, 77 Me. 290.

That the character or reputation of the driver of a team, when the issue is as to the misconduct of the driver, is inadmissible, is too well settled to admit of doubt.

Dunham v. Rackliff, 71 Me. 345.

In this case the court says (p. 349): "It mattered not how negligent he may have been in the past, if at the time of the collision there was no negligence, nor want of care. The reputation of the servant for skill, or want of skill, was not admissible as relevant testimony to the issue tried."

Apply this language to the plaintiff's horse, and is it not sound law?

McDonald v. Savoy, 110 Mass. 49; *Tenney v. Tuttle*, 1 Allen, 185.

In the case last cited, Metcalf, J., stated the rule to be that, "when the precise act or omission is proved, the question of whether it is actionable negligence is to be decided by the character of that act or omission, and not by the character for care that the defendant may sustain."

See also *Maguire v. Middlesex R. R. Co.* 115 Mass. 239; *Whitney v. Gross*, 140 Mass. 232, 1 New Eng. Rep. 512; *Chase v. Maine Cent. R. R. Co.* 77 Me. 62.

Did the presiding justice rightfully exclude testimony of the conduct of the horse on occasions prior to one year before the accident?

The only authority I can find for the admissibility of evidence of former conduct of the horse in any event is *Dennett v. Wellington*, 15 Me. 27, and the evidence seems in that case to have been admitted for the purpose of showing that the horse was unbroken at the time of the accident; and the admissibility for such purpose seems to have been predicated upon the fact that the misconduct testified to occurred a few months, only, prior to the accident.

That such testimony is ever admissible seems to me doubtful.

Parker v. Portland Pub. Co. 69 Me. 173, and authorities there cited.

Per Curiam:

The court is of opinion that the presiding justice erred in excluding evidence offered by defendants to show the "character" of the plaintiff's horse for "gentleness and kindness" at the time of the accident, and in limiting the defendants' evidence tending to show the character of the horse, as to shying and bolting, to one year prior to the accident.

The court is also of opinion that the evidence fails to show that the injury to plaintiff's horse was caused solely by the unsafe condition of the way.

Exceptions and motion sustained.

John W. MITCHELL

v.

Emery BOARDMAN.

1. **Mandamus** will not be issued upon the petition of a private citizen to compel a public officer to act in a public matter.
2. It will not issue, upon such a petition, **to compel a police court judge to issue a warrant of search and seizure, upon a proper complaint.**
3. It will not issue when the thing commanded by it would be **an idle and useless ceremony.**

(Waldo—Decided June 29, 1887.)

ON report of a petition for *mandamus*. *Writ denied.*

The case is stated in the opinion.

Mr. R. W. Rogers, for plaintiff:

It was agreed between the parties, before the drawing of the petition, that no question as to the right of a private citizen to petition in a public matter would be raised, and it is presumed that no such contention will be made. For the convenience of the court, however, in case any doubt of its authority to issue the writ prayed for should arise in connection with that question, the following cases are cited:

Hamilton v. State, 3 Ind. 452; *People v. Collins*, 19 Wend. 56; *Union Pacific R. R. Co. v. Hall*, 91 U. S. 355 (Bk. 23, L. ed. 432), and cases cited; *Williams v. Lincoln County*, 35 Me. 347; *State v. Gorham*, 87 Me. 461; *Dane v. Derby*, 54 Me. 95; *Walton v. Greenwood*, 60 Me. 363.

"On a summary hearing on a petition for *mandamus*, this court will not determine the question of the constitutionality of the law involving the rights of third persons, but will leave that question to be settled when properly presented by parties to an action.

Smyth v. Titcomb, 31 Me. 285.

The contention, however, that the statute is in conflict with art. 1, § 5, of the Constitution of Maine, is without any foundation. The Constitution neither delegates nor requires the Legislature to delegate to magistrates the power of passing upon the question of probable cause. It has the right to withhold that power, if it sees fit, and prescribe instead the rules and conditions upon which they shall issue their warrants. That is precisely what the Legislature has done in § 40, and this court has, at least twice, directly and explicitly declared its action to be constitutional.

Gray v. Kimball, 42 Me. 307; *State v. Miller*, 48 Me. 576.

And the law has often been indirectly sustained by the court, the last time in the recent case of *State v. Dunphy* (Me.), 3 New Eng. Rep. 827.

Messrs. W. P. Thompson and R. F. Dutton, for defendant:

In all cases arising under any statute other than Rev. Stat. chap. 47, § 40, it is the man-

fest duty of the magistrate, before issuing a warrant, to be honestly satisfied that the accused committed the offense with which he is charged.

Rev. Stat. chap. 132, § 6.

Before issuing a warrant to search any house or place for property stolen, etc., the complainant must allege that he has probable cause to suspect and does suspect that the same is there concealed.

Rev. Stat. chap. 132, §§ 11, 12.

The Constitution of Maine (art. 1, § 5), the highest law in this State, appears to regulate the issuing of search warrants, very plainly. The Constitution of the United States (art. 4 of amendments thereto) is in substance the same.

This question arose in the early history of this country, in 1793, in the case of the *United States v. Judge Lawrence*, who refused to issue a warrant to arrest a deserter from a ship. The minister of the French Republic having complained to the President of the United States, the opinion of the court was obtained thereon and reported in 3 Dall. 83 (8 U. S. bk. 1, L. ed. 518). The court says: "We are clearly and unanimously of the opinion that the district judge was acting in a judicial capacity when he determined that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre; and whatever might be the difference of sentiment entertained by this court, we have no power to compel a judge to decide according to the dictates of any judgment but his own."

See also *State v. Nephler*, 35 La. Ann. 365.

Probable cause for a criminal prosecution is understood to be such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives (2 Greenl. Ev. p. 452); or a reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man in believing that the party is guilty of the offense (*Munns v. Dupont*, 3 Wash. C. Ct. 31; *Foshay v. Ferguson*, 2 Denio, 617).

It is for the court to determine whether the facts and circumstances amount to probable cause.

Ulmer v. Leland, 1 Greenl. 135; *Stone v. Crocker*, 24 Pick. 81.

So far as we have been able to determine, the precise point involved in this case has never arisen in this State, but in various decided cases, notably *Flakerty v. Longley*, 62 Me. 420; *State v. Miller*, 48 Me. 580, and *State v. Bartlett*, 47 Me. 392, the question of the constitutional requirements in relation to the special designation of the place to be searched and thing to be searched for, has arisen, and any omission in the warrant in this respect has been held fatal.

In *State v. Wheeler*, 64 Me. 532, the question was raised whether it was necessary for the complaint to contain an averment that complainant has probable cause to believe, etc., and the court held that the statute does not require such an averment.

A statute may be good in part and bad in part, if the parts are separable.

Harris v. Niagara County Supers. 33 Hun, 279.

We are aware that courts usually hesitate and move with great caution in questioning the constitutionality of statutes; but if any Act of the Legislature in fact is repugnant to the Constitution.

stitution, it is *ipso facto* void, and the duty of the court to so declare it is as plain and imperative as any other duty which devolves upon them.

Vanhorne's Lessee v. Dorance, 2 Dall. 304 (2 U. S. bk. 1, L. ed. 391).

The general rule is that when a question is submitted to the discretion of a judicial officer his judgment is conclusive. He is not to be controlled by any discretion but his own. When an inferior court has discretion in relation to the proceedings pending before it, and proceeds to exercise it, the courts will not control that discretion by *mandamus*.

Davis v. York County, 63 Me. 398, and cases there cited.

Whenever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action, they are required to exercise any degree of judgment; while it is proper by *mandamus* to set them in motion and to require their action upon matters officially entrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion, or control or dictate the judgment to be given.

High, Ex. Leg. Rem. § 42, p. 47; *United States v. Seaman*, 17 How. 225 (58 U. S. bk. 15, L. ed. 226); *United States v. Commissioner*, 5 Wall. 563 (72 U. S. bk. 18, L. ed. 692); *Secretary v. McGarrahan*, 9 Wall. 298 (76 U. S. bk. 19, L. ed. 579).

And the rule may be regarded as established by an overwhelming current of authority, both English and American, that *mandamus* will not lie to control the exercise of the discretion of inferior courts; and when such courts have acted judicially upon a matter properly presented to them, their decision cannot be altered or controlled by *mandamus* from a superior tribunal; and it is important to observe that the rule applies with equal force, regardless of the propriety or impropriety of the action of the inferior court.

High, Ex. Leg. Rem. § 156, p. 144, and a multitude of cases there cited.

It is sufficient that the discretion has been exercised, and whether rightly or wrongly exercised it cannot be questioned by *mandamus*.

Queen v. Harland, 8 Ad. & El. 826; *State v. Watts*, 8 La. 76, cited in High, Ex. Leg. Rem. § 156, note.

The only office of the writ of *mandamus* when issued to a subordinate court is to direct the performance of ministerial acts, or to command the court to act in a case where the court has jurisdiction and refuses to act; but the supervisory court will never prescribe what the decision of the subordinate court shall be; nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.

Ex parte Newman, 14 Wall. 165 (81 U. S. bk. 20, L. ed. 879); *Life & Fire Ins. Co. of N. Y. v. Wilson's Heirs*, 8 Pet. 302 (83 U. S. bk. 8, L. ed. 953); *United States v. Peters*, 5 Cranch, 135 (9 U. S. bk. 3, L. ed. 59); *Ex parte Bradstreet*, 7 Pet. 648 (32 U. S. bk. 8, L. ed. 815); *Ex parte Many*, 14 How. 24 (55 U. S. bk. 14, L. ed. 811); *Commissioner of Patents v. Whiteley*, 4 Wall. 522 (71 U. S. bk. 18, L. ed. 385); *Life*

& *Fire Ins. Co. of N. Y. v. Adams*, 9 Pet. 602 (84 U. S. bk. 9, L. ed. 245).

The petition for the writ does not allege any interest of the petitioner to be promoted, or that his rights are in any degree diminished, by the omission complained of, more than any other individual in the community, and therefore he is not entitled to the writ of *mandamus*.

High, Ex. Leg. Rem. chap. 1, § 10.

The law makes it the imperative duty of municipal officers, assessors, and constables, in every city, town, and plantation, to make complaints and prosecute all violations of the statute.

Rev. Stat. chap. 27, § 27.

Also sheriffs and their deputies are invested with like duty.

Id. § 60.

The court, in *Sanger v. Kennebec County*, 25 Me. 294, says: "This writ is grounded on suggestion, by the oath of the party injured, and the denial of justice below. A private individual can apply for this remedy only in those cases where he has some private or particular interest to be subserved, or some particular right to be pursued or protected by the aid of this process, independent of that which he holds in common with the public at large; and it is for the public officers exclusively to apply, when public rights are to be subserved."

Danforth, J., delivered the opinion of the court:

In this case the petitioner in his individual capacity applies for a writ of *mandamus* to compel the respondent, the judge of the Police Court of the City of Belfast, to issue a warrant of search and seizure, upon his complaint in due form under oath. It has for a very long time been well-settled law in this State that "a private individual can apply for this remedy only in those cases where he has some private or particular interest to be subserved, or some particular right to be pursued or protected by the aid of this process, independent of that which he holds in common with the public at large. It is for the public officers exclusively to apply when public rights are to be subserved." *Sanger v. Kennebec County*, 25 Me. 291-296.

No private right distinct from that of the public is involved here. It is the refusal of a public officer to act in a public matter, an officer of the government in a matter which relates to the enforcement of a public law; and if he has violated his duty or refuses to perform it, there is other remedy more appropriate and efficient than this. The cases cited by counsel are unlike this, and in those cited from our own State this question was not raised.

Were it otherwise, in this case, no available remedy would result from granting the writ. The warrant asked for, if issued, could only be against such liquors as were in the building described at the date of the complaint. If the officer were to levy it upon any other, he would do so at his peril; and so long a time has elapsed since the complaint was made, and must in cases of this kind always elapse before a judgment can be obtained, that the issuing of the warrant would be a useless act, and more especially in this case, as the building described in the complaint has been destroyed by fire, a

historical fact of which the court will take judicial cognizance. Under these facts the court will not grant a *mandamus*, even if the petitioner were otherwise entitled. It would be an idle and useless ceremony. *Williams v. Lincoln County*, 35 Me. 349; *Woodbury v. Piscataquis County*, 40 Me. 304; *Dane v. Derby*, 34 Me. 102.

Writ denied.

Peters, Ch. J., Walton, Libbey, Emery, and Haskell, JJ., concurred.

Inhabitants of LIBERTY

v.

Inhabitants of PALERMO.

Where a father has fully abandoned and emancipated his daughter, and there is a complete destruction of the parental and filial relations, the furnishing of pauper supplies to the daughter, even with the knowledge of the father, will not prevent him from gaining a new settlement.

(Waldo—Decided July 1, 1887.)

ON report. Judgment for defendants.

The case and material facts are stated in the opinion.

Meers. W. P. Thompson and R. F. Duntun, for plaintiffs:

Evilla May, it is admitted, has received pauper supplies from the town of Palermo every year since her birth to within four years last past, and the plaintiffs claim that said supplies were indirectly furnished to Harris Bailey, and thus prevented him from gaining a settlement in the town of Liberty.

Garland v. Dover, 19 Me. 441; *Sanford v. Lebanon*, 31 Me. 124; *Clinton v. York*, 26 Me. 167; *Eastport v. Lubec*, 64 Me. 244.

Emancipation is never to be presumed, but must always be proved.

Lowell v. Newport, 66 Me. 78; *Oldtown v. Falmouth*, 40 Me. 106.

The court, in *Sanford v. Lebanon*, 31 Me. 124, says: "The test to be applied is that of the preservation or destruction of the parental and filial relations."

In *Monroe v. Jackson*, 55 Me. 59, the court says, in speaking of a similar case: "Poverty, even culminating in absolute pauperism of the parent, and resulting in a binding out to service of the child by the selectmen until he is twenty-one years of age, does not affect it."

In *Clinton v. York*, 26 Me. 167, the settlement of John Beal was the question, and where supplies furnished his daughter while living apart from his family were claimed to have prevented the father from gaining a settlement, and it appeared that the daughter had lived around in a good many places since her childhood, and that her father would not have her in his house, the court held that the daughter was not thereby emancipated.

The court, in *Lowell v. Newport*, 66 Me. 78, in reviewing the reported cases upon the question of emancipation, says: "From these cases, as well as from others in harmony with them, the principle to be deduced is that emancipation

such as will affect a settlement under the pauper law, however it may be in other cases, must be an absolute and entire surrender, on the part of the parent, of all right to the care and custody of the child, as well as to its earnings, with a renunciation of all duties arising from such a position."

Mr. William H. Fogler, for defendant:

During the entire lifetime of this child her father has bestowed upon her no parental care; has neither exercised nor attempted to exercise over her any parental control; has required of her no filial obedience or duty. So far as the father is concerned, she has been free to go where she would and subsist as she might. She can in no sense be said to have been under the father's care and protection.

In determining the question of emancipation, "the best test which can be applied is the separation and resulting freedom from parental and filial ties and duties."

Lowell v. Newport, 66 Me. 78.

Applying this test to the case at bar, it is contended, in behalf of the defendants, that the child, Evilla May, was so thoroughly abandoned by her father as to amount to complete emancipation.

After mature deliberation we are of opinion that supplies cannot be considered as furnished to a man as a pauper, unless furnished to himself personally, or to one of his family; and that those only can be considered as his family who continue under his care and protection.

Green v. Buckfield, 8 Me. 186.

In *Hallowell v. Saco*, 5 Me. 143, the court says that though a man may receive pauper supplies constructively, yet, "in all such cases, however, the supplies must have been furnished to some person under the care and protection of him whose settlement is to be affected, and for whose support he is by law responsible."

A case closely resembling the case at bar is *Raymond v. Harrison*, 11 Me. 190. One Edwards, in consequence of the supposed criminal conduct of his wife, abandoned her and his family. The controverted question was whether supplies furnished his children during such separation could be considered as furnished him. The court says: "They (the wife and children) cannot in any reasonable construction be said to have remained under his care and protection when the supplies were furnished."

In *Manchester v. West Gardiner*, 53 Me. 525, the rule is laid down as follows: "A father is not to be made a pauper by supplies furnished a child not a member of his family nor under his control."

In *Garland v. Dover*, 19 Me. 441, cited by plaintiffs, the jury found as a fact that the parental and filial relation continued.

And in *Sanford v. Lebanon*, 31 Me. 124, also cited by plaintiffs, it is stated (p. 129) that the criterion to be sought is that of the "preservation or destruction of parental and filial relations."

To use the language of the presiding justice in *Hampden v. Troy*, 70 Me. 485: "The tie between the parent and child is broken, not necessarily because all affection between them is gone; that may still exist in a smaller or larger degree, or not at all."

Foster, J., delivered the opinion of the court:
ME.

This action is brought to recover for supplies furnished Harris Bailey and family, paupers, residing in the plaintiff town.

It is agreed that Bailey formerly had a settlement in the defendant town, and that before the supplies for which this action is brought had been furnished, he had acquired a legal settlement in the plaintiff town by having his home therein for five successive years, unless prevented by the fact that supplies had been furnished by the defendant town to Evilla May Bailey, a minor daughter by a former wife, from whom he was divorced in 1869.

It was admitted that this daughter has received pauper supplies from the defendant town every year since her birth, which was in April, 1867, to within four years last past; and the plaintiffs claim that said supplies were indirectly furnished to Harris Bailey, and thus prevented him from gaining a settlement in the plaintiff town.

The defendants, while admitting the support to have been thus furnished to the daughter, contend that it had no effect upon the father's settlement; because, as they claim, the child was, during all said time, totally abandoned and emancipated by the father.

This is the only controverted question in the case,—the only one we need consider,—and the one decisive of the rights of the parties.

The evidence satisfies us that the child was emancipated by abandonment.

At the time the child was born, Bailey and his wife were living apart from each other, having separated two months before. He first saw the child when she was six weeks old, his wife carrying her to him where he was at work in an adjoining town. He then refused to take the child, utterly refused to furnish anything for her, and denied that she belonged to him. He repeatedly thereafter declared that the child was not his, and that he should not support her, or have anything to do with her. The next time he saw the child was about a year after that, when she was again carried to him, and he then refused to take any notice of her, still denying her paternity, and swearing that he would never support her. With one possible exception, and about which the evidence is conflicting, the father did not again see the girl for a period of about ten years, when he happened to meet her at a neighbor's house, but did not know who she was. When informed, he manifested no interest whatever in her, and, according to his testimony, does not recollect that he ever spoke to her. The child was then eleven years old, and his home had been in the plaintiff town for more than six years.

In 1880 the girl, then being thirteen years of age, by invitation, went to his house and remained four days. From that time to the present the father has had nothing to do with her, and it does not appear that he has even seen her. While there is some evidence that at one time he bought the child two yards of print, his own testimony is, "I never helped her any that I know of," and he does not recollect ever furnishing the child anything in her life except just what food she ate while she was at his house.

The father was a man of sound health, able-bodied, and received good wages. Divorced from the mother of this child in 1869, when it

was two years of age, he again married in 1871, and has reared and supported a family of four children, having received assistance but once, and that only to the amount of \$5 in the town of Somerville, previous to the bill for which this suit is instituted.

The separation of the child from the father was not occasioned through poverty, nor in other respects did the parental and filial relation continue, as in *Garland v. Dover*, 19 Me. 446; *Clinton v. York*, 26 Me. 170; *Sanford v. Lebanon*, 31 Me. 124, or *Eastport v. Lubec*, 64 Me. 244, cited by the plaintiffs. Here, from the testimony of the father, it appears that he could have supported this child if he had wanted to, but he "didn't want to."

In the cases to which we have referred it will be found that the mere fact that the child was not residing in the family of the parent was not satisfactory proof of abandonment or emancipation. And the more satisfactory criterion of whether or not there has been such abandonment or emancipation, was found to be that of "the preservation or destruction of the parental and filial relations."

It is in accordance with this principle that the decisions of our court have uniformly held, in cases where the parental and filial relation no longer continues to subsist, and the father has "deliberately abandoned his family and taken up his residence in another town, emancipating them from all duty to him, and renouncing all obligation to them, that supplies furnished, even under such circumstances as imply a knowledge of the fact upon his part, will not be considered as supplies furnished to him, so as to prevent his gaining a settlement in his new place of residence." *Eastport v. Lubec*, 64 Me. 246; *Raymond v. Harrison*, 11 Me. 190; *Hallowell v. Saco*, 5 Me. 143; *Lowell v. Newport*, 66 Me. 87.

During the entire lifetime of this child, now more than twenty years of age, the father has bestowed upon her no parental care. Neither has he exercised or attempted to exercise over her any parental control, and has required of her no filial obedience or duty. In no sense can it be said that she has been under her father's care and protection. There was such a voluntary and absolute renunciation of all duties arising from the parental and filial relation that, according to the established tests in such cases, emancipation would inevitably result.

In *Monroe v. Jackson*, 55 Me. 59, it is said by Barrows, J., that it occurs not only by the act of God in depriving the child of its natural protector by death, but also "by the voluntary act of the parent in surrendering the rights and renouncing the duties of his position, or in some way conducting in relation thereto in a manner which is inconsistent with any further performance of them."

And in *Lowell v. Newport*, 66 Me. 90, after an examination of many decided cases wherein the question of emancipation has arisen, the court says: "Indeed, the best test which can be applied is the separation and resulting freedom from parental and filial ties and duties, which the law ordinarily bestows at the age of majority."

What more potent evidence of deliberate abandonment, of freedom from parental and filial ties, and the renunciation of all parental obligation

and duty is required than appears in this case? It is sufficient, we think, to establish a defense to this suit.

Judgment for defendants.

Danforth, Walton, Libbey, Emery, and Haskell, JJ., concurred.

Josephine C. CASWELL

v.

Amos PITCHER.

A new trial will not be granted because a bystander expressed an opinion of a case on trial in the presence of one of the jurors, when there was no misconduct on the part of the juror, and the court is not satisfied that any injurious effect was produced by the remark.

(Waldo—Decided June 23, 1887.)

ON motion of plaintiff to set aside the verdict and for new trial. *Overruled.*

The plaintiff was the defendant's daughter, and the suit was to recover \$2,300 for wages from the time she arrived at twenty-one years till the time of her marriage,—fourteen years.

The verdict was for plaintiff for \$68. The motion for new trial was for the alleged reason that a bystander remarked in the presence of the foreman of the jury, at the noon recess of the first day of the trial, on the street, "that if they gave this girl the case, every girl in the county would sue her father."

The evidence as to the exact time and manner of making the remark, and whether the juror heard it, was somewhat conflicting.

Messrs. Joseph Williamson and Fred W. Brown, for plaintiff.

Messrs. William H. Fogler, and Thompson & Dunton, for defendant.

Per Curiam:

The fact that a bystander made a remark in the presence of a juror about a case on trial before the jury to which the juror belonged, expressing his opinion but not communicating any information of fact, the juror making no reply, and no misconduct on his part being shown, the court not being satisfied that any injurious effect was produced thereby, is not a cause for a new trial.

Motion overruled.

George P. BILLINGS

v.

Algerius MARTIN *et al.*

A town clerk's copy of the record of a lien claim had this certificate: "A true copy from records of the town of Eden, vol. 5, p. 272, Book of Mortgages, etc., April 12, 1887. Attest: S. N. Rich, Town Clerk of Eden." Held, sufficient evidence of the recording of the lien claim in compliance with the statutory provision that it should be

recorded by the town clerk in a book kept for that purpose.

(Hancock—Decided June 29, 1887.)

ON exceptions by Catherine Hinch, the owner of the building upon which a lien was claimed by the plaintiff, to enforce which this suit was brought. *Exceptions overruled.*

The exceptions were to the ruling of the presiding justice that the following certificate was sufficient evidence of a compliance with Rev. Stat. chap. 91, § 82:

Bar Harbor, Me. July 16, 1886.

I, George P. Billings, of Eden, in the county of Hancock and State of Maine, certify on oath that the following is a true statement of the amount due me, with all just credits given, for labor done by contract with Algerius Martin of Sullivan, in said county, upon a dwelling-house, the owner of which to me is unknown, situated on Eden Street in the village of Bar Harbor, in said Eden, between the house owned or occupied by James Hinch and the house of Prof. George Harris, upon a lot of land bounded and described as follows: Bounded on the north by land owned or occupied by James Hinch, on the west by land of James Eddy, on the south by land of Prof. George Harris, and on the east by said Eden Street, to wit:

For labor, 115½ days from the 16th day of November, 1885, to and including the 17th day of June, 1886, at \$2.00 per day.....\$231.50
Less cash paid me by Algerius Martin... 127.80

\$103.70

for which I claim a lien on said building and land.

George P. Billings.

State of Maine, } ss. July 16, 1886.
Hancock, }
Subscribed and sworn to by the said George P. Billings, before me, William P. Foster,
Justice of the Peace. [L. s.]

Filed July 17, 1886. A true copy received and recorded July 17, 1886, at 5½ o'clock, P.M.
Attest: S. N. Rich,
Town Clerk of Eden.

A true copy from records of the town of Eden, vol. 5, p. 272, Book of Mortgages, etc., April 12, 1887.

Attest: S. N. Rich,
Town Clerk of Eden.

Messrs. Deasy & Higgins, for defendant:
A lien should be recorded in a book kept for that purpose.

Rev. Stat. chap. 91, § 82.

Everything necessary to the validity of a lien must be shown.

Statement that a claim recorded in a book of mortgages, etc., without showing that it was also a book kept for recording liens, is fatal.

Falkner v. Colshear, 39 Ind. 201; *Phillips*, Mech. L. § 868.

Mr. W. P. Foster, for plaintiff:

Certified copy of record of lien claim is admissible to prove when recorded.

Ricker v. Joy, 72 Me. 106.

Even if the clerk made mistake in recording, that is not fatal. An instrument in law a defeasance was recorded, not in the mortgage

book, but in the agreement book. Held, properly recorded.

Paige v. Wheeler, 92 Pa. 282. See *Simpson v. Exchange & Deposit Bank*, 9 Lea (Tenn.), 718, where trust deed was recorded by mistake in book of chattel mortgages.

Mortgagee, having done all the statute requires of him, cannot be prejudiced by failure of officer to do his duty.

People v. Bristol, 35 Mich. 28. See also *Phillips*, Mech. L. §§ 297, 336; 58 Ind. 385; 48 Ark. 144; 3 La. Ann. 348; 18 Barb. 193; 58 N. H. 428.

The statute, while requiring that the statement of a lien claim shall be recorded by the town clerk "in a book kept for that purpose," does not require that it be recorded in a book kept only for that purpose.

Per Curiam:

The evidence offered to prove the recording of the lien claim of the plaintiff in the town records of Eden was competent for the purpose and rightly admitted, and is sufficient to prove compliance with the statute in such cases.

Exceptions overruled.

Warren STRATTON

v.

John SHOENBAR and St. John Hotel.

A laborer, with his own hand, wrote a bill for his own labor on a building, and made oath to it, and filed it with the town clerk for the purpose of securing his lien claim. Held, that thus writing his own name at the top of the bill was not a sufficient compliance with a statute which required that the statement of his claim should be subscribed by the lien claimant, as well as sworn to, before it is filed for record.

(Hancock—Decided June 29, 1887.)

ON exceptions by the plaintiff. *Overruled.*

An action to enforce a laborer's lien on St. John Hotel, in Sullivan.

The court states the material facts.

Mr. B. T. Soule, for plaintiff.

Messrs. Wiswell & King, for defendant.

Per Curiam:

This was an action to enforce an alleged lien for labor furnished by the plaintiff upon the St. John Hotel, in Sullivan, without any contract with, though by the consent of, the owner. Within the thirty days after the labor was so furnished, the plaintiff made, in his own handwriting, the following bill:

Sullivan, Aug. 12, 1884.

The St. John Hotel, John Shoenbar, Proprietor,
To Warren Stratton, Dr.

From June to date.

To 35½ days' painting at \$2.50.....\$88.12

" 2 books G. leaf..... 1.00

" Colors..... .50

\$89.62

This bill he made oath to, and filed in the town clerk's office in Sullivan within said thirty days.

It was contended by the plaintiff that the name "Warren Stratton" in the above bill, being in his handwriting, was subscribing the statement as required by Rev. Stat. chap. 91, § 32. We think not. The statute intends the statement to be attested or certified by the lien claimant, and to that end requires him to "subscribe" it.

There must be a writing of his signature for the purpose of attesting the correctness of the statement.

That evidently was not done in this case.

Exceptions overruled.

Luther E. WYMAN

Marcus WENTWORTH.

The provisions of **Rev. Stat. chap. 38, § 61,*** do not apply to a contract between other parties, that one shall pay to the other the **charge** by the owner for the **service of a stallion** as a part of the consideration in the sale of the mare.

(Waldo—Decided June 29, 1887.)

ON exceptions by the defendant. *Overruled.*

This was an appeal from the decision of a trial justice in an action to recover the sum of \$15, which sum the plaintiff had agreed to pay the owner of a stallion for service, after the mare foaled, and the plaintiff sold the mare while with foal to the defendant, who agreed, as a part of the consideration of sale, to pay the charge for the use of the stallion when due.

The defendant denied the agreement, and contended that no action could be maintained upon it if it had been made, because the stallion had not been registered as required by Rev. Stat. chap. 38, § 61. The exceptions were to the ruling of the presiding justice that that statute did not apply to this case.

Mr. J. H. Montgomery, for defendant.

Mr. George E. Johnson, for plaintiff:

This stallion was not advertised, either "by written or printed notices," and the statute was intended to, and does, apply only to such owner or keeper as advertises his stallion.

Rev. Stat. chap. 7, § 16, defining the duties of registers of deeds, says: "Registers shall receive all copies of seizures on executions; * * * also certificates of advertised stallions," etc., showing that the Legislature intended the statute to apply only to advertised stallions.

*§ 61. *The owner or keeper of any stallion for breeding purposes, before advertising, by written or printed notices, the services thereof, shall file a certificate with the register of deeds in the county where said stallion is owned or kept, stating the name, color, age, and size of the same, together with the pedigree of said stallion as fully as attainable, and the name of the person by whom he was bred. Whoever neglects to make and file such certificate shall recover no compensation for said services, and if he knowingly and willfully makes and files a false certificate of the statements aforesaid, he forfeits \$100, to be recovered by complaint, indictment, or action of debt for the county where the offense is committed."

"The owner or keeper" must, before advertising, file such certificate; and if he advertises without filing the certificate, he can recover no pay for such services.

But this is not an action to recover pay for the services of the stallion, but to recover the price agreed upon for the mare sold.

The contract of purchase was legitimate, and the defendant promised to pay the \$15 as a part of the purchase money, and that is what he is asked to do now.

Per Curiam:

The provisions contained in Rev. Stat. chap. 38, § 61, which provides that the owner of a stallion shall have no right of recovery for the services of the animal unless the owner makes the record required in the county registry, does not apply to a contract between other parties that the one shall pay to the other for such services as a part of the consideration in the sale of a horse.

Exceptions overruled.

STATE of Maine

v.

Alanson M. PHILLIPS.

After an assessor has been elected by the board of aldermen, the board cannot, at an adjourned session, held the next day, reconsider the election of such assessor and elect another person to that office.

(Hancock—Decided June 29, 1887.)

ON exceptions by defendant. *Overruled.*

Information of the attorney-general in the nature of *quo warranto*.

The facts are stated by the court.

Mr. John B. Redman, for defendant.

Messrs. Wiswell & King, for the State.

Per Curiam:

At a meeting of the aldermen of the city of Ellsworth, held on the 15th day of March, 1887, for the purpose of electing city officers, a ballot was taken for second assessor of taxes, and Albert G. Blaisdell was declared elected. The meeting was then adjourned to the next day, when it was voted, on motion therefor, to reconsider the said election, and on a ballot afterwards taken the respondent was declared elected.

The vote to reconsider the election of Blaisdell was without legal authority, and the election of the respondent was void, there being no vacancy.

Exceptions overruled. Judgment of ouster affirmed.

Henrietta NASH

v.

George A. SOMES.

When the evidence does not so strongly preponderate against the verdict as to bring the case within the well-established rule by which the court is con-

trolled, a new trial will not be granted on the ground that the verdict was against the evidence, though the court might have found the other way upon the same evidence.

(Hancock—Decided June 20, 1887.)

ON motion by defendant to set aside the verdict and for new trial. *Overruled.*

Real action to recover a lot of land known as the Lake Morris lot, situated on the eastern side of Somes's Sound in Mount Desert. The verdict was for the plaintiff.

Messrs. Wiswell & King, for defendant.
Mr. George P. Dutton, for plaintiff.

Per Curiam:

While this court, if acting upon the evidence reported, to render a decision upon its weight, might find against the plaintiff, still we cannot say that it preponderates so strongly against the plaintiff as to bring the case within the well-established rule by which the court is controlled on motion for a new trial on the ground that the verdict is against the evidence.

Motion overruled.

Inhabitants of ORNEVILLE

v.

Caleb O. PALMER.

An action can not be maintained to recover a tax assessed by a board of three assessors, two of whom took the oath of office before the moderator of the town meeting at which they were elected.

(Piscataquis—Decided June 20, 1887.)

ON report. *Plaintiffs nonsuit.*

The opinion states the case.

Mr. George W. Howe, for plaintiffs:

Where forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally.

Cressey v. Parks, 76 Me. 534.

An acting collector has authority to demand and discharge a tax under the Act of 1874.

Oldtown v. Blake, 74 Me. 280.

The oath taken by the assessors was sufficient, and in conformity with the provisions of Rev. Stat. chap. 1, § 6.

Greene v. Lunt, 58 Me. 532.

It makes no difference whether the lands of nonresidents, proprietors in their said town, were improved or unimproved.

Oldtown v. Blake, 74 Me. 280.

In the assessment no survey is named, but in said town there are no other lots of like number as those in the writ and assessment, hence the survey named in the writ might be stricken therefrom without destroying the plaintiffs' right of action, and treated as surplusage.

1 Greenl. Ev. § 51.

It is sufficient if they so describe them in their assessment that they can be identified with reasonable certainty.

French v. Patterson, 61 Me. 209.

The collector is the proper person to make

demand of the taxpayer in suit for taxes under Rev. Stat. chap. 6, § 175.

York v. Goodwin, 67 Me. 260.

In *Littlefield v. Brooks*, 50 Me. 476, it was remarked by Appleton, Ch. J.: "By these provisions it is unmistakably apparent that it was the legislative intention that every male inhabitant of this State, and that all property within the same, with certain exceptions not affecting this case, should be taxed. No person is to be exempt. No one should be. No property is exempt. None should be. The payment of taxes is the price paid for the protection which government gives to person and to property. The State affords security to all persons. It protects all property. The burden of maintaining government should be coextensive with the benefits conferred." We think the above quotation applies with equal force to the case at bar.

Mr. C. A. Everett, for defendant.

Haakell, J., delivered the opinion of the court:

Debt to recover tax.

It is settled law in this State that assessors must qualify by taking the oath of office in the manner prescribed by statute before they can assess a legal tax. Rev. Stat. chap. 8, § 24; *Dresden v. Goud*, 75 Me. 298.

The statute provides that assessors may be sworn "by the town or parish clerk, or by any person authorized by law." Rev. Stat. chap. 8, § 24. Two of the assessors attempted to qualify by taking the oath of office before the moderator, who was not authorized by law to administer oaths in such cases, and therefore these assessors were not legally qualified to perform the duties of office, and could not assess a legal tax.

Plaintiffs nonsuit.

Peters, Ch. J., Walton, Danforth, Libbey, and Emery, JJ., concurred.

Sarah A. ROWELL

v.

Nymphas BODFISH.

A deed of "one undivided half part" of certain premises "upon which any valuable mineral substances may be discovered or found, which the said grantee may deem proper to open and improve on said one undivided half of said land," is rather, in effect, an agreement for one half the minerals, with the right to operate, than a conveyance of an absolute fee in one half the premises.

(Somerset—Decided June 20, 1887.)

ON exceptions by the defendant. *Overruled.*

Writ of entry. Plea, general issue, with brief statement, disclaiming all except one undivided half of the demanded premises, both of which were filed within the first two days of the return term of the writ.

The defendant's title, if any, depended entirely upon the construction of a deed to him,

from the plaintiff, dated September 15, 1877, duly acknowledged and recorded.

The descriptive portion of the deed is as follows:

"A certain piece or parcel of land situate in said Harmony, and being one undivided even half part of all the land comprising the homestead farm now occupied and owned by me, the aforesaid Sarah A. Rowell, on which, upon which any valuable mineral substances may be discovered or found, which the said grantee may deem proper to open and improve on said one undivided half of said land."

The presiding judge ruled that the deed conveyed only an undivided half of so much of the farm referred to as had valuable mineral substances upon it; and there being no evidence that any portion of the farm had such substances upon it, apparently nothing passed by the deed, and instructed the jury to return a verdict for the plaintiff for the whole of the demanded premises; and such a verdict was returned. To that ruling the defendant excepted.

Messrs. Hudson & Everett, for defendant.

Mr. D. D. Stewart, for plaintiff.

Per Curiam:

Viewing the language of the deed in the light which is shed upon the whole of it, and giving effect to all its parts, rather than to any particular portion or phrase, it is evident that the intent of the grantor was not to convey a fee to one-half part of the farm. It was rather in effect an agreement for one half the minerals, with the right to operate, than a conveyance of an absolute fee in one half the farm.

At most, it could not be construed as conveying any more than one undivided half of the land "upon which any valuable mineral substances may be discovered or found, which the said grantee may deem proper to open and improve."

The ruling of the court was therefore correct, and the entry must be—

Exceptions overruled.

Inhabitants of BURNHAM

v.

Inhabitants of CORINTH.

1. By the statute of Maine no derivative settlement is acquired or changed by a marriage which was procured by one of the municipal officers of the town in which the wife had her settlement.
2. The children of such parents have the settlement they would have had if no marriage had taken place.
3. The statute is applicable, though not enacted until after the marriage and the birth of the children.

(Waldo—Decided June 29, 1887.)

ON exceptions by the defendants. *Overruled.* This was an action of assumpsit to recover for pauper supplies furnished to two minor children of Charles E. Emery and his wife, Jennie Emery.

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It was admitted at the trial that the settlement of Charles E. Emery at the time of his marriage to Jennie, August 19, 1879, was in the town of Burnham, and that the settlement of his wife at the time of their marriage was in the town of Corinth. It was shown at the trial that the children were both born prior to the year 1883. There was evidence tending to show that the marriage was procured by one of the municipal officers of the town of Corinth. Thereupon the presiding judge instructed the jury as follows:

"But the statute goes further, and says: 'and no derivative settlement is acquired or changed by a marriage so procured, but the children of such marriage and their descendants have the settlement which they would have had if no such marriage had taken place.'

"Now I instruct you here that this statute is applicable to this case if the facts are sufficient to bring it within its provisions, although the statute was not passed until after this marriage; and although the statute was not passed until after the birth of these children, still it is applicable the same as if it had been passed prior to both the marriage and the birth of the children."

Messrs. Davis & Bailey, for defendants.

Mr. William H. Fogler, for plaintiffs:

The plaintiffs claim that the marriage was procured to change the settlement of the woman by the agency or collusion of the town officers of Corinth, and that by virtue of the provisions of Rev. Stat. § 1, as amended by Pub. Laws 1883, chap. 103, the children of such marriage have the settlement of their mother, as though no such marriage had taken place.

The defendants contend that said section as amended does not apply to this case, for the reason that the marriage of Emery to Jennie Allen took place, and both children were born, before the passage of the Act of 1883.

"The Legislature has no power to disturb vested rights; but rules for the settlement of paupers have always been regarded by courts as matters of mere positive or arbitrary regulation, in establishing which the Legislature is limited in its power only by its own perception of what is proper and expedient."

Lewiston v. North Yarmouth, 5 Me. 66; *Goshen v. Richmond*, 4 Allen, 458.

"The Legislature has the right to prescribe what may constitute a settlement, or, within reasonable limits, what shall be evidence of a settlement, and may alter the law upon the subject from time to time."

Appleton v. Belfast, 67 Me. 579; *Belmont v. Morrill*, 69 Me. 814; *Bridgewater v. Plymouth*, 97 Mass. 882; *Dedham v. Milton*, 136 Mass. 424.

Per Curiam:

The ruling of the presiding justice is precisely in accord with the decision of this court in *Appleton v. Belfast*, 67 Me. 579, and is correct.

Exceptions overruled.

J. Edwin EATON,

v.

Humphrey N. LANCASTER *et al.*

1. The keeper of a livery and boarding stable is liable for damage to a horse

boarding therein, caused by the **negligence and carelessness of an employee** in the performance of his duties.

2. **Whether a night watchman in a livery and boarding stable is guilty of negligence** within the scope of his employment by **permitting three partially intoxicated men, whom he knew to be smokers, and supplied with pipes and matches, to go into the hayloft after midnight to pass the remainder of the night, is a question of fact for the jury.**
3. **Facts stated which would authorize a jury to find negligence.**

(Waldo—Decided July 19, 1887.)

ON exceptions by the plaintiff. *Sustained.*

The facts are stated in the opinion.

Mr. J. E. Hanley, for plaintiff:

"Negligence," in correct legal phraseology is more nearly synonymous with "carelessness" than any other word. It signifies primarily the want of care, caution, attention, diligence, skill, or discretion in the performance of an act by one having no positive intention to injure the person complaining thereof. The secondary meaning of "negligence" includes every omission to perform a duty imposed by law for the avoidance of injury to persons or property.

Shearm. & Redf. Neg. § 2.

Ordinary care is such as is usually exercised under like circumstances by men of average prudence.

Id. §§ 20, 21.

All persons to whom goods and chattels are delivered to be kept for hire and reward, and who are paid expressly and specifically for the exercise of their labor and care in keeping them, and not merely for the finding of a place of deposit, are bound to exercise that amount of care and vigilance for their preservation which the most prudent and careful of men exercise for the protection of their own property.

1 Add. Torts, § 600.

A master is responsible to third persons for the negligence of his servants in the course of their employment as such, to the same extent as if the act were his own; and is responsible even for their willful acts, though unauthorized or forbidden by him.

Shearm. & Redf. § 59.

There is no such rule as that the master is not liable for the willful and wrongful acts of his servants, though such a doctrine has often been propounded in judicial opinions.

Id. § 65.

The party employing has the selection of the agent employed; and it is reasonable that he who has made choice of an unskillful or careless person to execute his orders should be responsible for any injury resulting from his want of skill or want of care.

Id. § 79.

One who retains a servant, with knowledge of his negligent habits, very clearly assumes all the risks of such habits.

Id. § 601.

The plea of not guilty in actions for injuries caused by the negligence of the defendant, operates as a denial only of the wrongful act alleged to have been committed by the defend-

ant, and no defense other than such denial is admissible under that plea.

1 Add. Torts, § 585.

The bailee or general owner may recover.

Little v. Fossett, 84 Me. 545, and cases there cited; *Healey v. Gray*, 68 Me. 489; 1 Add. Torts, §§ 577, 692; Shearm. & Redf. Neg. § 14; *Mason v. Thompson*, 20 Am. Dec. 471.

The liability of a defendant for tortious negligence is broader than an action on contract. Shearm. & Redf. Neg. § 594.

Proof of delivery of property for the performance of service thereon, and its subsequent loss, is *prima facie* evidence of negligence.

Beardslee v. Richardson, 25 Am. Dec. 596; *Markatt v. Levee Steam C. P. Co.* 29 Am. Dec. 468; *Hill v. Owen*, 35 Am. Dec. 124; *Shaw v. Berry*, 81 Me. 478, 481; 1 Add. Torts, §§ 586-600.

The questions of negligence and the degree of care are for the jury.

Newson v. Axon, 10 Am. Dec. 685; Shearm. & Redf. § 11, notes 1, 2, p. 13; *Noyes v. Shepherd*, 80 Me. 179.

Imminent danger expected from fire or flood cannot excuse or exempt one from the use of ordinary care to prevent unnecessary injury to the property of others. What would be ordinary care must be determined by the jury.

Noyes v. Shepherd, *supra*.

Innkeeper is liable for horses of guests injured or killed by negligence in securing them, or by imperfect or badly-constructed stable.

Swann v. Brown, 72 Am. Dec. 568; *Dickerson v. Rogers*, 40 Am. Dec. 642.

When it be doubtful whether ordinary care has been used or not, the presumption is against the bailee.

Newson v. Axon, 10 Am. Dec. 685.

Where evidence has been introduced tending to prove all points required by law to be proved to maintain the action, although circumstantial in its character, and to be inferred from the facts proved, a nonsuit ought not to be ordered, but the case should be submitted to the jury.

Savage Mfg. Co. v. Armstrong, 17 Me. 84; *Foster v. Dixfield*, 18 Me. 380; *Lake v. Milliken*, 62 Me. 240.

In *Ricker v. Freeman*, 50 N. H. 420, Foster, J., says: "We think the principle is clearly established that negligence may be regarded as the proximate cause of an injury of which it may not be the sole and immediate cause. If defendant's negligent, inconsiderate, and wanton, though not malicious, act concurred with any other thing, person, or event, other than the plaintiff's own fault, to produce the injury, so that it clearly appears that, but for such negligent, wrongful act, the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent, wrongful act may not have been the nearest cause in the chain of events or order of time."

Mr. W. H. Fogler, for defendants:

The defendants were bailees for plaintiff, and as such were bound to ordinary diligence and responsible for ordinary negligence. They were bound to take only common and reasonable care of the plaintiff's team.

Story, Bailm. § 442 *et seq.*; *Healey v. Gray*, 68 Me. 489; *Burnham v. Young*, 72 Me. 278;

Foster v. Essex Bank, 17 Mass. 501; *Maynard v. Buck*, 100 Mass. 47.

"Ordinary care" means such care as men of ordinary sense, prudence, and capacity would take, under like circumstances, in the conduct and the management of their own affairs.

Shrewsbury v. Smith, 12 Cush. 177; *Shaw v. Boston & W. R. R. Corp.* 8 Gray, 45.

"Ordinary care" has relation to the situation of the parties and the business in which they are engaged.

Fletcher v. Boston & M. R. R. 1 Allen, 9; *Cunningham v. Hall*, 4 Allen, 268.

In the case at bar it cannot be contended that there was any want of ordinary care on the part of the defendants personally, for neither of them did any act in connection with the plaintiff's team.

The master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders, or doing his work.

Shearn. & Redf. Neg. §§ 62, 68; *McManus v. Crickett*, 1 East, 106; *Lynch v. Nurdin*, 1 Ad. & El. N. S. 29; *Wilson v. Peverly*, 2 N. H. 548; *Hovee v. Neumarch*, 12 Allen, 57.

The act was not only not authorized by the defendants, nor in performing any duties in the defendants' business, but was done against the reasonable rules of the defendants and in defiance of the protest of their authorized employee.

Johnson v. Barker (Ill.), 50 Am. Dec. 416.

Negligence is not actionable unless it is the proximate cause of the injury complained of. *Shearn. & Redf. Neg.* § 9.

The true inquiry is whether the injury sustained was such as, according to common experience, and the usual course of events, might reasonably be anticipated.

Derry v. Flintner, 118 Mass. 181.

Libbey, J., delivered the opinion of the court:

After the plaintiff's evidence was all out, the presiding justice ordered a nonsuit, to which the plaintiff excepted. If there was any evidence which, if believed by the jury, would authorize a verdict for the plaintiff, a nonsuit should not have been ordered. The following facts are not controverted. On the 11th day of July, 1885, the defendants were livery-stable keepers in Belfast, and on that day the plaintiff's horse and harness were delivered to them at their stable to be kept for hire for an indefinite time. In the night of that day the stable took fire from some cause, and with the plaintiff's horse, and all the horses in it but one, were burned. About one o'clock in the night three men, McCabe, Twombly, and Casey, drove into the stable a team belonging to the defendants, which they had been using. They were to some extent intoxicated. After the team was put up they went into the loft of the stable, which was full of dry hay, to stay during the night. About half an hour after, the stable was on fire in the loft, and Twombly and Casey were burnt in it, McCabe escaping slightly burned. McCabe and Twombly were servants of the defendants, employed in their stable during the day, but were not on duty that night, and were not doing any act for the defendants. One McIntosh was a servant of the defendants, and that

night was charged with the duties of night watch and the general care of the stable. One of the regulations of the defendants for the care and management of the stable was that no one should be permitted to sleep in the loft during the night. McIntosh knew that the three men were smokers, smoking pipes, and were in the habit of carrying their pipes and matches with them.

The plaintiff claims that he made out his right to recover on two grounds: (1) that the fire was set to the stable carelessly by the three intoxicated men, two of whom were then in the employ of the defendants; (2) that the three intoxicated men were permitted by McIntosh, the night watch, to go into the loft to sleep, and that that act was not the exercise of due care over the plaintiff's property, and that by reason of that careless act the stable was burned and the plaintiff's horse and harness were destroyed.

By the contract of bailment the defendants were bound to exercise ordinary care over the plaintiff's property,—that degree of care which prudent and careful men would exercise over their own property under the circumstances. They were liable for the negligence of their servants in the performance of any duty in regard to the care and custody of the plaintiff's property within the general scope of their own employment.

As to the first ground of the plaintiff's claim, we think it entirely fails, as neither of the three men were in the performance of any act for the defendants' during that night, but were acting as they pleased for their own pleasure.

Upon the second ground of the plaintiff's claim, there is more doubt. The plaintiff's claim is that McIntosh permitted the intoxicated men to go into the loft for the night; that this was within the scope of his general employment and in the performance of his duty as night watch; that it was a careless, negligent act on his part, for which the defendants are responsible, and was the proximate cause of the loss of plaintiff's property. These propositions are all controverted.

The first fact embraced in this ground of claim is that McIntosh permitted the three intoxicated men to go into the loft to sleep for the night. The burden is on the plaintiff to prove it. The only direct evidence in regard to it comes from McIntosh. He says the men went up in his presence. "They came into the office where I was going up to lie down up stairs; they then stepped out of the office and went across the barn floor to go up into the loft, and did go up into the loft,—a hayloft,—loose hay in it; should say the loft was 60 to 75 feet long and perhaps 35 wide. It was full of dry hay."

Q. Did you make any objections to their going up in the loft?

A. I did. I told them I should not go up there. Says I, "Boys, you better go up and lie down with me; there is plenty of room up stairs."

He further said he never knew them to go up there and lie down before; he knew it was against the rules.

McCabe, one of the three men who went up, was a witness; but did not testify upon this point. This was all of the evidence as to what McIntosh did to prevent their going. Might

the jury infer his consent from his testimony and the surrounding circumstances? We think they might. True, he says he objected; but when he states what he said to them it appears more like advice feebly expressed. He does not state their answer. He did not tell them they must not go,—it was against the rules; nor did he interpose, or attempt to interpose, any force to stop them. They appear to have been friendly to him, two of them fellow-servants, working with him by day, and it is fair to presume that they would not have needed any vigorous objections on his part; but as soon as they went into the loft he went to his sleeping place and went to sleep. He was not a willing witness against the defendants,—was still in their employ and testifying to sustain his own conduct. The jury might well infer that, if he objected at all, his objection was of the character which is equivalent to consent.

Was permitting them to go into the hayloft in their then condition, knowing that they were smokers and carried their pipes and matches with them, to stay during the night, a want of due care? This was a question of fact for the jury, and we think that they might properly so find. It may be assumed that the defendants thought so, as, by one of their rules, they had forbidden it.

Are the defendants responsible for this negligent act of their servant McIntosh? We think so. It was an act directly in the line of his duty as a night watch, in charge of the stable. The fact that his negligence was in violation of the defendants' orders, if it was within the general scope of his duties, does not relieve the defendants from responsibility. The case is not like *Williams v. Jones*, 3 H. & C. 256, 602, L. J. Exch. 297, to which our attention is called, where a carpenter was employed by A with B's permission to work for him in a shed belonging to B, and the carpenter set fire to the shed in lighting his pipe with a shaving. His act, though negligent, had nothing to do with his employment as A's servant, and was not within the general scope of his duties. Here the negligent act is directly within the line and purpose of McIntosh's employment. It is more like *Whatman v. Pearson*, L. R. 3 C. P. 422, where a cartman having an allowance of an hour's time for his dinner in his day's work, but also having orders not to leave his horse and cart or place where he was employed, happened to live hard by, and, contrary to his instructions, he went home to dinner and left his horse and cart unattended at his door. The horse ran away and did damage to the plaintiff's railings, and the master was held liable.

The remaining inquiry is, Was the negligence of McIntosh the proximate cause of the loss? The rule as claimed by the counsel for the defendants is that the injury must be such as according to common experience and the ordinary course of events might reasonably be anticipated. Admitted; and then it is a question for the jury. We think the jury would have been authorized to so find. To what extent the men were intoxicated was a fact for the jury. If to the extent to deprive them substantially of the use of their mental and physical powers, and they were in the habit of smoking, carrying matches for a light, might not in fact what occurred have been "reasonably an-

anticipated?" If it was negligent to let them go into the loft to stay under the circumstances, it must have been on account of danger from fire. There appears to have been no other danger to be apprehended. The negligence involved was permitting them to go into the loft to sleep. If, in their condition, they were a dangerous element there, the defendants must be held responsible for their acts. The case is the same in principle as where a railroad company, through its agents or servants, knowingly or negligently permits an intoxicated man to enter its cars among the general passengers, and from intoxication he commits an assault upon a peaceable passenger; in such case the company is liable. True, the degree of care required in the two cases is different, but as far as the test of proximate cause is involved the principle is the same.

Exceptions sustained.

Walton, Virgin, Foster, and Haskell, JJ., concurred.

Amos HOBBS *et al.*

v.

Joseph GOULD.

1. The **rights** of the parties to draw and use the **water** of a stream or pond can **not** be **determined** in a **real action**, though the parties desire it.
2. The **appropriate remedy** for the wrongful diversion of water is an **action on the case** for damages.

(Franklin—Decided July 29, 1887.)

ON report. *Plaintiffs nonsuit.*

The case is stated by the court.

Mr. S. Clifford Belcher, for plaintiffs.

Mr. H. L. Whitcomb, for defendant:

The statute in force when this suit was commenced conferred equity jurisdiction on this court "in cases of partnership, and between part owners of vessels and other real and personal property, for adjustment of their interests in the property and accounts respecting it.

Mustard v. Robinson, 52 Me. 54.

The court, in *Marco v. Low*, 55 Me. 549, went so far as to grant an injunction (which was made perpetual) restraining the respondent from prosecuting a writ of entry.

Judge Barrows says, in a case precisely like this: "The appropriate remedy for such an injury as the plaintiff here alleges, is an action of trespass on the case."

Hines v. Robinson, 57 Me. 324.

I have examined the authorities carefully, and have been unable to find where an action of this nature has ever been brought by one tenant in common against his cotenant, for using more than his share of the water taken from the reservoir in which each has an interest.

The following cases are of this very nature, but are actions on the case:

Blake v. Madigan, 65 Me. 522; *Hines v. Robinson*, 57 Me. 324; *Deahon v. Porter*, 38 Me. 289; *Ashley v. Pease*, 18 Pick. 268.

Davis v. Muncey, 38 Me. 90, was an action of trespass, but no question was raised as to the form of action.

The reservation of the water for a starch factory amounts to nothing. For the reservation is of water for the starch factory, etc., and is not of a quantity sufficient for a starch factory.

Ashley v. Pease, supra; Hines v. Robinson, 57 Me. 324; Deshon v. Porter, supra; Garland v. Hodsdon, 46 Me. 511.

Where grants are left doubtful as to the intention of the parties, courts will construe such grants most favorably to the grantee.

Garlund v. Hodsdon, supra.

Per Curiam:

This is a real action, and it comes before the court on report, accompanied by an agreement of counsel that the court shall have "power to draw such conclusions and render such decisions or verdict as a jury might render." Furthermore, the court is therein asked to "settle and determine the respective rights of the parties to draw and use water, and other matters raised by the writ and pleadings."

No pleadings have been filed.

The gravamen of the plaintiffs' complaint, judging from the writ, agreement, and the evidence before us, is based upon an unlawful diversion of water.

Although the principal question which the parties seem desirous of settling is their respective rights in the use of the water at their mills, we do not think it can properly be done under this form of action.

The title to real estate is in issue in an action of this kind; but a judgment in this suit would not properly settle the rights of the parties.

The appropriate remedy for a wrongful diversion of water is an action on the case. *Hines v. Robinson, 57 Me. 329. See also Deshon v. Porter, 38 Me. 289; Correl v. Hart, 56 Me. 518; Blake v. Madigan, 65 Me. 522; Hurd v. Curtis, 7 Met. 94; Biglow v. Battle, 15 Mass. 818.*

The boundaries of the plaintiffs' and defendant's premises are not in dispute. The controversy arises in relation to the construction to be given to certain deeds, wherein are set forth the rights of using water, and in relation to the use of water as claimed under those deeds. In an action on the case the rights of the parties can properly be determined. They cannot in the present form of action. The court will not take jurisdiction in settling important rights, even by agreement of parties, unless it be upon proper process. The allegations and proof should correspond.

Plaintiffs nonsuit.

Dennis A. MEAHER *et al.*

v.

Henry M. HOWES *et al.*

When a mortgagor demands of the mortgagee a true account of the amount due upon the mortgage and receives a false account, containing items to a large amount which were not due upon the mortgage, it will justify the mortgagor in commencing a suit in equity to redeem, without first making a tender of the amount due upon the mortgage.

(Cumberland—Decided August 2, 1887.)

ON exceptions by defendants. *Overruled.*

Messrs. Holmes & Payson, for defendants:

No intelligent conclusion as to what is necessary for an account, or what is a condition precedent for bringing a suit, can be found from the authorities without an examination of the history of the statutes of Maine and Massachusetts upon this subject.

1. The first enactment in this State seems to have been taken from Mass. Laws 1798, chap. 77, vol. 2, p. 853, approved March 1, 1799, under which there seems to have been no opportunity for a demand and account; but the mortgagor must make his tender at his own risk of tendering too much or too little, and had three years after possession in which to redeem.

Maine Laws 1821, chap. 39; 1 Smith, Laws 144, chap. 89, approved February 5, 1821; *Tirrell v. Merrill, 17 Mass. 117-121.*

2. The next two enactments in Massachusetts introduced the element of a demand and notice as affecting the costs, allowing the suit to be maintained without any tender or payment, exempting the defendant from costs unless there had been payment, tender, or demand for an account, and refusal, and charging him with them if such payment, tender, or demand and refusal appeared to have been made.

Mass. Laws 1821, chap. 85; *Id.* 1833, chap. 201.

This was followed in Maine by a provision which assimilated our statutes to those of Massachusetts.

Mass. Laws 1837, chap. 286.

3. Under Mass. Stat. 1821, and before that of 1833, a previous tender or demand and refusal was necessary in order to maintain a suit.

Willard v. Fiske, 2 Pick. 540-545; Putnam v. Putnam, 13 Pick. 129.

So where defendant said he had no account but one made two years before, and that proved not to have allowed payments made on the debt by other parties, the suit was maintained.

Battle v. Griffin, 4 Pick. 6-15.

"Without doubt it was the intention of the Legislature by Stat. 1798, chap. 77, to give the court general equity jurisdiction in cases of mortgages." Here a tender was made; but, both parties being in fault, no costs were allowed to either.

Saunders v. Frost, 5 Pick. 259.

In one case under this statute an error of \$5 in defendant's account was held not material, the court saying: "It was not the intention that any little errors in the account rendered should subject the defendant to costs."

This case does not show whether any tender was made.

Whitwood v. Kellogg, 6 Pick. 420.

Making and keeping at home an account pursuant to a demand made away from home was held sufficient. *Quere* if demand away from home was good. The bill was dismissed.

Fay v. Valentine, 2 Pick. 546.

So, stating a balance without items was held insufficient; but this is eminently inapplicable to this case, where all was offered, and complainant said he had all he desired.

Allen v. Clark, 17 Pick. 47.

4. These Massachusetts laws were subsequently revised and continued in language not

precisely similar, but the same in substance, in—

Rev. Stat. 1836, chap. 107, §§ 18, 19; Gen. Stat. 1860, chap. 140, §§ 14-21; Pub. Stat. 1882, chap. 181, §§ 27-29.

Now, under these statutes, it is plain that a mortgagor might bring his suit without a tender and without a demand, the only difference being as to the costs, which plaintiff is bound to pay unless mortgagee be in default. In other cases the court awards costs in its discretion.

Mass. Rev. Stat. chap. 107, § 19; *Miller v. Lincoln*, 6 Gray, 556; *Montague v. Phillips*, 16 Gray, 566.

Here the mortgagee claimed two notes, one of which he had paid off as a prior incumbrance, and the court found that by the agreement by which he bought the one, he was to pay off the outstanding incumbrance, and so was not entitled to receive it again.

Cushing v. Ayer, 25 Me. 888.

That this case was one of costs is apparent from its citation, at the close of *Parkhurst v. Cummings*, 56 Me. 155-160.

So, again, where the mortgagee showed amount of note and said there were no rents or profits, and no claims for repairs, etc., and on being asked to take the amount of the note in redemption, he said he would refer the question, the court said it was obscure, and the plaintiff was entitled to costs.

Pease v. Benson, 28 Me. 386-354.

In a later case, where all the facts were under Rev. Stat. 1841, *Cushing v. Ayer*, *supra*, and *Allen v. Clark*, 17 Pick. 47, were cited and approved.

Stone v. Locke, 46 Me. 445.

Another case under the same statute is *Stone v. Bartlett*, 46 Me. 438-448.

Again, the fact that it was costs that were affected by the demand and refusal of an account is illustrated by *Sprague v. Graham*, 38 Me. 328-331.

Now turn to our subsequent statutes, and it will be found that in 1857 a radical change was made in the statutes as to bills to redeem mortgages.

Rev. Stat. 1857, chap. 90, § 13 *et seq.*

In the first place, § 16, instead of opening with the right to bring suit, begins with the right to make a demand; and if the mortgagee "unreasonably neglects or refuses to render an account, or in any way by his default prevents the plaintiff from performing or tendering performance, he may bring his bill in equity and offer to pay the same or perform the conditions."

Such offer has, under the circumstances, the effect of tender.

The bill shall be sustained without tender; and, thereupon, he shall be entitled to his costs. *Ibid.*

Section 20 also provides that if one shall pay more than is due on the mortgage, he may recover it back in a suit at law.

Bragg v. Pierce, 58 Me. 65.

Nor can it be said that Rev. Stat. 1857, chap. 90, so far as relates to this subject, was intended to be merely a revision of the prior laws.

"As the law now stands, no suit can be made without a tender, unless the defendant is in default in preventing such a tender."

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Dinsmore v. Savage, 68 Me. 191.

The prayer of the bill is very loosely worded; but if complainant intends to ask that part of the security held by respondents shall be applied by them to any mortgage in order to relieve the property derived from Margaret by him, as he has heretofore twice attempted in her behalf, it cannot be done. He must first pay the debt before that can be accomplished (2 Jones, Mort. 1086; Sheldon, Subr. §§ 3, 5, 6, 45, 127, 128, 137; *Kinnear v. Lowell*, 34 Me. 299; *Norton v. Soule*, 2 Me. 341; *Cummings v. Little*, 45 Me. 183; *Lamson v. Drake*, 105 Mass. 564; *Lamb v. Montague*, 112 Mass. 352; *Hubbard v. Acutney Mill Dam Co.* 20 Vt. 402; *Field v. Hamilton*, 45 Vt. 35; *Swaine v. Perine*, 5 Johns. Ch. 482; and especially *Frye v. Barker*, 4 Pick. 382-384); and must pay in full the mortgages and other claims upon the property (*Wilcox v. Fairhaven Bank*, 7 Allen, 270-272; *Johnson v. Hoeford*, 8 West. Rep. 43; *Richardson v. Washington Bank*, 8 Met. 586-541).

Messrs. J. J. Perry and D. A. Meaher, for plaintiffs.

Per Curiam:

The ruling that the bill could be maintained without a tender was correct. It is true that to support a bill in equity to redeem real estate under mortgage, without first making a tender of the amount due upon the mortgage, the plaintiff must aver and prove that he has been prevented from making the tender by the default of the defendant. So held in *Dinsmore v. Savage*, 68 Me. 191. But in this case the plaintiff has averred and proved that he was so prevented. He demanded of the defendant a true account of the amount due upon the mortgage and received in reply a false account,—an account which contained items to a large amount which were not due upon the mortgage, and which the plaintiff was under no obligation to pay in order to redeem. Such an account is, in the opinion of the court, a false account, and will justify the commencement of a suit in equity to redeem without first making a tender of the amount due upon the mortgage.

Exceptions overruled.

William H. WORKS

v.

Andrew CROSWELL.

Where the defense to an action upon a promissory note is that the note was given in part payment for a horse, which the plaintiff warranted to be sound, and which proved not to be sound, it is error to instruct the jury that there is no evidence in the case which would authorize them to find that the plaintiff warranted the horse, when the defendant had testified that while trading for the horse the plaintiff said: "She is sound and all right."

(Franklin—Decided August 2, 1887.)

ON exceptions by the defendant. Sustained. This was an action of assumpsit, brought upon a due-bill or memorandum for the bal-

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ance due for a horse. One point of the defense was that the horse was warranted "sound and all right," and that in consequence of a breach of said warranty the horse was not worth near as much as it would have been had it been as warranted. The court instructed the jury, among other things, that there was no evidence in the case which would warrant them in finding that the plaintiff warranted the horse. To this instruction the defendant excepted.

At the trial the defendant testified that he examined the horse which he bought of the plaintiff, for which the note in suit was given, on two different occasions, the last time being at plaintiff's house, and the plaintiff took him home; and the defendant further testified as follows:

Q. What, if anything, did he say about the horse at his house?

A. Well, I asked him this question: says I, "Is she sound and all right?" and he says, "She is sound and all right." I says, "If she is not sound, I do not want her at any price; I want a horse that is sound and all right." As we came up a little rise after we crossed the brook that empties out of Crolie's pond into Sunday Brook. I says, "Mr. Works, I will make you an offer for that horse, and if it is not enough there will be no hardness about it. If she is sound and all right I will give you \$160—pay you \$50 down, and \$110 in ten days; but if she is not sound and all right, I do not want her;" and he says, "She is." We drove up to the store, and my son was standing there, and I says, "You get in and drive her, and see how you like her." He got in, and Mr. Works and my son drove up as far as the watering-trough,—scant half a mile,—and came back. As they came back I had occasion to go to the house and met them right opposite my gate. Mr. Works says, "Aren't you going to pay?" I had asked him before, and he said he asked \$175. When he got back to my gate, he says, "Aren't you going to put something on to that? Put \$10 on to it, or something." I says, "No, I am not going to give you another cent; if the mare is sound and all right, I will give you \$160." He and my son both were sitting in the wagon, and he says, "She is sound and all right."

Q. Who said so?

A. Mr. Works. "Well," says he, "the horse is yours."

Messrs. Joseph C. Holman and Arthur F. Belcher, for defendant:

The jury had the right to consider the meaning or sense in which any term was used by the parties as related to the soundness of the horse, and to adopt that sense for the purpose of determining what was warranted and wherein the warranty failed, if at all.

2 Allen, 348; *Id.* 486; 8 Gray, 432; 24 Me. 181.

Inferences from the testimony are for the jury.

39 Me. 448; 76 Mo. 132.

The purchaser of a cow said to the seller, after the sale, "You said the cow was all right." To which the seller replied, "Well, she is all right." Held, that this was competent evidence of a warranty at the time of sale. Whether a statement made by the seller that "she is all

right" is a warranty of her soundness, is a question for the jury.

4 Gray, 457.

The defendant did not trust to his own judgment, and if such is the case, the doctrine that a warranty does not include or cover patent defects which are plainly visible to a purchaser, has no application to a case like this.

10 Allen, 244; *Benj. Sales*, § 619.

No special form of words is necessary to create a warranty.

Benj. Sales, § 618; 40 Me. 9; 43 Me. 236.

Intention is a question of fact for the jury.

Benj. Sales, § 618, p. 707, and cases previously cited.

We claim the warranty was so expressed as to protect the buyer against the consequences growing out of a patent defect.

Benj. Sales, §§ 616, 618; 10 Allen, 242.

In *Benjamin on Sales*, § 620, I find: "But a horse may have a congenital defect, which in itself is unsoundness. In *Holliday v. Morpan*, 1 Ellis & E. 1, a horse sold with a warranty of soundness had an unusual convexity in the cornea of the eye, which caused short-sightedness and a habit of shying. The direction to the jury was that 'if they thought the habit of shying arose from defectiveness of vision, caused by natural malformation of the eye, this was unsoundness.' All the judges held this direction correct, and concurred in the doctrine of *Kiddell v. Burnard*, 9 Mees. & W. 668, that the true test of unsoundness is as expressed by Hill, J., whether the defect complained of renders the horse less than reasonably fit for present use."

Whether corns in a horse's foot constitute a breach of warranty of soundness is a question of fact for the jury.

58 N. H. 282.

Chitty on Contracts, page 654, says when a horse is warranted sound, any infirmity which renders it less fit for present use and convenience, is an unsoundness within the meaning of such warranty.

Mr. E. O. Greenleaf, for plaintiff:

The verdict cannot be set aside, for it is not manifestly against the evidence, and erroneous.

Farnum v. Virgin, 52 Me. 576; *Enfield v. Bussell*, 62 Me. 128; *Coffin v. Phenix Ins. Co. of Nantucket*, 15 Pick. 291.

It is clearly in the line of the evidence in the case. The verdict will not be set aside, as the evidence does not show that the jury acted under a mistake or were influenced by improper motives.

Williams v. Buker, 49 Me. 427; *Baker v. Briggs*, 8 Pick. 122, 126.

Again, the verdict will not be disturbed, as there is no pretense that the jury acted under passion, bias, or prejudice.

Folsom v. Skofield, 53 Me. 171; *Darby v. Hayford*, 56 Me. 246.

The damages were only the amount of due bill and interest, and were not excessive, and ought not be disturbed.

Kimball v. Bath, 38 Me. 219; *Butler v. Bangor*, 67 Me. 385.

Even a misdirection of the court, from which party complaining sustained no injury, is not ground for setting aside a verdict.

Mansfield v. Wheeler, 23 Wend. 79.

All the questions of fact were properly submitted to the jury, and I claim they came to the only proper conclusion; and if so, a new trial will not be granted.

Woodbeck v. Keller, 6 Cow. 118.

At most, the presiding justice only expressed his opinion in regard to the weight of evidence. This he had a right to do.

10 Pick. 252.

It would have been idle in this case to have gone through the ceremony of submitting the testimony of the defendant to the jury to find a warranty, when it was clear to a judicial mind that, had they found a warranty, the verdict could not have stood.

Pleasants v. Fant, 22 Wall. 116 (89 U. S. bk. 22, L. ed. 780).

The instruction of which the defendant complains wrought him no injury.

Per Curiam:

The exceptions must be sustained. It is the opinion of the court that upon the evidence it was a question for the jury to answer whether or not the plaintiff warranted the horse sold by him to the defendant. The judge took it from the jury, and ruled as matter of law "that there was no evidence in the case which would warrant them in finding that the plaintiff warranted the horse." This was erroneous. It is the opinion of the court that the defendant's testimony, if believed by the jury, would warrant them in finding such a warranty.

Exceptions sustained, and a new trial granted.

Robert G. WILEY

v.

Marshall W. DAVIS, Admr.

1. **At the trial, in a suit in equity to obtain title to real estate from an administrator of the person by whom, when alive, it is alleged that the estate was held in trust, the complainant cannot testify to the facts alleged when the administrator does not see fit to testify.**
2. **The heirs of the deceased should be joined as defendants in such a suit.**

(Oxford—Decided August 2, 1887.)

ON exceptions by the plaintiff. *Overruled.*

Bill in equity against the administrator of the estate of Abner Davis, late of Bethel, deceased, to recover an interest in certain real estate in Bethel, which it was alleged that the deceased held in trust for the complainant.

The exceptions were to the ruling of the court that the bill be dismissed.

Mr. S. F. Gibson, for plaintiff:

The single question presented by the exceptions is whether, under provisions of Rev. Stat. 1868, chap. 82, § 98, cl. 11, in cases where an executor or administrator is a party, the adverse party can be permitted to testify in relation to facts occurring before or subsequent to the decease of the party, unless the executor or administrator offers his own testimony at the trial, the deceased never having testified in the case.

Chap. 82, § 98, abrogates the common rule

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excluding parties to civil suits from giving testimony therein, "except as hereinafter provided." Clause 11 of § 98 declares: "In all cases in which an executor, administrator, or other legal representative of a deceased person is a party, such party may testify to any facts admissible upon the rules of evidence, happening before the death of such person; and when such person so testifies, the adverse party is neither excluded nor excused from testifying in reference to such facts, and any such representative party or heir of a deceased party may testify to any fact admissible upon general rules of evidence, happening after the decease of the testator, intestate, or ancestor; and in reference to such matters the adverse party may testify."

The court says: "The statutes regulating the admission of the testimony of parties are to be examined carefully and construed strictly."

74 Me. 291; 46 Me. 377.

The answer of the representative party seems to negative every material allegation in the plaintiff's bill of complaint, simply admitting some to be true and others not true. "In proceedings in equity this ordinarily is equivalent to the testimony of one credible witness that the facts stated in the bill are not true" (25 Me. 26); and in 35 Me. 53, the court says the answer, except so far as responsive to the bill, is not evidence.

In 36 Me. 549, the court says: "So far as the defendant's answer is responsive to the bill, or necessarily connected with or explanatory of the responsive matter in the bill, it is evidence."

See also Rev. Stat. chap. 77, § 15.

Such being the effect of the defendant's answer, and it being "equivalent to the testimony of one credible witness,"—he then having testified, or given his evidence in the case,—why should the plaintiff be excluded or excused from testifying?

Mr. A. E. Herrick, for defendant:

1. The defendant has been called into court as the administrator of Abner Davis, and claimed the benefit of this fact in his answer, and disclosed the names of the heirs at law.

There is no party defendant who can convey real estate under a decree in this case.

1 Dan. Ch. 192-194; *Simmons v. Moulton*, 27 Me. 496.

The administrator, as such, should not have been made a party, even were the heirs in court.

1 Dan. Ch. 288, 284.

2. The plaintiff has failed to sustain the allegations in his bill by sufficient and competent proofs.

The defendant was required to answer on oath, and has answered, denying upon his knowledge, information, and belief that there was any purchase of the note by the plaintiff, as alleged in the bill, and claiming that the note was paid by the maker thereof through the plaintiff.

The burden of proof is upon the plaintiff.

It is admitted that the deposition was not offered to prove any matters happening after the decease of Abner Davis. It is clearly inadmissible to prove anything occurring before his death, unless the administrator himself first testify concerning such matters.

Troubridge v. Holden, 58 Me. 117.

The rules governing the competency of evidence are the same in law and equity.

Manning v. Lechmere, 1 Atk. 458; *Glynn v. Bank of England*, 2 Ves. 41.

Should the court admit the deposition, then the plaintiff fails in his proof.

The answer of the defendant is evidence, and throws the burden of proof on the plaintiff beyond one witness.

8 Greenl. Ev. § 289, note 1; *Clark v. Biemadyk*, 9 Cranch, 153 (18 U. S. bk. 3, L. ed. 686); *Dodge v. Griswold*, 12 N. H. 577.

Should the heirs of Abner Davis be made defendants, the plaintiff would then fail in his proof. He would still be incompetent as a witness.

Rev. Stat. chap. 82, § 98; *Higgins v. Butler*, 73 Me. 521, 8 New Eng. Rep. 278; *Wentworth v. Wentworth*, 71 Me. 72.

Per Curiam:

The bill seeks to obtain title to an interest in real estate from the administrator of the person by whom, when alive, it is alleged the estate was held in trust for the complainant. The allegations are not proved unless the complainant is allowed to testify to them; which he could not do because the administrator did not see fit to testify. Furthermore, the heirs should have been made the principal party as respondent. But in such case the same objection would lie against allowing the complainant to testify.

Exceptions overruled.

BENJAMIN F. ANDREWS

v.

CITY OF PORTLAND.

1. The city marshal of Portland, holding the legal title to the office, is entitled to the salary while the office is filled by an officer *de facto*, the marshal *de jure* being willing to perform the duties, but being prevented by the city authorities.
2. In an action by the marshal against the city to recover the salary, it is no defense that the city had paid the salary to the officer *de facto*, the payment having been made with full knowledge of the plaintiff's claim of title to the office.
3. Nor can the city, in such an action, have deducted from the salary any money earned by the marshal by his personal labor during the time he was prevented from performing the duties of his office.
4. An officer *de facto* is not entitled to the salary attached to the office; that belongs to the officer *de jure*.

(Cumberland—Decided August 2, 1887.)

ON exceptions by plaintiff. *Sustained.*

The point and material facts are stated in the opinion.

Messrs. William L. Putman and C. W. Goddard, for plaintiff:

Upon the question of interest the case seems to us to fall clearly within the rule quoted by this court in *Sweett v. Hooper*, 62 Me. 54, from *People v. New York*, 5 Cow. 331: "Whenever the debtor knows what he is to pay and when he is to pay it, he shall be charged with interest if he neglects to pay."

In any event, therefore, interest from July 1, 1884, to May 8, 1885, the date of the formal petition to the city council after final judgment on the writ of *certiorari*, viz., \$3.19, should have been added to the verdict, making it \$203.89, instead of \$195.70. And the same principle should be applied to each subsequent quarter in controversy, if the court finds us entitled to such salary.

The principle is of some importance, and is fully sustained in a very recent case, — *Philadelphia v. Rink*, 2 Cent. Rep. 289.

The New York Court of Appeals decided that where a payment was made to the officer *de facto* after judicial determination of title, the officer *de jure* was entitled to recover from the city the whole amount so paid.

McVeany v. Mayor, 80 N. Y. 190; also *Dolan v. Mayor*, 68 N. Y. 274.

The \$485 earned by plaintiff by his personal labor between May 15, 1884, and March 6, 1885, cannot lawfully be deducted from the amount due him from defendants for salary during said period.

On principle, he was and is entitled to his salary, and the whole of it, without abatement or reduction. This is the doctrine of—

United States v. Addison, 6 Wall. 291 (73 U. S. bk. 18, L. ed. 919); *Costigan v. Mohawk & H. R. R. Co.* 2 Denio, 609; *Allen v. McKean*, 1 Sumn. 315; *People v. Miller*, 24 Mich. 458; 8 C. 9 Am. Rep. 131; Dill. Mun. Corp. 3d ed. § 235.

The doctrine laid down in *People v. Miller* is the inevitable sequence of the principal case relied on by the defense. In this case it was distinctly held that one who is wrongfully kept out of office by a claimant thereto is entitled to recover against the claimant, as damages, the whole official salary.

It is to be noted that this was under a peculiar statute, authorizing damages to be assessed in the proceedings by *quo warranto*; but the statute did not affect the rule of damages.

Mayfield v. Moore, 53 Ill. 423, 5 Am. Rep. 52, is a fully-reasoned case. This was an action of assumpsit brought to recover fees received by the defendant as sheriff and collector. The defendant was returned as elected; but it was afterwards judicially determined that the office belonged to the plaintiff; and the court held that he was entitled to recover from the defendant the fees and emoluments of the office, after deducting the necessary expenses in earning them. The court says: "The fees of an office are incident to it as fully as are the rents and profits of lands."

In *Saline County v. Anderson*, 30 Kan. 203, 27 Am. Rep. 171, a case relied on by the defendant, it was stated near the close of the opinion that "the remedy of the county clerk *de jure* is an action against the county clerk *de facto*."

The defendant also relies very strenuously on the New York cases; but in the latest New York case, *Nichols v. MacLean*, 101 N. Y. 225, 2 Cent. Rep. 500, on a full examination of the law, it was held as in the cases already cited.

This was the unanimous opinion of the court of appeals, and is very thoroughly reasoned.

This decision of the New York court in 1886 is a suggestive commentary on the unsound and pernicious doctrines laid down by the same court in 1868, in *Smith v. Mayor*, 37 N. Y. 518.

If the *de jure* officer has done all in his power,—all that he was permitted to do; if he has been ready to perform his official duty,—he is entitled to his pay, so far as service is concerned.

"They also serve who only stand and wait," is good law in such cases as well as good theology in all cases. For certain minor officers paid by the day, it is true that public necessity requires regulations to secure prompt attendance; such employees are docked their pay when not personally present at their posts to perform their daily labor, but that is by special regulation, as with ordinary policemen. Higher officers are left to broader and more general principles.

The same rule was held in *Pettitt v. Rousham*, 15 La. Ann. 289, and *Singer v. Crenshaw*, 10 La. Ann. 297.

In the familiar case of *Allen v. McKean*, 1 Sumn. 276, by the judgment of so eminent a jurist as Judge Story, Dr. William Allen, who had been wrongfully excluded from his office as president of Bowdoin College, and had been prevented from performing any services as such, was awarded, in an action against the treasurer of the college, the fees and emoluments of the office which had been received by the treasurer.

The rule is so held in *Matthews v. Coptiah County*, 53 Miss. 715, 24 Am. Rep. 715.

It is held otherwise in High on Extraordinary Remedies, §§ 103, 108, and 113; but the only cases cited in the support of the author are from Missouri.

In *Baker v. Johnson*, 41 Me. 17, this point did not arise, the court holding that the allowance at *nisi prius* was conclusive.

We may add the opinion of Judge Hoar, then attorney-general, and which must be regarded as very high authority, in the case of *Major Herod*, 13 Opinions of Attorneys-General.

The same was held in *Frazer v. United States*, 16 Ct. Cl. 507, where an officer was suspended from the execution of his official duties pending an indictment.

The case of *McVeany v. Mayor*, 80 N. Y. 189, alludes to the distinction made by us that the so-called *de facto* officer in that case was given by the municipal court a certificate of election and took the oath of office; and that *McVeany*, the plaintiff, did not take the oath of office until after the judgment in his favor on the *quo warranto*.

While it is not denied that the Legislature may abolish the office, or that the compensation may be diminished by the proper authorities, it has been repeatedly decided that the officer *de jure* has a peculiarly valuable interest in his office. Indeed, it was the very basis of the proceedings in *United States v. Addison*, 6 Wall. 291 (73 U. S. bk. 18, L. ed. 919).

On this state of facts it was held in *Stuhr v. Curran*, 15 Vroom, 181, 43 Am. Rep. 353, that the person so taking office could retain the fees, as against one afterwards decided to be entitled to the office.

In *Farrell v. Bridgeport*, 45 Conn. 195, the court says: "As a rule, so far forth as public officers are concerned, those only are entitled to the salary who both obtain and exercise their offices. Payment follows the actual discharge of duty, and not the formal offer to do it, no matter how honestly or persistently made."

In that case there was no point involved as in the case at bar; and the case cites as establishing this general principle, which we do not dispute, *Samis v. King*, 40 Conn. 248, which was the case of an officer who never was in office, and who was decided to have no claim to the office.

That the officer *de facto* cannot compel payment of salary from anybody is in accordance with the general principles stated in *Pooler v. Reed*, 73 Me. 129.

In *State v. Carroll*, 38 Conn. 449, it is stated that the officer "cannot collect his fees nor claim any rights incident to his office without showing himself to be an officer *de jure*."

In the case of *McVeany v. Mayor*, 80 N. Y. 192, it seems to be admitted that an officer *de facto* cannot recover a salary by suit; and this we also understand to be distinctly admitted in *Dolan v. Mayor*, 68 N. Y. 274.

The precise point that an officer *de facto* cannot recover a salary was decided in *McCue v. Wapello County*, 56 Iowa, 698, 41 Am. Rep. 134.

The same was held in *People v. Potter*, 68 Cal. 127; and in *Philadelphia v. Given*, 60 Pa. 140, the chief justice said: "There is no *quantum meruit* in such cases. If there be no title, there is no salary."

The decided cases are so much in conflict as perhaps to leave the court to decide this case on principle, as Judge Van Syckel thought in *Stuhr v. Curran*, 15 Vroom, 181. Without being able to count them pro and con, as to number, we think the weight of the authority is with us.

Defendant also relied on *Auditors of Wayne County v. Benoit*, 20 Mich. 186, 4 Am. Rep. 382; but Judge Cooley dissented in that case on this very issue. Certainly the weight of Judge Cooley is enough to destroy the authority of the case, if not to turn it in our favor.

It is of this case that Chalmers, J., thus speaks in his opinion in *Matthews v. Coptiah County*, 53 Miss. 715, 24 Am. Rep. 715: "Campbell, Ch. J., thought that the *de jure* officer who had been kept out by the *de facto* incumbent, could not recover compensation for the period during which he was so kept out, it appearing that the *de facto* officer had received the salary during his incumbency; and rested his opinion upon the argument that the *de facto* officer could have maintained a suit for the salary accruing during his incumbency. Cooley, J., thought otherwise, and, in an opinion of unusual force and ability, demonstrated, we think, the unsoundness of the reasoning of the chief justice. Christianity, J., concurred with the chief justice, but upon a ground which leaves it impossible to say what his opinion was on the main point at issue." And in *McVeany v. Mayor*, 80 N. Y. 191, Judge Folger says that "the dissent of Cooley, J., and the qualified concurrence of Christianity, J., take from the force of the decision."

It will be observed that the chief justice of

Michigan, who charges the California court with basing its decision in *People v. Smyth*, 28 Cal. 21, upon New York cases which are not law in New York, and which were made in disregard of the previous decision in *Connor v. Mayor*, 5 N. Y. 285,—the Michigan chief justice, we say, himself, undertakes to base his decision upon *Smith v. Mayor*, 37 N. Y. 518, apparently unconscious that *Smith v. Mayor* is not law in New York, as we have already shown.

Sustaining our views, we have the very weighty authority of Dillon on Municipal Corporations, § 285.

We have with us the following cases directly deciding the precise point in issue, namely: *Mattheus v. Copiah County*, 53 Miss. 715, 24 Am. Rep. 718; *Carroll v. Siebenthaler*, 37 Cal. 193; 1 U. S. Ann. Dig. 1870; *Douglass v. State*, 31 Ind. 429; *Memphis v. Woodward*, 12 Heisk. 499, 27 Am. Rep. 750.

We array against Iowa, Kansas, perhaps Missouri, and the court of Michigan, the weight of the names of Judge Cooley and of Judge Dillon, and the unanimous opinions of the courts in Mississippi, Tennessee, California, Indiana, and Pennsylvania.

The decisions in New York are inconsistent. They are all referred to in *McVeany v. Mayor*, 80 N. Y. 190-192.

In *United States v. Addison*, 22 How. 174 (63 U. S. bk. 16, L. ed. 804), where the precise and only question before the court was whether a writ of error would lie with reference to the possession of a public office (the statute prohibiting a writ of error unless more than \$2,000 was involved), it was held that a writ of error would lie, showing beyond all question that a public office has a property value. This was explained when the same case again came before the court in 6 Wall. 297 (78 U. S. bk. 18, L. ed. 919).

See *Goddard v. Grand Trunk R. of Canada*, 57 Me. 228; *Answers of Justices*, 70 Me. 596, 597; *Freem. Judg.* § 481.

Mr. Joseph W. Symonds, City Solicitor, for defendant:

In *Farwell v. Rockland*, 62 Me. 296, it is held that "a public officer has no proprietary interest in his office, nor property in the future compensation attached to it."

In *Conner v. New York*, 2 Sandf. 370, it is said: "There is no contract, express or implied, between a public officer and the government whose agent he is. The latter enters into no agreement that he shall receive any particular compensation for the time he shall hold office; nor, in the case of a statutory office, that the office itself shall continue any definite period."

"A policeman of the city of Bridgeport is an arm of the law; he holds an office as a trust from the State; he is a preserver of the public peace; he is not the hired servant of a master; no contract relation exists between him and the city by which he is bound to its service; he can lay down his trust at any time, according to his pleasure, without exposing himself to an action for damages for breach of contract. As a rule, so far forth as public officers are concerned, those only are entitled to the salary who both obtain and exercise their offices. Payment follows the actual discharge of duty, and

not the formal offer to do it, no matter how honestly or persistently made."

Farrell v. Bridgeport, 45 Conn. 195; *Marden v. Portsmouth*, 59 N. H. 18.

A was illegally removed from the office of assessor and tax collector by the board of county commissioners, who appointed B in his stead. B performed the duty, and was compensated therefor. Subsequently A was restored to office. Held, that he could not recover from the county the fees to which he would have been entitled but for his illegal suspension.

Gorman v. Boise County Comrs. 1 Idaho, N. S. 655, cited in 13 U. S. Dig. N. S. 692, ¶ 36, 1882.

B and M were opposing candidates for county treasurer. M was declared elected by the county canvassers and entered upon the duties of the office. The election was contested, and B was finally declared entitled to the office by the judgment of the supreme court. The county auditor, in settling with M, allowed him the salary for the time he held the office. Held, that B could not exact salary for the time M was actually in office.

Auditors of Wayne County v. Benoit, 30 Mich. 176, 4 Am. Rep. 382.

County commissioners paid to the county clerk *de facto*, claiming *de jure*, the salary of his office. The title to the office was then in litigation to the knowledge of the commissioners, and the clerk *de facto* was insolvent. Held, that the clerk *de jure*, whose title was affirmed, had no cause of action for such salary.

Saline County v. Andersen, 20 Kan. 296, 27 Am. Rep. 171.

In *Steubenville v. Culp*, 38 Ohio St. 18, 43 Am. Rep. 417, it was held that "a police officer suspended by the mayor of a city under authority of the city charter, 'for sufficient cause,' is not entitled to wages during the period of suspension, although the city council afterward declared the cause of suspension insufficient."

Compare *Regina v. Cambridge*, 12 Ad. & El. 713, 714.

Disbursing officers charged with the duty of paying official salaries have, in the discharge of that duty, a right to rely upon the apparent title of an officer *de facto*, and to treat him as an officer *de jure* without inquiring whether another has the better right.

Dolan v. Mayor, 68 N. Y. 274, 278-283.

A municipal corporation, whose disbursing officer has once made payment of the compensation given by law to an office, to one actually in the office, discharging its duties, with color of title, and with his right thereto not determined against him by a competent tribunal, is protected from a second payment.

McVeany v. Mayor, 80 N. Y. 185, 193, 194.

In *Terhune v. Mayor*, 88 N. Y. 247, it appeared that "the plaintiff was appointed inspector of combustibles by the fire commissioners; he was removed and S appointed in his place; but, under a decision of the supreme court determining that his removal was unauthorized and illegal, the plaintiff was reinstated. S performed the duties and received the salary of the office from the time of his appointment. Held, that plaintiff could not maintain an action against the city to recover the salary during the time he was kept out of

office." And in this case the court, after referring to it as no longer an open question that payment to a *de facto* officer, while he is holding the office and discharging its duties, is a defense to an action brought by the *de jure* officer to recover the same salary, proceeds to say: "But the plaintiff claims that his action may be treated as one to recover of the city damages for his wrongful dismissal from office. It is a sufficient answer to this claim that the city did not dismiss him from his office. The fire commissioners were public officers and not agents of the city. The city is no more liable for their wrong in dismissing the plaintiff than it would have been if they had committed an assault and battery upon him;" thus putting the case in this respect upon precisely the same ground taken by this court in the case of *Andrews v. King*, 77 Me. 224, that the removal of the plaintiff from his office by the order of the mayor and aldermen was a judgment of court, and in no sense the act of the city.

It may be said in argument that these cases which have been cited to the effect that disbursing officers of cities and counties may pay the *de facto* officer in possession without being subject to liability themselves, and without subjecting the municipality or the county to danger of being obliged to make double payment, proceed upon the ground that the *de jure* officer in such case has his remedy against the *de facto* officer to recover of him the salary which he has received from the disbursing officer. It is undoubtedly true that many of these cases assume, argumentatively, that such remedy against the officer *de facto* exists. Thus in *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 53, it was held that the legal right to an office confers the right to receive and appropriate the fees and emoluments legally incident to the place. So, if a person without legal right assumes to perform the duties of an office and receive the fees and emoluments thereof, he will be liable, in an action for money had and received, to him who holds the legal title for the amount so received, deducting therefrom the reasonable expenses of earning the same, where the person receiving the fees acted under an apparent right and in good faith.

The same was substantially held in *Benoit v. Miller*, 24 Mich. 453, 9 Am. Rep. 131.

But the opposite was held in an elaborate opinion in *Stuhr v. Curran*, 15 Vroom, 181, 43 Am. Rep. 353, and the whole subject is considered in a note to this case in 43 Am. Rep. 361-365.

We do not understand that the theory that the officer *de jure* can recover of the officer *de facto* the salary of the office during the time that he held the title but performed no service, forms any essential part of the doctrine that the municipality or the county may safely pay to the officer *de facto* in possession, without liability to make second payment. That doctrine proceeds upon entirely different grounds, namely, upon the general principles of law applicable to officers *de facto*, that, so far as the public and third persons are concerned, their actions are valid, and they are in fact the incumbents of the office which they hold. The disbursing officers of the county or municipality are just as much under the necessity, and therefore have just as much right, to treat them as incumbents

of the office as the public or any other persons who have occasion to have dealings with such officers *de facto*.

Libbey, J., delivered the opinion of the court:

The plaintiff was duly appointed city marshal of Portland, March 31, 1883; was duly qualified April 2, 1883, and performed the duties of the office till May 1, 1884, when, by proceedings had before the mayor and aldermen of said city, he was formally removed May 14, 1884; one Decelle was appointed by the mayor, with the advice and consent of the board of aldermen, to said office, to fill the assumed vacancy. He performed the duties of the office under that appointment till March 6, 1885.

The salary of the city marshal was fixed by the city council of Portland at \$1,800 a year, payable quarterly, on the first days of January, April, July, and October, and he was required to provide at his own expense a horse and carriage for his official use.

On May 6, 1884, the plaintiff protested to the board of aldermen against his removal, claimed the right and offered to continue to perform the duties of the office.

He refused to surrender the keys to the marshal's office; held himself ready to perform the duties of marshal, keeping his team therefor until he was reinstated. During the time of his suspension he earned by his personal labor \$495.

May 17, 1884, the plaintiff filed his petition for a writ of *certiorari* to quash the proceedings of his removal, and, on proceedings duly had thereon, this court held that the proceedings were not in conformity to law and void, and that the plaintiff was legally entitled to the office of marshal. This decision was announced May 1, 1885. *Andrews v. King*, 77 Me. 224.

From May 14, 1884, to March 7, 1885, the salary was paid by the city to Decelle.

The question in contention in this action is whether the plaintiff can recover of the city his salary from May 14, 1884, to March 7, 1885, while the duties of the office were performed by Decelle, and the salary paid to him. We think he can.

The plaintiff was marshal *de jure*. His salary was fixed by law. The legal right to the office carried with it the right to the salary or emoluments of the office. The salary follows the legal title. This doctrine is so generally held by the courts that authorities hardly need be cited. *Dolan v. Mayor*, 68 N. Y. 274; *McVeany v. Mayor*, 80 N. Y. 185; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 3 Cent. Rep. 660.

A *de facto* officer has no legal right to the emoluments of the office, the duties of which he performs under color of an appointment but without legal title. He cannot maintain an action for the salary. His action puts in issue his legal title to the office, and he cannot recover by showing merely that he was an officer *de facto*. In *Nichols v. MacLean*, 101 N. Y. 526, 2 Cent. Rep. 500, the court says: "It is abundantly settled by authority that an officer *de facto* can, as a general rule, assert no right of property, and that his acts are void as to himself, unless he is also an officer *de jure*." In *Cro. Eliz.* 699, the doctrine is tersely stated as follows: "The act of an officer *de facto*, when

it is for his own benefit, is void, because he shall not take advantage of his own want of title which he must be consunt of; but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good." *Pooler v. Reed*, 73 Me. 129; *State v. Carroll*, 38 Conn. 449; *McVeany v. Mayor*, 80 N. Y. 192; *Dolan v. Mayor*, 88 N. Y. 274; *Nichols v. MacLean*, *supra*; *McCue v. Wapello County*, 56 Iowa, 698; *People v. Potter*, 63 Cal. 127. Hence it was held in *Nichols v. MacLean*, *supra*, after a careful examination of authorities, that the *de jure* officer, who was prevented from performing the duties of the office by an illegal removal, might recover of the *de facto* officer, who performed the duties under color of an appointment, the salary which he had drawn while performing them. This result can be reached only on the ground that the *de facto* officer has no right to the emoluments of the office.

But it is contended by the learned counsel for the defendant that, admitting the foregoing propositions to be well founded, still Decelle was exercising the duties of the office, in fact, under color of title upon which the defendant might well act, before his legal right was decided, and be legally protected in paying the salary to him. We think this contention, when tested by the facts of the case and well-established legal principles, is unsupported by logic or sound reason. The city had full notice of the plaintiff's claim as the legal officer, and that the title to the office was in litigation. It must be held that it knew that the legal title to the office would draw with it the salary. May it assume to determine the question of legal right between the parties before decided by the court, pay to the one having no legal title, and then successfully set up its action in defense of the claim of the one having the legal right? May A, who holds a fund claimed by B and by C, with full notice of the claim of each, elect to determine between them, and pay to B, who has a *prima facie* right, and set up the payment as defense to the claim of C, who has the legal title? It is perfectly well settled that he cannot. If he elects, it is at his peril. He is not required to do so. He may await an action at law and then bring both claimants into court by bill of interpleader to litigate their title; or he may bring the bill at once, without waiting for the commencement of an action at law. Here the city was in no peril. It might have refused to pay to either till the title to the office was determined; or, by bill of interpleader, it might have brought the parties into court to litigate their title to the salary.

It is well settled that an office which has attached to it emoluments has a pecuniary value, although primarily it is an agency for public purposes, and that the right to the emoluments follows the legal title to the office. *Nichols v. MacLean*, *supra*; *Andrews v. King*, 77 Me. 231.

The officer cannot be deprived of his office without due process of law. Can it be that, while the action of the mayor and aldermen of Portland, in the attempted removal of the plaintiff, was illegal and void as affecting his title to his office, that it deprives him of his salary, all that was of pecuniary value to him? Such a contention has no support in well-established legal principles. It would give the mayor hav-

ing the power of removal for cause, by the consent of the aldermen, the opportunity by unauthorized proceedings, to deprive the legal officer of his salary, and bestow it upon a favorite.

We are aware that courts of high authority have sustained the doctrine contended for by the defendant. The doctrine of the Court of Appeals of New York now seems to be that a payment of the salary by the city to the officer *de facto*, before the title to the office is determined, is a good defense to a claim by the legal officer; but that the legal officer may recover all of the salary not, in fact, paid before the right to the office is determined, although it accrued before the determination of the title. We do not find that that court has noticed the element of notice to the city by the legal officer of his claim before payment. Courts in some other States have followed the New York doctrine. Courts of high authority in several of the States have held that the officer, having a legal title to the office, may recover of the city the salary, notwithstanding it has been paid to the officer *de facto*. We have not attempted to analyze the cases and to try to reconcile them. They appear irreconcilable. Our court is uncommitted, and we have come to the conclusion which seems to us best supported by reason and sound legal principles.

There is another question involved in the case, although not before us on the exceptions, arising on the special finding of the jury of the amount earned by the plaintiff by his personal labor during the time involved. It is claimed that the defendant has the right to recoup, and have that amount deducted from the salary. The right of recoupment exists when the plaintiff claims damages for the breach of a contract; and then the sum to be recouped must arise out of the contract or the execution of it. The right to a salary fixed by law is not by contract. It is by statute, and unless there is some inhibition of the power, the tribunal establishing it may change it at pleasure. *Farnell v. Rockland*, 62 Me. 301. This precise question was settled in *Fitzsimmons v. Brooklyn*, 102 N. Y. 586, 3 Cent. Rep. 660.

The result is that the plaintiff is entitled to recover his salary as claimed, with interest from the time of demand.

Exceptions sustained.

Peters, Ch. J., Walton, Virgin, Emery, and Haskell, JJ., concurred.

Fred W. HYER

WESTERN UNION TELEGRAPH CO.

1. When an important word is dropped by a telegraph company in the transmission of a message, and the company offers no explanation of the mistake, it is *prima facie* evidence of negligence.
2. A stipulation upon a telegraph blank limiting the liability of the company for the negligence of itself, or any of its servants, in case of a mistake or omission in transmitting the message written thereon unless the message is

repeated at the expense of the sender, is void, as against public policy.

3. The sender of a message by telegraph must sustain any loss occasioned by a mistake or omission in its transmission, as between himself and the receiver.

4. The sender has his remedy over against the telegraph company when the error is the result of its negligence.

(Penobscot—Decided August 24, 1887.)

ON report. Judgment for plaintiff.

The facts are stated in the opinion.

Messrs. Wilson & Woodard, for plaintiff:

The burden was on the defendant to show that the error was caused by some agency for which it was not responsible.

Bartlett v. Western Union Tel. Co. 62 Me. 209.

In *True v. International Tel. Co.* 60 Me. 9, this court laid down certain rules by which we ask that this defense should be tested.

The argument on behalf of defendant must be that set out in Gray's Communication by Telegraph, § 105. No authority is cited in support of the argument there stated, and we believe that none can be found.

In *May v. Western Union Tel. Co.* 112 Mass. 90, it was held that the proper remedy against a telegraph company for delivering a message which had not been sent was "an action in the nature of a false warranty against one acting as agent, who represents that he has authority when he has not," which doctrine is cited and approved in *Boston & A. R. R. Co. v. Richardson*, 185 Mass. 472.

Messrs. Baker, Baker, & Cornish, for defendant:

Assuming that the telegraph company was the agent of the sender of the telegram, it is well settled that the principal is not responsible for the acts of his agent beyond the scope of his authority; it matters not whether the agency be general or special.

Rossiter v. Rossiter, 8 Wend. 496; *Johnson v. Wingate*, 29 Me. 404; *Hazeltine v. Miller*, 44 Me. 177.

The limitation of the power of a special agent is universally recognized.

Blaine v. Proudft, 3 Cal. 207; *Munn v. Commission Co.* 15 Johns. 44; *Beals v. Allen*, 18 Johns. 363; *Thompson v. Stewart*, 3 Conn. 171; *Moore v. Lockett*, 2 Bibb. 67; *Martin v. United States*, 2 T. B. Mon. 90; *Banorjee v. Hovey*, 5 Mass. 11; *Starbird v. Curtis*, 43 Me. 352; *School Dist. No. 6 v. Aetna Ins. Co.* 62 Me. 380.

Now, if a telegraph company can be deemed the agent of the sender in any sense, its power is closely restricted, and the authority conferred upon it is extremely limited. That authority is simply to deliver a particular message in exact and unvarying terms.

Applying these principles of law to the facts of this case, it is evident that the plaintiff was not bound to deliver the laths at \$2 per thousand. He did not offer to sell them at that price.

We have been unable to find any decision upon this precise question in the United States, but in England and Scotland it has been square-

ly determined. The question arose in England in 1870, in the case of *Henkel v. Pope*, L. R. 6 Exch. 7; *S. C. Allen*, Tel. Cas. 567. In that case the court decided squarely that there was no contract between the parties.

The same question arose in Scotland in 1871, in *Verdin v. Robertson*, 10 Ct. of Sess. Cas. 35; *S. C. Allen*, Tel. Cas. 697; and the same doctrine was announced.

There is no liability on the part of the defendant under the law of master and servant.

If the person sought to be charged under the rule, as employer, did not contract with the party committing the wrongful act for his labor or services, and is not directly liable to him for compensation for such labor or services, and has no such control over him as will enable the employer to direct the manner of performing the labor or services, he is not liable for the wrongful act of the agent or servant.

Callahan v. Burlington & M. R. R. Co. 23 Iowa, 562. See *McCarthy v. Second Parish of Portland*, 71 Me. 318; *Mayhew v. Sullivan Mining Co.* 78 Me. 100.

The same principle flows through all the authorities.

Fletcher v. Braddick, 2 Bos. & P. N. R. 182; *Spruill v. Hemmingway*, 14 Pick. 1; *Clark v. Vermont & C. R. R. Co.* 28 Vt. 108; *Pavlet v. Rutland & W. R. R. Co.* Id. 297; *Eaton v. European & N. A. R. Co.* 59 Me. 520; *Wood, Mast. & Serv.* §§ 279, 311, 314.

Unless the relation of master and servant exists, the party contracting is not responsible for the negligent or tortious acts of the person with whom the contract is made, especially if these acts are outside of the contract.

Eaton v. European & N. A. R. Co. supra.

As to validity of the condition limiting liability in the case of an unrepeatable message: Was this condition valid and binding upon the parties? We are aware that the courts of the various States differ radically in their decision upon this point, but it would seem that the greater weight of authority is in favor of upholding its validity. In 1866 the question came before the Supreme Court of Massachusetts in the leading case of *Ellis v. American Tel. Co.* 13 Allen, 226, where the error in transmission was like that at bar, and the condition as to repetition also the same.

Mr. Chief Justice Bigelow, in a most elaborate opinion, held the condition valid, making its reasonableness the test of its validity.

This decision has been followed in Massachusetts in—

Redpath v. Western Union Tel. Co. 112 Mass. 71; *Grinnell v. Western Union Tel. Co.* 118 Mass. 299; *Clement v. Western Union Tel. Co.* 137 Mass. 463.

The error in the case at bar was such as would have been remedied by repetition. The counsel for the plaintiff says the defendant was bound to show this, and that there is no evidence upon the point. It is evident from the very nature of the case that such a fact cannot be proved by positive testimony. Nor is it required. It is enough if (to use the language of the court in *True v. International Tel. Co.* 60 Me. 18) the error causing the injury "would have been manifestly prevented or avoided by repeating."

Without quoting further, we will simply cite

a few of the authorities supporting the validity of this condition as to repetition:

Camp v. Western Union Tel. Co. 1 Met. (Ky.) 164; *De Rutte v. New York, etc. Tel. Co.* 1 Daly, 547; *Breese v. United States Tel. Co.* 48 N. Y. 132; *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Wann v. Western Union Tel. Co.* 37 Mo. 472; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232; *Passmore v. Western Union Tel. Co.* 78 Pa. 238; *Becker v. Western Union Tel. Co.* 11 Neb. 87; *Kinghorne v. Montreal Tel. Co.* 18 U. C. Rep. 60; *M'Andrew v. Electric Tel. Co.* 17 C. B. 3; 84 Eng. C. L. 5; *Lassiter v. Western Union Tel. Co.* 89 N. C. 334; *Western Union Tel. Co. v. Neill*, 57 Tex. 283; *Womack v. Western Union Tel. Co.* 58 Tex. 176; *Western Union Tel. Co. v. Edsall*, 63 Tex. 668; *Jones v. Western Union Tel. Co.* 18 Fed. Rep. 717; *White v. Western Union Tel. Co.* 14 Fed. Rep. 710; *Schwartz v. Atlantic & P. Tel. Co.* 18 Hun, 157; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429, affirmed in 49 Ind. 53; *Young v. Western Union Tel. Co.* 65 N. Y. 163; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Candes v. Western Union Tel. Co.* 34 Wis. 471; *Tyler v. Western Union Tel. Co.* 60 Ill. 421; *Hibbard v. Western Union Tel. Co.* 33 Wis. 559; *Sweatland v. Ill. & Miss. Tel. Co.* 27 Iowa, 433; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299; *S. C.* 45 Am. Rep. 480; *Western Union Tel. Co. v. Fontaine*, 58 Ga. 443; *Sprague v. Western Union Tel. Co.* 6 Daly, 200; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168.

In this State the question has never been decided. In *True v. International Tel. Co.* 60 Me. 9, and *Bartlett v. Western Union Tel. Co.* 62 Me. 209, the question involved was the validity of the condition in a night-message blank, and that differed essentially from the condition now under consideration.

The counsel also contends that the words, "or otherwise," create an invalid exemption from liability that renders the whole contract void. To this we reply that such has not been the rule adopted by the courts; that the conditions are clearly severable; and that in case the error is such as could have been prevented by repetition, the condition is held applicable to it.

M'Andrew v. Electric Tel. Co. 17 C. B. 3; *Ellis v. American Tel. Co.* 13 Allen, 226; *Clement v. Western Union Tel. Co.* 137 Mass. 463; *Western Union Tel. Co. v. Neill*, 57 Tex. 283.

Emery, J., delivered the opinion of the court:

On report. The defendant telegraph company was engaged in the business of transmitting messages by telegraph between Bangor and Philadelphia, and other points. The plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message: "Will sell 800 M. laths, delivered at your wharf, two-ten, net cash. July shipment; answer quick." The regular tariff rate was prepaid by the plaintiff for such transmission. The message delivered by the defendant company to the Philadelphia correspondent was as follows: "Will sell 800 M. laths delivered at your wharf, two, net cash. July shipment; answer quick." It will be seen that the important word "ten" in the statement of price was omitted.

The Philadelphia party immediately returned by telegraph the following answer: "Accept your telegraphic offer on laths. Cannot increase price spruce." Letters afterward passed between the parties, which disclosed the error in the transmission of the plaintiff's message. About two weeks after the discovery of the error, the plaintiff shipped the laths, as per the message received by his correspondent, to wit, at \$2 per M. He testified that his correspondent insisted he was entitled to the laths at that price, and they were shipped accordingly.

The defendant telegraph company offered no evidence whatever, and did not undertake to account for or explain the mistake in the transmission of the message. The presumption therefore is that the mistake resulted from the fault of the telegraph company. We cannot consider the possibility that it may have resulted from causes beyond the control of the company. In the absence of evidence on that point, we must assume that for such an error the company was in fault. *Bartlett v. Western Union Tel. Co.* 62 Me. 221.

The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims it extends to the difference between the market price of laths and the price at which they were shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds:

1. The company relies upon a stipulation made by it with the plaintiff, as follows: "All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed, between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission, or delivery, or for nondelivery of any unrepeatable message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." This is the usual stipulation printed on telegraph blanks, and was known to the plaintiff, and was printed at the top of the paper upon which he wrote and signed his message. He did not ask to have the message repeated.

Is such a stipulation in the contract of transmission valid as a matter of contract assented to by the parties, or is it void as against public policy? We think it is void.

Telegraph companies are *quasi* public servants. They receive from the public valuable franchises. They owe the public care and diligence. Their business intimately concerns the public. Many and various interests are practically dependent upon it. Nearly all interests may be affected by it. Their negligence in it may often work irreparable mischief to individuals and communities. It is essential for the public good that their duty of using care and diligence be rigidly enforced. They should no more be allowed to effectually stipulate for exemption from this duty than should

a carrier of passengers, or any other party engaged in a public business.

This rule does not make telegraph companies insurers. It does not make them answer for errors not resulting from their negligence. It only requires the performance of their plain duty. It is no hardship upon them. They engage in the business voluntarily. They have the entire control of their servants and instruments. They invite the public to entrust messages to them for transmission. They may insist on their compensation in advance. Why, then, should they refuse to perform the common duty of care and diligence? Why should they make conditions for such performance? Having taken the message and the pay, why should they not do all things (including the repeating) necessary for correct transmission? Why should they insist on special compensation for using any particular mode or instrumentality as a guard against their own negligence? It seems clear to us that, having undertaken the business, they ought, without qualification, to do it carefully, or be responsible for their want of care.

It is true there are numerous cases in other States holding otherwise, but we think the doctrine above stated is the true one, and in harmony with the previous decisions of this court. *True v. International Tel. Co.* 60 Me. 1; *Bartlett v. Western Union Tel. Co.* 62 Me. 221.

2. The defendant company also claims that the plaintiff was not in fact damaged to a greater extent than the price paid by him for the transmission. It contends that the plaintiff was not bound by the erroneous message delivered by the company to the Philadelphia party, and hence need not have shipped the laths at the lesser price. This raises the question whether the message written by the sender, and entrusted to the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender.

The question is important and not easy of solution. It would be hard that the negligence of the telegraph company, or an error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message a liability he never authorized or contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should, through such error, lose all claim upon the sender. If one owning merchandise write a message offering to sell at a certain price, it would seem unjust that the telegraph company could bind him to sell at a less price by making that error in the transmission. On the other hand, the receiver of the offer may in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps, at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receives instructions by telegraph from his principal, and in good faith acts upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission.

It is evident that in case of an error in the

transmission of a telegram either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is that, as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, any other rule would now be impracticable.

Of course the rule above stated presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else, indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting. Neither does the rule include forged messages, for in such case the supposed sender did not make any use of the telegraph.

The authorities are few and somewhat conflicting, but there are several in harmony with our conclusion upon this point. In *Durkee v. Vermont Cent. R. R. Co.* 29 Vt. 137, it was held that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of any contract. In *Saveland v. Green*, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of a contract binding on the sender. In *Morgan v. People*, 59 Ill. 58, it was said that the telegram received was the original, and it was held that the sheriff receiving such a telegram from the judgment creditor was bound to follow it as it read. There are *dicta* to the same effect in *Wilson v. Minneapolis & N. W. R. R. Co.* 81 Minn. 487, and *Howley v. Whipple*, 48 N. H. 488. *Western Union Tel. Co. v. Shotton*, 71 Ga. 760, is almost a parallel case. The sender wrote his message: "Can deliver hundred turpentine at sixty-four." As received from the telegraph company it read, "Can deliver hundred turpentine at sixty," the word "four" being omitted. The receiver immediately telegraphed an acceptance. The sender shipped the turpentine, and drew for the price at sixty-four. The receiver refused to pay more than sixty. The sender accepted the sixty, and sued the telegraph company for the difference between sixty and the market. It was urged, as here, that the sender was not bound to accept the sixty, as that was not his offer. The court held, however, that there was a completed contract at sixty,—that the sender must fulfill it, and could recover his consequent loss of the telegraph company.

It follows that the plaintiff in this case is entitled to recover the difference between the \$2 and the market as to laths. The evidence shows that the difference was 10 cents per M.

Judgment for plaintiff for \$80, with interest from the date of the writ.

Peters, Ch. J., Walton, Danforth, Virgin, Libbey, Foster, and Haskell, JJ., concurred.

George N. NOYES *et al*

v.

Ellen L. SMITH, Admx. of the Estate of Robert Potter.

It is not enough for a bill of exceptions to state that the evidence was admitted under objections. It must somehow appear that the evidence was admitted to the injury of the party complaining of its admission.

(Franklin—Decided August 2, 1887.)

ON exceptions by the plaintiffs. *Overruled.*
The following is a copy of the exceptions:

This was an action of assumpsit. Writ dated May 2, 1884. *Ad damnum*, \$3,000. The verdict was for the defendant. Plea, general issue.

At the trial of the cause, this defendant was allowed to introduce, against plaintiffs' seasonable objection, the following evidence, to wit: Interrogatories 3, 4, 5, 11, and 12 and the answers thereto, contained in the deposition of Thomas F. Temple; interrogatory 4 and answer thereto, contained in the deposition of Joseph E. Wilber; interrogatories 3, 4, and 5 and the answers thereto, contained in the deposition of Jacob A. Leonard. (All the questions and answers in said depositions to be printed and form a part of these exceptions.) [These interrogatories called upon the deponents to examine certain records and state what mortgages or conveyances to or from George M. Noyes or George A. Noyes were there recorded.]

The defendant, having given notice to plaintiffs to produce at the trial all books, papers, and letters relating to the matter in suit, was allowed to testify in regard to, and to give from her recollection, the contents of an alleged letter from her intestate, Robert Potter, to the plaintiffs, which she testified she saw in the hands of one of the plaintiffs subsequent to said Potter's death, and which letter the plaintiff did not produce at the trial.

The defendant was allowed to introduce the inventory and appraisal of the estate of Robert Potter, defendant's intestate.

The plaintiff George N. Noyes was not allowed to testify in relation to matters happening before the death of said Robert Potter.

To all which rulings admitting evidence for defendant and including testimony of plaintiffs, the plaintiffs excepted, and pray that their exceptions may be allowed.

Mr. S. Clifford Belcher, for plaintiffs.

Mr. S. C. Strout, for defendant:

Unless the exceptions show the rulings to be material and prejudicial to the excepting party, and to be erroneous, the court cannot pass upon them as legal propositions, and they must be overruled.

Allen v. Lawrence, 64 Me. 175; *Webster v.*

Calden, 55 Me. 165; *Holbrook v. Knight*, 87 Me. 246.

The objection that interrogatories 3, 4, and 5 are "incompetent," is general. If competent for any purpose, the objection falls. For what purpose the questions are asked or admitted by the court does not appear. Nothing appears to show whether Temple is an official person or not; nor what the "record" was which he was asked to examine. It may have been the record of some private person or corporation. No question appears to be involved as to the effect or scope of the conveyances. Simply the fact that such deeds appeared upon the record examined, was called for. It is admissible to prove such facts without copy of the record.

United States v. Reyburn, 6 Pet. 364 (31 U. S. bk. 8, L. ed. 429); *State v. Lynde*, 77 Me. 562, 1 New Eng. Rep. 290; *Id. v. Pierce*, 134 Mass. 260; *Mauri v. Heffernan*, 13 Johns. 58; *Whiton v. Narragansett F. & M. Ins. Co.* 109 Mass. 30; *Binney v. Russell*, Id. 55; *Amherst Bank v. Conkey*, 4 Met. 459; *Commonwealth v. Morrell*, 99 Mass. 544; *Nason v. First Bangor Christian Church*, 66 Me. 105; *Sawyer v. Garcelon*, 63 Me. 25.

These depositions were taken out of the State, and the court has a discretion as to their admission.

Freeland v. Prince, 41 Me. 105.

Counsel further cited—

Harriman v. Sanger, 67 Me. 444; *Briggs v. Heroey*, 130 Mass. 186; *Sweetser v. Bates*, 117 Mass. 468.

Mr. E. O. Greenleaf, also for defendant:

The rule of "original deeds" or "office copies" does not apply in this case, as the reality of the plaintiffs was not the subject of this suit; and the record, as well as the absence of record, was properly shown by deposition.

Hutchinson v. Chadbourne, 35 Me. 189; *De v. Scribner*, 36 Me. 168.

The plaintiff objected to the depositions as being immaterial; and, if they were immaterial or irrelevant, they were not injured and have no grounds for exceptions.

Moody v. Sabin, 9 Cush. 505; *Commonwealth v. Bailey*, 11 Cush. 415.

There is no question but defendant gave plaintiffs ample notice to produce all books, papers, and letters relating to the matter in suit. I believe it is good law that if a written notice, or letter, is delivered to a party to pay money, the contents may be proved by parol with proof of notice to produce the written notice.

Gaskell v. Morris, 7 Watts & S. 32.

A party's own declarations may be given in evidence by him when a part of the *res gestæ*.

Mulliken v. Greer, 5 Mo. 489.

The letter referred to may have been, and was, so connected with the transactions of plaintiffs and Robert Potter as to become a part of the *res gestæ*, and thereby admissible in evidence.

New England M. Ins. Co. v. De Wolf, 8 Pick. 56.

If the inventory and appraisal admitted were immaterial, the plaintiffs were not injured, and there can be no grounds for exceptions.

Millett v. Marston, 62 Me. 477.

Per Curiam:

The objections in this case are to the admis-

sion of certain evidence alleged by the plaintiffs to be exceptionable. The bill of exceptions does not enable us to see that the plaintiffs were aggrieved by the evidence objected to. The defendant was permitted to swear to the contents of a letter. But the contents of the letter are not produced to us. Whether hurtful to the plaintiffs or not, does not appear. It is objected that officers keeping records were allowed to testify to the showing of the records as to certain property dealings of one of the parties. In what connection, and for what purpose admitted, is not stated. It is not enough for a bill of exceptions to state that the evidence was admitted under objection. It must somehow appear that the evidence was admitted to the injury of the party complaining of its admission.

Other points in the exceptions are not relied on.

Motion and exceptions overruled.

Charles N. BRADBURY

v.

B. F. PLACE.

1. All contracts, except for necessities, made by a person under a guardianship, are declared void by Rev. Stat. chap. 67, § 7.
2. The holder of a promissory note, who took it after it was dishonored, cannot recover it from the maker when he knew the payee was of unsound mind, though he did not know he was under guardianship, the maker having paid the amount of the note to the guardian.

(York—Decided August 2, 1887.)

ON report. Judgment for defendant.

Action of assumpsit on a promissory note, which was given to one Solomon N. Hall for \$80 borrowed money. At the time of the taking of the note, said Solomon N. Hall was under guardianship, and continued under guardianship at the time of the trial. The defendant paid the note to the guardian. The interest indorsed on the note was paid to Solomon L. Hall, who held the note until it was overdue. The guardian did not know of the existence of the note until a short time before collecting it. It is not claimed that Bradbury, the plaintiff, received the note before it was overdue, but bought it as an overdue note of a third party, not knowing that the original payee of the note was under guardianship.

Messrs. Hamilton & Haley, for plaintiff.

Mr. J. A. Edgerly, for defendant:

This action cannot be maintained. The transfer of a promissory note by the payee is a contract which an insane person cannot make, because he has no power to give that consent which the contract requires.

Burke v. Allen, 9 Foster, 106.

There can be no contract unless the party is capable of giving a rational consent.

Chitty, Cont. 129, note a; 1 Bl. Com. 438; 1 Pars. N. & B. 150; 8 Bac. Abr. 540; 1 Bouv. Inst. 229; *Davis v. Lane*, 10 N. H. 156; *True v.*

Ranney, 1 Foster, 52; *Seaver v. Phelps*, 11 Pick. 804; *Lang v. Whidden*, 2 N. H. 488; *Peaslee v. Robbins*, 8 Met. 164.

Where a person *non compos mentis*, under guardianship, had in his possession a promissory note payable to himself, and received payment of it from the promisor, who had knowledge of the guardianship, it was held that such payment was of no effect; and the letters of guardianship were held to be conclusive evidence that at the time of payment the ward was not of sound mind.

Leonard v. Leonard, 14 Pick. 280. See Rev. Stat. chap. 67, § 7.

Per Curiam:

All contracts, except for necessities, and all gifts, sales, or transfers of real or personal estate, made by a person under guardianship, are, in this State, void; not voidable merely, but absolutely void. So declared by Rev. Stat. chap. 67, § 7. The note in suit was once the property of a person under guardianship, and the amount due upon it has been paid to the guardian. The plaintiff is not a *bona fide* holder, and he does not show that the person from whom he took it was a *bona fide* holder. He did not take the note until after it was dishonored. He did not know that the payee was under guardianship, but he knew the note was overdue, and he does not deny that he knew the payee was a person of unsound mind and incapable of managing his property.

It is the opinion of the court that the action is not maintainable, and that judgment must be entered for the defendant.

John P. SWASEY, Admr.,

v.

Hezekiah AMES et al.

Although one party to a suit be the representative of a deceased person, the other party may be a witness in his own behalf as to matters happening after the death of such deceased person.

(Oxford—Decided August 2, 1887.)

ON exceptions by defendants. Sustained.

Trover by the administrator of the estate of Mellen T. S. Ames for two pairs of steers and a shoat,—all of the value of \$200. The verdict was for plaintiff for \$179.04.

At the trial the counsel for defendants called Deborah B. Ames, one of the defendants, to testify to facts happening after the death of the intestate. The court ruled that the defendants could not be permitted to testify to such facts until the representative party had first taken the stand and testified to such facts. To this ruling defendants excepted.

Mr. George D. Bisbee, for defendants:

By a proper construction of Rev. Stat. chap. 82, § 98, item 2, we think this witness was improperly excluded. This portion of said section seems to apply only to matters happening before the intestate's death. The latter part of said section clearly allows the witness to testify as to matters happening after intestate's death,

regardless of the fact of the representative party being a witness.

We are not aware that this court has ever given a different interpretation of this statute.

The court, in *Kelton v. Hill*, 59 Me. 260, passed upon Rev. Stat. 1871. That statute contained the words "or after."

The Legislature immediately amended the statute by striking out the words "or after," and providing for the adverse party to testify to matters happening after the death of the testate or intestate, regardless of the action of the representative party.

See Pub. Laws 1873, chap. 145.

The testimony excluded was not only material, but went to the foundation of the defense.

Mr. John P. Swasey, for plaintiff:

The exceptions of a general character cannot be sustained if any of the instructions excepted to are found to be correct.

Macintosh v. Bartlett, 67 Me. 180; *State v. Reed*, 62 Me. 129.

It can only be considered as to such objections, where exceptions are taken, as are specifically and distinctly presented to the presiding justice.

See *Lee v. Openheimer*, 84 Me. 181; *White v. Chadbourne*, 41 Me. 149.

To be available upon exceptions an objection to the testimony must be specific.

Harriman v. Sanger, 67 Me. 442, and cases cited.

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In deciding upon a bill of exceptions, the court will look at the whole case and not disturb a verdict which is fully justified by the facts in the case independently of those excepted to, though the instructions may not be perfect or correct.

Farrar v. Merrill, 1 Me. 17; *French v. Stanley*, 21 Me. 512; *Howard v. Miner*, 20 Me. 325.

Peters, Ch. J., delivered the opinion of the court:

The fact that one of the parties to a suit is the representative of a person deceased does not preclude the other party from the privilege of being a witness in his own behalf respecting matters that have happened after the death of such deceased person, whether the representative party testifies or not. Formerly the rule was otherwise, the statutory provision having been amended since the decision in *Kelton v. Hill*, 59 Me. 260. Laws 1873, chap. 145; Rev. Stat. chap. 82, § 98.

The Legislature deemed it reasonable to allow the living party to be a witness in relation to matters of which the deceased in his lifetime could have known nothing, and about which someone other than the living party may be supposed to be in a position to testify.

Exceptions sustained.

Walton, Virgin, Libbey, Foster, and Haskell, JJ., concurred.

RHODE ISLAND.

SUPREME COURT.

William G. MCQUITTY *et ux.*
v.

CONTINENTAL LIFE INSURANCE CO.

A fifteen-year endowment life insurance policy, taken out by a married woman for her own benefit, contained a condition that it should cease in case of default on the part of the assured in paying premiums, or interest in advance on outstanding premium notes, or the notes themselves at maturity, with the proviso that if, after payment of two or more annual premiums, the assured should make default in paying a subsequent premium, the company would convert the policy into a "paid-up" policy for a proportionate amount of the sum insured. The policy also provided that in every case where it should cease, all payments and all dividend credits thereon should be forfeited to the company. On the margin of the policy were the words: "Non-forfeiture endowment policy with profits." The assured paid the first two premiums in money and notes, and then made default and applied for a paid-up policy, agreeing to pay the company annually in advance the interest on all outstanding premium notes. The policy was indorsed by the company as binding for two fifteenths of the sum insured, subject to the conditions of the policy. The assured did not thereafter pay any interest on the premium notes theretofore given, and at the maturity of the policy she demanded payment of the company, which was refused; whereupon she brought suit to recover the moneys paid by her under the policy, claiming that as she was a married woman she was incapable of contracting, and there was therefore no consideration for her payments. *Held:*

(a) That she could not recover.

(b) That the paid-up policy was forfeited by reason of the nonpayment of interest on the outstanding premium notes (following *Holman v. Continental Life Ins. Co.* 2 New Eng. Rep. 833).

(c) That if the assured was capable of taking the original policy, she was also capable of exchanging it, under the provision for conversion, into the so-called "paid-up" policy.

(d) That, under R. I. Pub. Stat. chap. 166, a married woman is capable of entering into a valid contract of insurance on her own life for her own benefit, by means of her separate estate, and such contract is not rendered void by the fact that notes made by her, which would not bind her personally, were received in part payment of premiums.

(Providence—Decided July 23, 1887.)

ACTION for money had and received. On exceptions by plaintiffs to the Court of Common Pleas. *Overruled.*

The facts are stated in the opinion.

Mr. Edward C. Dubois, for plaintiffs:

The Act of January, 1848, which became § 20 of chap. 186 of the Revised Statutes of Rhode Island, as amended by chap. 886 of the Acts of January, 1860, provided that a policy of insurance, not to exceed \$10,000, made by an insurance company on the life of any person and expressed to be for the benefit of a married woman, whether the same be effected by herself, or by her husband, or by any other person on her behalf, shall enure to her separate use and benefit, etc.

It is conceded that the foregoing Acts of legislation conferred upon married women, at the date of the policy involved in this suit, all the power they had in the premises; and that without such enabling Acts, at that time married women had no authority to effect insurance in this State.

The foregoing statutes, being in derogation of common-law right, are to be construed strictly.

What policy of insurance does the Act empower a married woman to effect? A policy of insurance not to exceed \$10,000 on the life of any person. Do the words "life of any person" include her own life? Are the words "life of any person" broad enough to include endowment policies for terms of years?

The Act further provides that the policy shall be expressed to be for the benefit of a married woman; that is, such expression shall be used in the policy. In the policy in this case no such expression is made use of. The words "whether the same be effected by herself" contain all that there is enabling in the Act, and refer to insurance effected.

Was the insurance in this case ever effected?

The policy itself, in its third express condition and agreement under which the same is granted, provides: "Third. That this policy shall not take effect nor become binding on the company until the advance premium hereon shall have been actually paid during the lifetime of the insured," etc. Therefore, to effect this insurance it was necessary to actually pay the advance premium thereon. In this case no such payment has been made. A partial payment was made in money, and for the balance of the premium the married woman gave her individual promissory note, which note has never been paid; so with the second annual premium. Has a married woman in this State authority to bind herself by her individual promissory note? Does the giving of such a note by a married woman for the balance of premium, together with the cash paid, constitute an actual payment?

As to authority of a married woman to make a promissory note, see—

Hayden v. Stone, 18 R. I. 106.

It may, however, be claimed that she is estopped from setting up her incapacity; but see—

Mason v. Jordan, 18 R. I. 193.

If the married woman did effect the insurance, was she authorized to make the new contract converting the same into a paid-up policy for \$188.83? This being with a married woman, was it a fair contract to make?

The defendant should have given a real paid-up policy for the two fifteenths of the amount originally insured, less the amount of the outstanding notes. Has not the court the right to declare that if it was the duty of the defendant to have done this, the defendant in effect did do it? Otherwise what kind of a policy is a forfeitable "nonforfeiture" unpaid "paid-up policy?"

For pertinent remarks on this point in a case against this same defendant, see—

Concles v. Continental L. Ins. Co. 1 New Eng. Rep. 247.

To sum up, we claim:

1. That the statute of the State was for the purpose of securing to married women the benefit of insurance effected, and not for the purpose of exposing married women to the consequences of sharp contracts made with them by sharp insurance men.

2. That the statute, being in derogation of common-law right, is to be construed strictly and its terms strictly followed.

3. That the statute does not authorize a married woman to make a promissory note.

4. That the giving of such a note is no payment.

5. That, as the insurance was not effected, there was a failure or want of consideration; and that the plaintiffs are entitled to recover the moneys paid to said defendant by said female plaintiff, and that judgment should be for the plaintiff for such amount with interest.

But if the court should find that such insurance was effected, then we claim that the plaintiff is entitled to a paid-up policy, in fact as well as in name, for \$83.95 (two fifteenths of the policy, less the outstanding notes); and that in such event judgment should be for plaintiffs for that sum.

Mr. C. Frank Parkhurst, for defendant:

1. Mary A. McQuitty had the power to effect insurance on her own life, under R. I. Pub. Laws, chap. 336 (Laws 1857-1867), being the law in force at the date of the policy, and the same in substance as Gen. Stat. 1872, chap. 153, § 21.

See *Aetna L. Ins. Co. v. Mason*, 14 R. I. 538. See also (under statutes of other States substantially similar to our statute) *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419; *Baker v. Young*, Id. 458; *Winchell v. Hancock Mut. L. Ins. Co.* 8 Rep. 549; *Eadie v. Slimmon*, 26 N. Y. 9; *Moehring v. Mitchell*, 1 Barb. Ch. 264; *Fraternal Mut. L. Ins. Co. v. Applegate*, 7 Ohio St. 292; *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 258 (Bk. 26, L. ed. 767); *Brooklyn L. Ins. Co. v. Dutcher*, 95 U. S. 269 (Bk. 24, L. ed. 410); *Pomeroy v. Manhattan L. Ins. Co.* 40 Ill. 398; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53.

2. That plaintiff, under the facts, has forfeited all right of recovery under the policy, see—

Patch v. Phoenix Mut. L. Ins. Co. 44 Vt. 481; *Nettleton v. St. Louis L. Ins. Co.* 7 Biss. 293; *Anderson v. St. Louis Mut. L. Ins. Co.* 1 Flip. 559; *Holman v. Continental L. Ins. Co.* 2 New Eng. Rep. 833.

8. Inasmuch, therefore, as the plaintiff had power to make this contract, and has, by her default, forfeited the same, she can have no right to recover moneys paid by way of pre-

mium on the ground of failure or want of consideration.

Durfee, Ch. J., delivered the opinion of the court:

This is an action of assumpsit for money had and received to the use of the female plaintiff, Mary A. McQuitty, wife of William G. The action was begun in the court of common pleas, and was there tried on an agreed statement of facts, from which the case appears to be as follows, to wit: The said Mary, on November 16, 1870, being then and ever since then a resident of Rhode Island, procured in Rhode Island, through its Rhode Island agent, F. W. Hart, a policy of insurance by which the defendant corporation agreed, in consideration of the representations made in the application and of the annual premium of \$87.49 to be paid every year on or before November 16, for the term of fifteen years, to insure the life of said Mary for her benefit in the sum of \$1,000, to be paid within ninety days after due notice and satisfactory evidence of her death during the continuance of the policy; or, if she should survive November 16, 1885, to be paid then to her, deducting all indebtedness to the company on account of the policy, if any then existed. A note in the margin of the policy states that the annual premiums are payable, \$34.99 note, \$52.50 cash,—each twelve months from November 16, 1870.

The policy was issued subject to the condition that it should cease and determine in case of default on the part of the assured in paying the premiums, or interest in advance on the outstanding premium notes, or the notes themselves at maturity, with the proviso, however, that if, after the payment of two or more of the annual premiums, the assured should make default in paying a subsequent premium, the company would convert the policy into a "paid-up" policy for as many fifteenths of the sum insured as there had been complete premiums paid, the application for conversion, with return of the policy, being made within one year after the default. The policy was also issued upon the express condition that in every case where the policy should cease, or become null and void, all payments thereon and all dividend credits accumulating therefrom should be forfeited to the company.

The first two premiums were paid by the said Mary in money and notes as required, and receipts therefor given to her by the company. In 1873, said Mary decided to make default and convert the policy into a paid-up policy for \$133.33,—the *pro rata* amount stipulated for the premiums previously paid,—and accordingly she remitted to the company \$4.20 interest on the two outstanding notes and applied for such policy, agreeing in her application "to pay to said company annually, in advance, the interest on all outstanding notes given in part payment of annual premiums." Thereupon the company wrote across the face of the policy the following, to wit: "This policy, having lapsed after two annual payments, is hereby recognized as binding upon the company for two fifteenths thereof, or \$133.33, subject to the terms and conditions expressed in this policy, and in the quitclaim to the company bearing even date with this entry," signed

"Robert Beecher, Sec'y," and dated "Hartford, Conn. Nov. 18, 1872."

The quitclaim referred to is a quitclaim or release, expressed in the application to the company, of all claims to the sum assured by the policy except the two fifteenths.

Mrs. McQuitty never paid any further interest on the notes, and the notes are still outstanding unpaid. She demanded payment of the policy after maturity, and the company refused it. The company claims that she has forfeited her policy and all moneys paid by her. She claims that being a married woman she was incapable of contracting and is therefore entitled to recover the moneys paid by her under the policy. It is agreed that if the court find, on the facts as stated, the policy and moneys forfeited, judgment shall be for the defendants for costs; otherwise for the plaintiffs for \$——, debt or damages, and costs.

In the court of common pleas judgment was rendered for the defendant, and the case has been brought upon exceptions.

The policy has conspicuously displayed in the margin the words "Nonforfeiture endowment policy with profits." There are cases which, regarding these marginal catch-words as an element of the contract, hold that the policy, at least when converted into a "paid-up" policy, is nonforfeitable (*Cowles v. Continental L. Ins. Co.* 63 N. H. 800; *Bruce v. Continental L. Ins. Co.* 58 Vt. 253); other cases hold differently.

In a recent case against the defendant company, decided by the Supreme Court of Connecticut, to wit, *Holman v. Continental L. Ins. Co.* 2 New Eng. Rep. 893, the sum insured was \$1,000, the period of time ten years, the annual premium \$108.72, payable partly in cash, partly by note, the conditions the same as here. After the payment of two annual premiums, partly in cash and partly in notes, which remained outstanding, the insured applied for a paid-up policy for \$200, agreeing to pay annually, in advance, interest on all outstanding notes. Thereupon the company re-issued the policy indorsed as in the case at bar. The insured, after paying the interest twice more, stopped, and at the expiration of the term of the policy brought suit thereon. The court held that "the paid-up" policy was in effect a new policy on the conditions of the old, except in so far as the conditions of the old were inapplicable for the reasons that no further premiums were to be paid, and that therefore it was forfeited by nonpayment of the interest annually in advance on the outstanding premium notes. The court in rendering judgment delivered an elaborate opinion, citing numerous cases in its support. We think its conclusion correct.

There can be no doubt that the original policy was liable to forfeiture by such nonpayment unless its clear provisions are to be overruled because of a misleading phrase in its margin, as of course they cannot be without proof of fraud; and in our opinion the paid-up policy, both as issued and as provided for, is only the original policy reduced to an amount corresponding to the premiums paid, so that no further premiums are required. The expression "paid-up," as used in the provision for the conversion of the original policy into a "paid-up"

policy, is put in quotation marks as if, the expression were used to designate instead of characterize it; and if the expression be so regarded, there is little reason for supposing that the paid-up policy was intended to be anything other than the original policy converted by reducing it as stated, the conditions so far as applicable continuing unchanged. That the female plaintiff so understood appears from the terms of her application, and from her receiving back the policy as indorsed. It seems to us that it is by laying undue stress on the expression "paid-up" that a contrary view has obtained. The use of an expression so likely to mislead cannot be too severely reprehended; but courts should not on that account give an effect to it which it is not entitled to. We see no reason to doubt that the female plaintiff, if capable of taking the original policy, was also capable of exchanging it under the provision for conversion into the so-called "paid-up" policy.

The plaintiffs raise the question whether an endowment policy like the policy taken out by the female plaintiff is within the purview of our statute (R. I. Pub. Stat. chap. 166, § 21), as follows: "Any policy or policies of insurance, or part thereof, which shall not exceed in the aggregate the sum of \$10,000, made by an insurance company on the life of any person and expressed to be for the benefit of a married woman, whether effected by herself, or by her husband, or by any other person on her behalf, shall enure to her separate use and benefit, independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same on her behalf, his creditors and representatives; and such policy may be sued in the name of the person beneficially interested therein, or in the name of the representative of such person." We see no reason to doubt it. Such a policy taken out by the assured on her own life insures it for a term of years. If she dies within the term, it is payable to her legal representatives. The fact that it is payable to her personally if she survives the term does not make it any the less an insurance on her life, such payment being one of the considerations for taking the policy for such limited term. *Aetna L. Ins. Co. v. Mason*, 14 R. I. 588.

The principal ground on which the plaintiffs claim to recover is that the policy was void *ab initio* because the female plaintiff, being a married woman, was incapable of contracting, and consequently the premiums paid by her being moneys paid upon a void consideration can be recovered back as moneys paid to and for her use. The defendant contends that she was capable of entering into a contract of life insurance by force of the statute, R. I. Pub. Stat. chap. 166, § 21. The apparent purpose of this section, however, is not to enable married women to enter into such contracts, but to secure the policy, to the extent of \$10,000, when expressed to be for her benefit, "whether effected by herself, or by her husband, or by any other person on her behalf," to her separate use "independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same on her behalf, his creditors and representatives." It is true the section recognizes that a policy of

life insurance may be effected by a married woman; but we see no reason to doubt that, independently of § 21, under the other provisions of chap. 166, a married woman could invest her own money, being part of her separate estate, in a proper life insurance policy, if she chose, as validly as in a pianoforte or a sewing machine. If, for example, Mrs. McQuitty, instead of paying the first two premiums partly in cash and partly by note, had paid them wholly in cash, and then had taken out a paid-up, a really as well as nominally paid-up, policy, we do not think there can be any question but that it would have been valid and that she could oblige the company to pay it. The question, then, is whether, supposing she was incapable of binding herself personally by her promissory note, the policy was void because the premiums were paid partly in her notes. Suppose she had died in the second year of the original policy, or in the first year of the "paid-up" policy, before committing any default, could the company have repudiated their contract and successfully resisted the payment of it? We think not. The company would have received the larger part of the premiums in cash and have secured the remainder by the right reserved in the policy to deduct it from the sum insured. That they had taken notes from the assured which did not bind her personally would not avail them, since they must be presumed to have known her disability when they took them, and to have relied on their right to deduct and on the conditions of forfeiture as a sufficient protection. They could not be heard to say that the policy was without consideration. *Chamberlin v. Roberts*, 31 Iowa, 408; *Abshire v. Mather*, 27 Ind. 381; *Glass v. Warwick*, 40 Pa. 140.

But if this be so, the policy was not void *ab initio*, and the company is entitled to set up the forfeiture by nonpayment of interest in advance to defeat recovery upon it.

Exceptions overruled; judgment of Court of Common Pleas affirmed, with costs of this court.

Robert SHERMAN, Trustee,
v.

Charles A. COBB.

A lease contained a covenant for "such price or rate of rent as such two or three judicious persons as shall be agreed on by said parties shall judge and determine." The parties entered into a submission to arbitration to two persons named by them, providing that if such two persons could not agree, they should appoint a third, and that the award of either two of the three should be binding. The two arbitrators selected a third, and he, with one of the original two, united in an award. *Held*, that the submission departed from the covenant in making a majority award binding; that hence the award must be considered as made under the submission and not under the covenant; that hence one of the parties to the submission had a right to revoke it before award made, and that an

award made after such revocation was invalid.

(Providence—Decided July 16, 1887.)

ASSUMPSIT. Heard by the court, jury trial being waived.

The facts and case are stated in the opinion.

Mr. James Tillinghast, for plaintiff.

Mr. Patrick J. McCarthy, for defendant.

Per Curiam:

This is assumpsit for the rent of certain premises used and occupied by the defendant. The plaintiff claims to recover the rent by force of an alleged award, signed by Louis J. Doyle and Henry A. Webb, under a submission to arbitration between him and the defendant, by which it was agreed that said Doyle and James Tiffany should fix the rent, and in case they could not agree, that they should have authority to select a third person to aid them, and that the award of either two of the three should be binding. Doyle and Tiffany selected Webb as the third arbitrator. The defendant submitted evidence to show that, before the final conference at which the award was agreed upon, he revoked the authority of the arbitrators and that, thereupon, Tiffany withdrew and no longer acted with the others.

It is a general rule that a party to a submission may, at any time before award made, revoke the authority of the arbitrators. In this case, however, the plaintiff contends that the defendant could not revoke because the submission was in pursuance of a covenant in the lease under which the defendant occupied. *Flint v. Pearce*, 11 R. I. 576.

The lease was for five years, with covenant for renewals and appraisal of rent. The covenant, however, is for "such price or rate of rent as such two or three judicious persons as shall be agreed on by said parties shall judge and determine." In the case at bar only two persons were directly agreed upon as arbitrators, the third having been selected by the two. Perhaps, however, this variation from the covenant might be treated as merely formal, the third being regarded as indirectly selected by the parties. Under the covenant, however, there is no agreement that the award shall be binding unless it is unanimous, and therefore a mere majority award would not be binding under the covenant. The agreement departs from the covenant in its making a majority award binding. We think, therefore, that the award must be regarded as an award, not under the covenant, but under a new and independent agreement, and that, the authority of the arbitrators having been revoked before it was made, it is invalid.

Josiah M. FISKE
v.

George Peabody WETMORE.

1. Although the grant of an estate or easement carries with it by implication whatever incidental right is necessary to its beneficial enjoyment, still such

implications do not add to the extent of the grant as expressed; they simply make it serviceable within the limit expressed.

2. Hence, in the case of the grant of a right of drainage "in and through" a certain private way,—*Held*, that the right of drainage to an outlet beyond the way (here the ocean) was not conferred as an incident to the easement granted.
3. In the absence of prescription, one has no right to use a natural watercourse through the land of another for the carriage of house or stable drainage or sewage; and the same rule applies to the use of a drain substituted for such watercourse.
4. *Held*, on the facts, that the doctrine of apparent and continuous easements does not apply to the present case.

(Newport—Decided March 23, 1887.)

CROSS BILL in equity for an injunction. On respondent's petition for a rehearing. *Petition dismissed.*

The original opinion (wherein the facts are stated), granting the relief prayed for in the cross-bill, is reported in 2 New Eng. Rep. 626.

The questions presented by the present application are stated in the opinion now reported.

Messrs. William P. Sheffield and F. B. Peckham, for Wetmore, respondent in cross-bill, for the rehearing.

Mr. Samuel R. Honey, for Fiske, complainant in cross-bill, *contra*.

Durfee, Ch. J., delivered the opinion of the court:

The respondent asks us to grant him a rehearing for several reasons, one of which is that we were influenced in coming to our former conclusion by certain errors of fact. These errors are stated to be: (1) that a plan of sewerage providing for a sewer in Ruggles Avenue was before the city council of Newport when the indenture granting rights of drainage in and through Lawrence Avenue was executed; (2) that the Lawrence Avenue drain had not previously been used for house and stable drainage; and (3) that said drain is unsuitable for such drainage. The respondent submits affidavits to prove that when the indenture was executed the plan was not before the city council, having been rejected, after adoption by the common council, by the nonconcurring vote of the board of aldermen; that he had used the Lawrence Avenue drain for several years for house and stable drainage, and that such drains were in common use in Newport for such drainage. Some of the reasons given for our former opinions would be weakened by the proof if admitted; but would it lead us to a different conclusion?

What we formerly decided was that the respondent is not entitled, either by prescription or under the indenture, to a right to conduct the sewage of his new stable and tenement through the Lawrence Avenue drain across Ruggles Avenue and the complainant's land to the sea. The indenture grants "the right of drainage in and through" three private ways

or avenues belonging to the grantors, Lawrence Avenue being one. Lawrence Avenue ends at Ruggles Avenue, and therefore the grant according to its terms extends no further. The respondent contends that it extends to the sea by implication, inasmuch as the land, now of the defendant, belonged to the grantors at the date of the grant. He argues that this must have been contemplated by the parties, since otherwise the grantees would take nothing by the grant, a right ending at Ruggles Avenue being unavailable. It was in view of this argument that we formerly referred to the plan of sewerage which we then supposed was before the city council. The rejection of the plan lessens the pertinency of the reference, but it does not convince us that the respondent would attach no value to the right unless it extended to the sea, since the adoption of some system of sewerage is probably only a question of time. Moreover the indenture grants other rights and privileges, and therefore the grant of the right of drainage in addition might be accepted, however small its value.

The respondent, citing many cases, contends that an extension of the right to the sea must be implied as a matter of law. We have examined the cases, and find that they go only to the effect that the grant of an estate or easement carries with it by implication whatever incidental right is necessary to its beneficial enjoyment, provided the grantor has power to bestow it. Thus the grant of a right of way implies a right to make or mend the way. So the grant of a right of turbary implies a right, not only to cut the turfs, but also to stack them for removal. Such implications do not add to the extent of the grant as expressed; they simply make it serviceable within the limit expressed. Cases which hold that the conveyance of a house may carry the site and curtilage are not in point, for they hold that the site and curtilage pass, not incidentally to the house, but as parcel of it, within the meaning of the word "house" as used. A right of drainage from Lawrence Avenue to the sea cannot be construed to pass as parcel of a right of drainage "in and through" Lawrence Avenue.

The case among the cited cases which comes nearest to supporting the respondent's claim is *Bushnell v. Proprietors of Salisbury Ore Bed*, 81 Conn. 150. There the plaintiff conveyed to the defendants a right to wash ore in a stream and discharge the dirt on his meadow lot. The exercise of the right resulted in an accumulation of dirt on the meadow lot which washed down upon the plaintiff's adjoining pasture lot, and the court held that no action would lie for the injury, the same being a natural consequence of the exercise of the right as granted. The case is authority to the effect, not that the grant of the right of drainage in and through Lawrence Avenue implies a right in continuation thereof across the complainant's land to the sea, but only that the respondent would not be liable for any injury resulting to the land of his grantors, or of the complainant as their successor in title, for exercising his right as granted, *i. e.*, in and through Lawrence Avenue.

The respondent contends that he has a right to transmit his house and stable drainage through the drain to the sea, because the

drain is a substitute for a natural watercourse which formerly followed the same direction. If the drain be such substitute, we suppose the respondent may have a right to use it as if it were the watercourse, but he would have no right, except by prescription, to use the watercourse for the carriage of his house and stable drainage or sewage to the sea, since such use would unlawfully contaminate and defile the water running in it. There is no satisfactory proof of prescription; on the contrary, it is in evidence that years after the drain was constructed the water running in it was pure enough to be drunk by both cattle and men.

The respondent contends that he is entitled to the use of the drain from Lawrence Avenue to the sea under the law in regard to apparent and continuous easements. The law referred to is this: when the owner of land subjects one part of it to accommodations resembling continuous easements, for the benefit of the other, such accommodations, by conveyance of the servient parts, will really become continuous easements for the benefit of the other part. *Providence Tool Co. v. Corlies Steam Engine Co.* 9 R. I. 564. It may be that under the rule the complainant's land is subject to the drain for the benefit of Lawrence Avenue, since the drain was there when the land was conveyed to his predecessor in title by the owners of that avenue; but we do not see how it is subject thereto for the benefit of the respondent's land, except in so far as the drain is a substitute for the ancient watercourse. It is true the respondent was using the drain when the land was conveyed; but in so far as he was using it independently of the indenture, the use was either permissive or by way of substitution for the watercourse; and, in so far as he was using it under the indenture, his right did not extend beyond Lawrence Avenue. It will be observed that the right granted by the indenture is not in terms a right to use the existing drain, but only a right of drainage in and through the avenues mentioned; and even if the grant covers house and stable drainage or sewage, it does not follow that the grantees are entitled to use the existing drain, which was laid for other purposes, as a conduit for such drainage or sewage. We have no doubt that the trustees of the Lawrence estate, as owners of the land below Lawrence Avenue, could have refused to permit such use even after the indenture, because such use would send the drainage or sewage through the continuation of the drain upon their land below the avenues in excess of the grant. And if the trustees, as owners of the land below the avenues, were entitled to stop such use or to have it stopped, we think the complainant, as their successor in the title, is likewise entitled to have it stopped.

The respondent contends that to construe the grant so, is to construe it contrary to the intention of the parties. In proof of this he introduces the deposition of one of the two trustees who signed the indenture. We do not think oral testimony is admissible to show the intention of the parties to a written instrument under seal. The deposition, however, scarcely goes to the extent of the respondent's claim; for the deponent, while disavowing any intention to limit the grant to land or surface drain-

age, in answer to the question, "How was it understood that the drainage should be carried off after it was conducted to Ruggles Avenue?" replied: "I don't think there was any understanding about it; my idea was that the drain would find a natural outlet as formerly." Unless a sewer was laid in Ruggles Avenue, we cannot help thinking that if the trustees had really intended to charge their land from the foot of Lawrence Avenue to the sea with such a servitude as is claimed, they would have had an understanding about it and would have expressed, and been required to express, it in plain words.

Petition dismissed.

William H. JOYCE

v.

Sylvester G. MARTIN and Harlan P. Bliss

Where the owner of a defective wharf leases it in the defective condition, and one lawfully using the wharf for the purpose for which it is intended, while in the possession of the lessee, is injured through the defect therein, an action for damages is maintainable against both the lessor and lessee jointly.

(Providence—Decided July 16, 1887.)

TRESPASS on the case. On demurrer to the second count of the declaration. *Demurrer overruled.*

Messrs. Van Slyck & Van Slyck, for defendants:

1. It is submitted that the defendant Martin, the owner, is not liable.

Leonard v. Storer, 115 Mass. 86; *Mellen v. Morrill*, 126 Mass. 545; *Robbins v. Jones*, 15 C. B. N. S. 221; *Pretty v. Bickmore*, L. R. 8 C. P. 401.

The landlord, after the execution of the lease, was under no obligation, and, indeed, had no right, to enter upon the premises, and could not make the repairs.

Taylor, Land. & T. §§ 173, 174, and note; *Barker v. Barker*, 3 C. & P. 557.

In the absence of fraudulent concealment of the defect, defendant Martin was guilty of no misconduct towards the defendant Bliss in making the lease.

Robbins v. Jones, 15 C. B. N. S. 221.

2. Said second count is demurrable for misjoinder.

It sets out what is claimed to be a cause of action against the defendant Martin, and a cause of action against the defendant Bliss.

NOTE.—*Liability of lessor for damages for injuries caused by defects in the leased premises.* In addition to the case of *Albert v. State*, Use of Ryan (Md.), 6 Cent. Rep. 447, cited and quoted from in the present opinion, see the case of *Rankin v. Ingwersen* (N. J.), 8 Cent. Rep. 371, in which it is held that if one create a nuisance on his own premises, and thus become liable for its erection, and also for its maintenance, he cannot escape the latter liability by demising the premises, and that the landlord's liability in such case will not be discharged by reason of his having required the tenant to stipulate to keep the demised premises in repair.

The actions are both in tort, and grow out of the same defect. But the torts are not joint; they are related only.

Bennett v. Fifield, 18 R. I. 189.

The tort of the defendant Martin consisted in knowingly leasing the wharf in a defective condition. In this tort the defendant Bliss had no share. It is expressly averred in the declaration that the defendant Bliss was "then and there ignorant of said dangerous condition of said wharf."

The tort of the defendant Bliss consisted in maintaining the wharf during the term in an unsafe condition.

In this tort, although growing out of his act (leasing in a defective condition), the defendant Martin had no share, for during the outstanding term he could not enter and make repairs.

Taylor, Land. & T. § 173.

Messrs. Augustus S. Miller and Arthur L. Brown, for plaintiff.

Durfee, Ch. J., delivered the opinion of the court:

We think the second count of the plaintiff's declaration sets forth a good cause of action, and that the demurrer to it must be overruled.

Briefly stated, the case set forth is this: On February 15, 1881, the defendant Martin was, and for a long time had been, the owner of an estate in East Providence, bounding on Providence River, known as "Silver Spring," being a place of public resort and entertainment to which the public had long been in the habit of resorting, and of a wharf extending therefrom into said river, over which the people were in the habit of coming and going in great numbers to and from said Silver Spring, and at which many steamboats were accustomed to touch. This wharf was, at the time mentioned, and long had been, unfit for such use in this, that there was a large opening in the top of it which was accustomed to close when the steamboats touched, to the great danger of persons standing there, the wharf being without proper protection against the resulting shock. On February 15, 1881, Martin, knowing this, leased Silver Spring and wharf to the defendant Bliss, who was then ignorant of it, for the term of eight years at \$1,500 per annum, Silver Spring being let to be used as a place of public entertainment and resort, and said wharf as a suitable landing place and place of egress for the numerous visitors thereto. Bliss soon became acquainted with the condition of the wharf, but left it unrepaired until after July 31, 1886, while he continued to invite the public to his resort, both he and Martin meanwhile deriving great gains and profits therefrom. On July 31, 1886, the plaintiff's son, Henry D. Joyce, a boy of eleven years, was on the wharf a visitor at the invitation of Bliss, and while in the exercise of due care, got his foot caught in the opening and crushed by the closing thereof when a steamboat touched the wharf. The plaintiff sues for damages for loss of the boy's services, etc.

In *Owings v. Jones*, 9 Md. 108, the plaintiff sued for damages for injuries received by falling into a vault appurtenant to the property of the defendant, and built under the sidewalk of a public street. It was shown in defense that the property had been leased by the defendant

for the term of seven years, the lessee agreeing to pay an annual rent therefor, but not in any manner stipulating to keep the demised premises in repair, nor to have the sink kept clean; and that the lessee was in possession at the time of the accident. But the court held that the defendant was not relieved from liability if the vault was so constructed as to be unsafe for passers-by when the premises were let, or as to be liable to become unsafe in the necessary opening for the purpose of cleaning it. The court, in giving its opinion, laid down the following doctrines, relying on the authority of *Rich v. Basterfield*, 4 C. B. 784, and the cases cited there, to wit: "(1) when property is demised, and at the time of the demise is not a nuisance, and becomes so only by act of the tenant while in his possession, and injury happens during such possession, the owner is not liable; (2) but where the owner leases premises which are a nuisance, or must in the nature of things become so by their use, and receives rent, then, whether in or out of possession, he is liable for injuries resulting from such nuisance." Numerous cases support this view. *Rosewell v. Prior*, 1 Salk. 460; also 12 Mod. 635, 639; *Rex v. Pelly*, 1 A. & E. 822; *Rex v. Moore*, 3 B. & Ad. 184; *Todd v. Flight*, 9 C. B. N. S. 377; *Nelson v. Liverpool Brewery Co. L. R. 2 C. P. Div. 311*; *Pretty v. Bickmore*, L. R. 8 C. P. 401.

In the last-named case the lessor was held to be exempt from liability because he let the premises by lease in which the tenant covenanted to keep them in repair. See also the following American cases: *Staple v. Spring*, 10 Mass. 72; *Fish v. Dodge*, 4 Denio, 311; *Davenport v. Ruckman*, 37 N. Y. 568; *Anderson v. Dickie*, 26 How. Pr. 105; *House v. Metcalf*, 27 Conn. 631.

In *Godley v. Haggerty*, 20 Pa. 387, affirmed in *Carson v. Godley*, 26 Pa. 111, it was held that where the owner of real estate erected thereon a row of buildings, with the intention of renting them to the government as bonded warehouses, and with the knowledge that they would be obliged as such to sustain very great weight, he was liable in damages for an injury to a person employed in one of the stores, occasioned by its fall, after having been so rented, though the immediate cause of the accident was the storage of heavy merchandise in an upper story, it appearing that the building had been constructed on a defective plan and of insufficient strength.

In *Swords v. Edgar*, 59 N. Y. 28, it was held that the lessors of a pier, which was in possession of their lessee from whom they were receiving rent for it, were liable for an injury received by a longshoreman engaged in discharging a cargo thereon, the cause of the injury being a dangerous defect which existed at the date of the demise. The pier, though private property, was kept for use by all vessels which might come to it for the purpose of loading and unloading, and the court held that the longshoreman, being in the employ of such a vessel, was to be regarded as there by invitation, and therefore as entitled to the protection which would result from having the pier in an ordinary state of security and strength. The court also held that though the lease contained a covenant binding the lessee to keep the pier

in good order and repair, the lessors were not exonerated thereby, dissenting from *Pretty v. Bickmore*, *supra*.

In *Edwards v. New York & H. R. R. Co.* 98 N. Y. 245, the plaintiff was injured by the falling of a gallery in a building let to be used for public exhibitions, and it was held that the lessors were not liable, there being no evidence that they either knew or had reason to know that the gallery would be used in such a way as to endanger its security. The court, however, in delivering judgment said: "If one builds a house for public amusements or entertainments, and lets it for those purposes, knowing that it is so imperfectly or carelessly built that it is liable to go to pieces in the ordinary use for which it was designed, he is liable to the persons injured through his carelessness." A vigorous dissenting opinion, arguing that the lessors ought to be held to respond in damages, was drawn up by Ruger, *Ch. J.*, and concurred in by Danforth and Finch, *JJ.* See also *Camp v. Wood*, 76 N. Y. 92.

The case of *Albert v. State*, 6 Cent. Rep. 447, appears to have been almost identical in its circumstances with the case at bar. It was an action brought by or for a minor for damages sustained by him by the death of his parents, who were drowned by reason of the defectiveness of a wharf in the occupation of the defendant's tenant. The instruction given on trial to the jury was that, "if the jury found that the defendant was the owner of the wharf, and that he rented it out to a tenant, and that at the time of the renting the wharf was unsafe, and the defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover." On appeal this instruction was approved by the court of appeals as correct.

Several of the cases above cited are cases in which the lessors were held to respond in damages because the premises from which the injuries were received were in such a state as to be nuisances, public or private, when let; but others are cases in which the lessors were held to respond because the premises, let by them for a rent or profit, were let to be used for purposes for which they were not fit or safe to be used, and because the lessors knew, when they let them, the purposes for which they were to be used, and also knew, or ought to have known, that they were not fit or safe to be so used. The latter class includes *Godley v. Haggerty*, *Swords v. Edgar*, and *Albert v. State*, *supra*; the liability which it proclaims being of special application where the premises are let to be used for popular resort or entertainment, or for other public or quasi public purposes. And, indeed, a disposition appears to exist on the part of some judges to limit the lessors' liability, except for nuisances, to cases in which the injuries complained of are attributable to defective or dangerous premises let to be so used. The case at bar plainly falls within this class, even when so limited.

The defendants cite *Leonard v. Storer*, 115 Mass. 86. In that case the plaintiff was injured

while passing along a public street in Boston by the falling of snow and ice upon her from a house belonging to the defendant, but leased by him nearly twelve years before for the term of fifteen years to a tenant who, by the terms of the lease, was "to make all needful and proper repairs, both external and internal." The plaintiff sought to charge the defendant because the roof was so constructed that the snow and ice collecting upon it would naturally slide into the street. The court held that it did not appear that the tenant "might not have cleaned the roof by the exercise of due care, or that he could not by proper precautions have prevented the accident," nor that "any neglect of duty, or wrongful act on the part of the defendant, was the cause of the injury," and affirmed the judgment for the defendant. The ground of decision is not very clearly set forth, but it would seem that the defendant was discharged because the injury was attributable to the negligence of the tenant instead of to any defect in the structure of the house; or, if there was any defect, because it was for the tenant alone, under the lease, to remedy it. It will be observed that the defendant, if charged, would have been charged on the ground that the house when let was a public nuisance, and the case would have belonged to the first class of cases as above.

The defendants also cite *Mellen v. Morrill*, 126 Mass. 545. In that case the defendant was the owner of a dwelling-house which he let by parol to a tenant, who occupied it for a dwelling-house and market. The walk from the street to the door led along an embankment, and was unsafe for want of a railing. The plaintiff, in going to the house along the walk in the night-time, for the purpose of settling an account with the tenant, fell down the embankment and was injured.

The court held that the defendant was not liable, but that it was the duty of the tenant, if he used the premises so as implicitly to invite people to visit them in the night, "to make them safe by a railing, or by a light or other warning." It did not appear that the defendant let the premises to be used as a market. Moreover it would seem that they might have been safely used if the tenant had simply set out a light or other warning. See *Rich v. Basterfield*, 4 C. B. 784.

We think the action is maintainable against the lessor and lessee jointly. The case of *Irvine v. Wood*, 51 N. Y. 224, is exactly in point. There the cause of the injury was a coal-hole excavated in a city sidewalk and defectively covered, which was used by lessees of the premises. The lessor did not contest his liability. The court held that the lessees were liable jointly with him. The court in giving judgment said: "The landlord rented the nuisance and took rent for it. The tenants used it and paid rent, and hence they must all be considered as continuing and responsible for the nuisance,"—citing *Rex v. Paddy*, 1 A. & E. 822; *Anderson v. Dickie*, 26 How. Pr. 105; *People v. Erwin*, 4 Denio, 129. See also *Rex v. Moore*, 3 B. & Ad. 184.

Demurrer overruled.

VERMONT.
SUPREME COURT.

Loomis WELLS

v.

Stephen F. AUSTIN.

1. A sale of land to satisfy taxes assessed by the Legislature is not invalidated by the fact that the statute was not strictly complied with as to the publication of the notice of the proposed application to the Legislature for the assessment of the tax.
2. A Special Act of the Legislature, assessing a land tax, is not limited by the general law providing that the committee appointed to superintend the expenditure of taxes should not be allowed their account for labor, unless it had been completed, to the amount of the tax, within two years from the rising of the Legislature.
3. In a case involving the validity of a tax sale, it is immaterial whether the rate-bill issued to the collector correctly contained the name of the original proprietor.
4. Under Rev. Stat. chap. 4, § 2, the majority of said committee could act in the premises.
5. One of the committee signed by mark; the proof of the proceedings was made by copies from the public records. *Held*, that it was not necessary to verify the signature.
6. The collector could lawfully adjourn the sale.
7. A party, to avail himself of an estoppel by conduct, must show affirmatively that he has acted in reliance upon the fact being otherwise than it is claimed to be; thus, the plaintiff is not estopped, although, prior to his becoming the owner of the lot, he advised with and assisted the defendant in a lawsuit, in an attempt to establish his title to it, it not appearing that the defendant had done anything in reliance upon the plaintiff's acts.
8. A possession that will work an ouster of the owner must be open, notorious, hostile, and continuous; thus, where there is no color of title, the fragmentary possession of a wild lot, arising from the paying of taxes and the cutting of a few trees here and there, and at different times, is not sufficient.
9. A certain survey (*q. v.*) held not to show color of title.

(Essex—Decided August 18, 1887.)

TRESPASS *quare clausum*. Heard on a referee's report, September Term, 1884, Essex County, Ross, J., presiding. Judgment for the defendant. *Reversed*.

The case appears in the opinion.

Mr. William H. Heywood, for plaintiff:

The Legislature had power to assess the tax without any notice.

VT.

Cortiss v. Cortiss, 8 Vt. 373; *Crosby v. School Dist. No. 9 in Readsboro*, 85 Vt. 623.

The sale was valid.

Messrs. Bates & May, for defendant:

The tax sale was not valid. The notice of intention to apply to the Legislature for an assessment of a tax upon the nonresident landowners was not properly published.

Slade, Comp. 1824, p. 682, § 2.

The law required a new notice in the newspapers after the extension was granted; but no new notice was in fact given to the landowners. By the record it appears that work was done upon the roads by landowners in 1840.

Rev. Stat. p. 405.

The notice of sale to delinquents, made in 1840, was signed by Mr. Appleton, and a man, said to be Mr. Bell, also made a mark. The rate-bill is also signed in the same way. Mr. Buck's name disappears after the first notice to taxpayers, March 20, 1838.

Acts 1837, p. 76; *Townsend v. Gray*, 1 D. Chip. (Vt.) 127; *Danville v. Montpelier & St. J. R. R. Co.* 43 Vt. 144; *First Nat. Bank of North Bennington v. Mount Tabor*, 52 Vt. 87.

This statute was a private one, and there is no proof that Mr. Buck in any manner participated in these acts of his associates, or consulted with them. Will this court call this mark of Mr. Bell a signature of anyone until the same is in some manner authenticated?

Lyons v. Holmes, 32 Am. Rep. 482.

The sale of 50 acres of land to pay a \$2 tax was in violation of the rights of landowners, and contrary to the law.

Slade, Comp. 662.

The advertisement of the collector was to sell only so much of the lands "as will be requisite to discharge their respective taxes, with costs." The warrant to the collector in this case is to same effect.

Ainsworth v. Dean, 1 Foster (N. H.), 400; *Loomis v. Pingree*, 43 Me. 299; *Stead's Err. v. Course*, 4 Cranch, 403 (8 U. S. bk. 2, L. ed. 660); *Slater v. Maxwell*, 6 Wall. 268 (73 U. S. bk. 18, L. ed. 796); *O'Brien v. Coulter*, 2 Blackf. (Ind.) 421; *Doane v. Chittenden*, 25 Ga. 103.

The plaintiff is estopped by his conduct. The defendant has gained title to the lot by adverse possession.

Bing. Real Prop. 583; *Perry v. Weeks*, 19 Rep. 144; *Hodges v. Eddy*, 38 Vt. 337.

Powers, J., delivered the opinion of the court:

This is an action of trespass *quare clausum* to recover damages for cutting timber on lot 5, range 4, in Granby.

The plaintiff claims title, through sundry mesne conveyances, under a tax sale of the premises in question, made in 1840 by Timothy Fairchild, collector of a land tax. The defendant interposes sundry objections to said tax sale.

1. The Legislature, November 1, 1837, assessed a tax of four cents an acre on the lands in Granby, and appointed Silas Buck, Ashley Appleton, and Nathaniel Bell a committee to superintend its expenditures, and said Timothy Fairchild collector. In 1840 the Legislature passed an Act entitled "An Act Reviving an Act Laying a Tax on the Lands in Granby," as follows: "An Act Laying a Tax on the Lands in Granby, passed November 1, 1837, is here-

by revived, and the committee appointed to superintend the expenditure of said tax are allowed the term of one year from the passage of this Act to complete the working out of the same."

At the time both said Acts were passed, we had a statute in force requiring notices by publication in certain papers of proposed application to the Legislature for the assessment of land taxes. In June, 1837, such notice of the tax in question was published, but not in the papers named in the statute. It is claimed that this omission invalidated the Acts in question, and, by consequence, the tax sale of Fairchild.

But this is not a case where the jurisdiction of a tribunal to take action is dependent upon notice and an opportunity to be heard. The Legislature has plenary and exclusive jurisdiction over the whole subject of taxation, limited only by constitutional restrictions. It may act on the subject whether the taxpayer has notice or not. Similar statutes have been in force since the earliest organization of the State, and many Acts have been passed in disregard of them; but we have never understood that such Acts were void for this reason. In *Smith v. Helmer*, 7 Barb. 416, this question arose under a similar statute in New York. The court said: "That the notice was a direction to the public calculated merely to guard the Legislature from surprise and fraud, and to prevent hasty and improvident legislation; that the rule was made by the Legislature for its own convenience, and might be entirely disregarded; and that a law would be valid although no notice whatever of its application was published."

The rule of strictness applied to the proceedings of tax sales is only invoked upon those proceedings taken after the Legislature imposes the tax.

2. It is urged that, as the tax was not levied, collected, and expended within two years from the passage of the Act of 1837, Fairchild's authority was gone, and the proceedings should begin *de novo*; and we are referred to Slade, Comp. 1824, p. 668, § 7, and Rev. Stat. 1839, p. 406, § 5; p. 408, § 13. Neither of the statutes referred to, nor any others, fixed any limitation within which the Acts in question should continue in force, but both provide that the committee appointed to superintend the expenditure of a land tax shall not be allowed their account for labor unless such labor, to the amount of the tax, be completed within two years from the rising of the Legislature appointing them committee. This comes far short of a limitation upon the continuance of the Act imposing the tax. It was designed to promote diligence in the repair of roads, under a penalty of refusal to audit their accounts.

But this difficulty was avoided by the Act of 1840, which revived the Act of 1837 and extended the time allowed to the committee for completing the labor upon the roads. The Act of 1837, like all statutes providing for special things to be done, continues in force until such things are done. The authority to Fairchild was to collect the tax then voted. His authority would continue until the tax was collected. So far as he was concerned, and so far as all other matters and things appertaining to the levy, collection, and expenditure of the

tax were involved, except the audit of the committee's accounts, the Act of 1837 needed no revival; and the Act of 1840 was manifestly passed merely to remove the bar to such audit. The landowners had had their opportunity to work out their taxes under the Act of 1837, and had lost it long before any necessity for the Act of 1840 had become manifest.

3. It is objected that the notice to the landowners of the assessment of the tax and that they might pay the same in labor, as provided by the statute, was published in April, 1838, whereas it should have been published partly in March and partly in April. We are quite at a loss to comprehend this objection. The defendant's counsel, in their brief, say the law required this notice to be published in March or April; that no change in this respect was made between 1824 and 1839. This publication was in 1838. Counsel are correct as to the law; and they would have been correct if they had added to their brief that this notice was published in strict conformity with the law.

4. It is said that the rate-bill issued to the collector by the committee set out the lot sold in the columns designating the original proprietors, the number, range, and number of acres, as follows:

Original Proprietor	Lot	Range	Acres	Amt. of Tax
Robert Pike				
Southwest half	5	4	50	\$2

whereas, they argue, Samuel Parker was the original proprietor of said lot.

The referee refers in the report to the proprietor's records, but only meagre abstracts have been furnished us. However, it appears therefrom that at a meeting held some time, the date not appearing, the proprietors of Granby chose a committee to draw the lots according to the statute, and that lot 5, range 4, section 10, was drawn to Samuel Parker. The record further shows that at a meeting held October 27, 1795, the proprietors "voted that, whereas the proprietors at their meeting holden heretofore, have given, as encouragement to the twelve settlers who should first settle in said town, a tract of public land not exceeding 150 acres to each, and whereas the following persons have made improvement according to said vote, and are considered as settlers, and to hold and enjoy to themselves and heirs and assigns forever in fee the lands hereafter voted to them respectively, viz.: To Robert Pike the half of lot 5 in the 4th range, and the half of lot 5 in the 5th range, to him, his heirs and assigns, forever."

The Act of March 9, 1787, provided for a division of lands among proprietors by lot, and in the same section provided that "nothing herein contained shall prevent the proprietors from voting to any settler the lot he lives on in lieu of his draft."

It is quite evident that the vote recited was taken under the statute, and that Robert Pike was, by the action of the proprietors, the "original proprietor" of half of lot 5, range 4. He was a "settler," and had "made improvements" as "encouraged" by a former vote of the proprietors.

Where his half of lot 5 was, is shown by the report. The plan shows that the "Pike lot,"

called the "settling" or "settler's" lot, was the southerly half of lot 5. Lot 5 was apparently cut up in accordance with the well-known usage of the time by running the division lines at right angles to the range lines. The referee says that Pike went on to this lot at an early day, cleared up 15 to 25 acres, and had a house thereon. Pike sold in 1808 to Elliott part of his settling lot by warranty deed, describing his grant as "the westerly half of settling lot No. 5 in the 4th range, containing 50 acres, together with the buildings and all the appurtenances thereunto belonging."

The "half of lot 5" voted to Pike is clearly the southerly half as indicated on the plan, and he was the original proprietor thereof, and not Parker. But it is said that it is called the "southwest half" in the rate-bill. A glance at the plan will show, as the referee says, that the range lines were run at an angle of forty-five degrees to the meridian line. It could well be called the southwest half.

But no law in force required the committee to set the name of the original proprietor in the rate-bill or to supply any rate-bill at all. It obviously was necessary, or some document equivalent to it, to enable the collector to know and describe the land he was to sell. But the purpose of it is to describe the lands, and in his notice of sale, as well as in the rate-bill, the name of the proprietor is merely descriptive of the land. The name of a later owner might just as well be used.

We think there is no support for this objection.

5. The Act appointed Buck, Appleton, and Bell, committee. All signed the notice to land-owners, but Appleton and Bell only signed the subsequent proceedings. It is said all should have signed, or at least have acted.

There is a class of cases holding that where there is a joint power given to three, all must act and all concur; and another class holding that all must act, but a majority may decide. The cases are reviewed in *First Nat. Bank of North Bennington v. Mt. Tabor*, 52 Vt. 87. But when these proceedings were had, our statute (Rev. Stat. chap. 4, § 2) provided that "all words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons," etc. This statute is different from the one now in force, and clearly gives to the majority full power to act in the premises.

Buck did act at the outset of the proceedings, and we cannot presume that he did not continue to act throughout from the fact that he omitted to sign certain papers made by the committee. If he acted but dissented from the conclusions reached by his associates, their conclusion is nevertheless sufficient.

Bell signed by mark. This signature is not required to be verified. The proof of the proceedings is made by copies from the public records, and the signatures are presumed to be copies of genuine originals.

6. The collector adjourned his sale from time to time. The day fixed for the sale was February 25, 1841, and on that day the Pike lot was sold. If a subsequent adjournment was made, it would not affect the validity of this sale. But it did not affect any sales. The

collector is bound to conduct the sale for the best interests of all concerned. If he deemed it necessary to adjourn, he had the right to do so. No presumption is to be made against his doings.

On the whole, no reason has been shown us why the Fairchild tax sale was in any way irregular, and we think it conveyed the title of the lot in question to the plaintiff's grantor; and if so, it is conceded that the plaintiff holds the legal paper title to said lot.

But it is insisted that the plaintiff is estopped from asserting his title against the defendant, because he knew as early as 1865 that the defendant claimed the lot, paid taxes upon it, and in a lawsuit in 1870, or earlier, advised with and assisted the defendant in his attempt to establish the title to the lot. This all happened before the plaintiff got his title in 1872. He has not, as an owner, stood by and encouraged the defendant to make expenditure in the effort to make title to land in which the plaintiff had an interest, nor is it shown that the defendant, in what he has done to make title, has relied upon anything done or omitted by the plaintiff. The defendant, to avail himself of an estoppel by conduct, must show affirmatively that he has acted in reliance upon the fact being otherwise than it is claimed to be. *Earl v. Stevens*, 57 Vt. 474.

Lastly, the defendant claims the lot by adverse possession.

The plaintiff concedes that the defendant has got title by possession to the westerly half of the settling lot, but denies the claim to the easterly half where the cutting took place.

The westerly half has been enclosed by a fence and used in connection with the defendant's adjoining lands for a great many years, but such use has no relation to the possession relied upon to establish title to land east of said fence.

It is elementary that a possession that will work an ouster of the owner must be open, notorious, hostile, and continuous. If stealthy, hidden, permissive, or intermittent, it will not avail. The tenant must unfurl his flag on the land and keep it flying, so that the owner may see, if he will, that an enemy has invaded his dominions and planted the standard of conquest.

The defendant confessedly had no color of title to the easterly half unless the Houston survey can be called such. This was made in 1870, eleven years before the plaintiff gave notice to the defendant to quit. No possession, therefore, for fifteen years, under color of title is shown. All possession prior to the Houston survey was strictly *possessione pedis*. The Houston survey is in these words and figures:

"Survey bill of division line between S. F. Austin and A. R. Boyce.

"Survey made January 24, 1870, for Stephen F. Austin. Commencing on range line between range 4 and 5, 100 rods from the corner of lot 4, range 5, on said range line near a fence. Run south 45½ degrees east to range line between range 3 and 4 to stake; thence north 49 degrees east 50 rods to a small spruce tree 1 rod beyond an old corner, or that J. Chandler run a line from in March, 1867; then spotted a line about 1 rod from the line run by said Chandler on the northeast side in a northwesterly direc-

tion to a stake for a division line of said lot 5 in range 4.

J. R. Houston."

This document does not show color of title to the land in question so as to extend a possession constructively to the whole tract. Indeed it would be pretty difficult to locate any land within the description. *Atkinson v. Patterson*, 48 Vt. 750.

The possession of the defendant has been fragmentary and occasional. In 1864 or 1865 he cut one or two trees for shingles, east of the fence and about the centre of the lot. He also cut and made long shingles on this part of the lot several times about 1872. About 1871 he cut the timber on a strip 3 or 4 rods wide next to the Boyce piece on the north side. He has occasionally repaired the old slash fence dividing the easterly and westerly halves of the lot, and cut trees for this purpose on either side of the fence as happened to be the most convenient. He has paid the taxes on the land since 1862.

Nothing else is shown as to his acts from 1860 to 1881, when the plaintiff interfered with him.

It is fundamental that the claim of an adverse possession must be made out by clear and satisfactory proof. Every presumption is to be made in favor of a possession in subordination to the legal title. The burden is on him who sets up an ouster.

Sedg. & W. Land Title, §§ 728, 730 et seq.; 2 Waterman, Trespass, § 633.

It follows that acts of occupancy, that as well indicate a trespass by a wrongdoer as a possession by an owner, are *prima facie* trespasses.

A roving possession from one part of a tract to another is insufficient. *Potts v. Gilbert*, 3 Wash. C. Ct. 475.

The location and natural features of the land will obviously determine in a large degree the characteristics of the possession of which it is susceptible. *Boven v. Guild*, 180 Mass. 123.

If it be near or remote from a mill or farm, and at customary intervals is invaded for wood or lumber, this stamps the impress of ownership upon the possession. *Miller v. Long Island R. R. Co.* 71 N. Y. 883. On the other hand, if it be "marauder's ground," invaded whenever and wherever it is convenient to answer a temporary call for shingles or lumber, the entry is mere depredation. *Beaupland v. McKeen*, 28 Pa. 124.

Between these two extremes there is a debatable ground where it is oftentimes difficult to distinguish the features of the occupancy.

Again, when the occupancy is under color of title as well as claim of right, less positive and pronounced acts of possession are required than in its absence.

But in all cases the burden is upon the party claiming an adverse possession to show a state of facts that establish the adverse title. Here the facts detailed in the report come far short of this requirement.

Without color of title the defendant cuts a tree or two in 1864 or 1865, the circumstance so insignificant as to leave the cutting doubtful in time and extent; then neglects the land thereafter till 1871, when he cuts the strip on the north line next to Boyce, how long the strip or why cut over not appearing; then makes shingles in 1872,—how many and the character of 382

the occupancy are not shown,—and finally the haphazard cutting of trees to repair the fence on either side as was most convenient,—are the acts disclosed as constituting an occupancy openly and continuously hostile to the true owner.

The judgment is reversed, and judgment for the plaintiff to recover the damages found by the referee.

Ira ANDREWS

v.

Thomas BAKER.

An action of replevin, brought before a justice of the peace, is appealable, when the *ad damnum* in the writ is \$20, and the value of the property, as shown by the return, was \$8.*

(Washington—Filed September 3, 1887.)

REPLEVIN for a cooking-stove, stove-pipe, etc., brought before a justice of the peace, and appealed by the plaintiff. Heard on the defendant's motion to dismiss, September Term, 1886, Washington County, Powers, J., presiding. Judgment sustaining the motion. *Reversed.*

The motion to dismiss was put upon the ground that neither the *ad damnum* in the writ, nor the sum demanded by the declaration, nor the amount of the property in the demand, exceeded the sum of \$20; and that the action was not an action of trespass on the freehold. The writ was dated August 2, 1886.

Messrs. Heath & Willard, for plaintiff, cited—

Flisk v. Wallace, 51 Vt. 418; *Rev. Laws*, §§ 821, 1246; Acts 1884, No. 122; *Gen. Stat.* chap. 31, § 18.

Mr. John G. Wing, for defendant:

The only question in this case is, Has the county court appellate jurisdiction of the action of replevin when neither the sum demanded by the declaration, nor the *ad damnum* of the writ, nor the specifications and exhibits of the plaintiff on trial, exceeds the sum of \$20?

Acts 1884, No. 122; *Tripp v. Leland*, 39 Vt. 63; *Earl v. Leland*, 14 Vt. 328; *Morgan v. Mead*, 16 Vt. 644.

The damages are but an incident to the detention, and are no part of the action of replevin.

Burke v. Grace, 1 Conn. L. ed. 143 (3 New Eng. Rep. 307), 53 Conn. 518.

The plaintiff cannot add his damages to the value of the property and thereby make his case appealable.

Taft, J., delivered the opinion of the court:

The question presented by the exceptions was decided in *Flisk v. Wallace*, 51 Vt. 418.

Judgment reversed; cause remanded.

**Rev. Laws*, § 821. "A justice shall have jurisdiction of actions of a civil nature where the debt or other matter in demand does not exceed \$20, except actions for slanderous words, false imprisonment, replevin for goods and chattels where the value thereof exceeds the sum of \$20," etc.

Simon PARKER *et al.*

v.

EAST MONTPELIER and Calais.

The county court has only appellate jurisdiction under Rev. Laws, § 2959, which regulates the laying of a highway on or near a town line; and, in a proceeding brought under Rev. Laws, § 2969, which regulates the laying of a highway extending into or through two or more towns, has no power to assess one town to pay any part of the expenses of building a highway in another town.

(Washington—Filed September 3, 1887.)

ROAD PETITION, brought under Rev. Laws, § 2969. Heard on the report of commissioners, September Term, 1886, Washington County, Powers, J., presiding. Judgment that the commissioners had no power, under a petition framed as this one was, to award that Calais should bear any part of the expense of building the road lying in East Montpelier. *Affirmed.*

Exceptions by East Montpelier:

The commissioners reported that the highway in question was near the line between the towns of East Montpelier and Calais; that the same was necessary,—and recommended that the town of Calais should pay the land damages in Calais, and that Calais should contribute the sum of \$250 toward the expense of building that part of the highway in East Montpelier. Only a small portion of the highway was in Calais.

Messrs. Heath & Willard, for East Montpelier:

Nice rules of pleading should not be applied to such a proceeding as this. Here it appears from the report that it is entirely appropriate, under Rev. Laws, § 2958, to require Calais to do something more than build the few rods of road laid within its limits.

Mr. S. C. Shurtliff, for Calais:

Neither the petition nor the report brings the case within Rev. Laws, §§ 2958, 2959. Application must first be made to the selectmen of the towns, and on their refusal or neglect to lay the road, a petition must be made to the county court. That court has no original jurisdiction.

Taft, J., delivered the opinion of the court:

This proceeding was brought under Rev. Laws, § 2969, by petition of freeholders, directly to the county court. That court held that it had no power to assess the town of Calais to pay any part of the expenses of building the road lying in East Montpelier. This holding was correct. The council for the petitioners do not insist that the town of Calais could have been assessed by force of that section, but contend that it was proper to do so under Rev. Laws, § 2959, regulating the laying out of a road on or near the line between two towns. The difficulty with this claim is that the county court had no jurisdiction, under § 2959, to lay out a road. Its jurisdiction under that section was appellate, and attached in case the selectmen of the respective towns did not, upon petition, lay out the road, and in such case only.

WT.

The selectmen of the defendant towns have never been asked to establish the road under this latter section. The county court could not establish it under that section, having no jurisdiction; and could not assess the town of Calais to help build the road in East Montpelier, having no power to do so by force of the statute under which the proceedings were instituted.

The judgment of the County Court therefore was correct and is affirmed.

STATE of Vermont

v.

Maurice LOCKLIN.

A plea to an indictment charging a breach of the peace, which alleges that the offense with which the respondent is charged in the present indictment is part of an offense for which he had been indicted and convicted, is sufficient on demurrer.

(Washington—Filed September 3, 1887.)

INDICTMENT for a breach of the peace. Heard on demurrer to the respondent's plea, September Term, 1886, Washington County, Powers, J., presiding. Judgment sustaining the demurrer. *Reversed.*

The indictment charged that the respondent "did disturb and break the public peace by tumultuous and offensive carriage, by assaulting and striking one Marlin Hill," etc. The plea set out the former indictment, wherein it was charged that the respondent made an assault upon one Herman Hill "with a certain dangerous weapon * * * to kill and murder," etc., and also set out the verdict of guilty of common assault.

Messrs. Heath & Willard, for respondent:

The prior conviction of an offense which is part of the offense charged in the later indictment is a bar.

1 Bish. Cr. L. 1057; *Solliday v. Commonwealth*, 28 Pa. 18; Bish. Directions & Forms, 1042; *State v. Matthews*, 42 Vt. 545.

Mr. E. W. Bisbee, State's Attorney, for the State:

The two offenses set out in the two indictments are different in law and fact. One is the common-law offense of assault, and the other is statutory.

Ross, J., delivered the opinion of the court:

The respondent's plea sets forth another indictment for an assault upon Herman Hill, of the same date with the one under consideration. The one under consideration is for an assault upon Marlin Hill. The plea alleges that the assault charged in the present indictment is "a part of one and the same breach of the peace" charged in the former indictment for which he has been convicted; and that the assault charged in the present indictment was "incident to, and a part of, the assault" for which he has been convicted, and prays for a discharge from the present indictment. The allegations of the plea are admitted by the demurrer. The

substance of the whole plea is that the offense with which the respondent is charged in the present indictment is part of an offense for which he has been indicted and punished. As the whole includes all the parts, in legal effect, the plea alleges that the respondent has been already punished for the offense charged in the present indictment, and this is admitted by the demurrer. Whether the plea is true in fact, we have no occasion or right to inquire. If it is not, the State should have traversed it. As admitted by the demurrer, it, in legal effect, alleges that the respondent has already been punished for the very offense charged in the present indictment, in the conviction on the former indictment.

Exceptions sustained, judgment and sentence reversed, and cause remanded.

F. A. CROSS

v.

Nathaniel PIKE and Robert Pike.

A deed conveyed a sawmill, "with the privilege of occupying land in front of said mill and below the same, * * * sufficient for a timber-yard adjacent to said sawmill." Held, that only an easement was granted in the mill-yard.

(Caledonia—Filed September 7, 1887.)

TRESPASS for the entrance upon the plaintiff's close and cutting the grass. Heard on a referee's report, December Term, 1886, Powers, J., presiding. Judgment on the report for the defendants. *Reversed.*

Messrs. Walter P. Smith and L. P. Poland, for plaintiff:

The language used in the deed—"privilege of occupying," etc.—is the common and ordinary language when a license or permission is granted. The words are inconsistent with the idea of absolute ownership. If they convey a title in fee, it is unsafe to attempt to grant privileges of use.

Hale v. Barrows, 22 Vt. 240.

Messrs. Nichols & Dunnnett, for defendants:

It is a general principle that when property is granted, all that is necessary to the enjoyment of the grant is impliedly granted as incident to the express grant.

The term "mill-site," first used in the description, is sufficient to convey the land upon which the mill stood, the water privilege connected with the mill, and the mill-yard.

Hastbrouck v. Vermilyea, 6 Cow. 677; Hapgood v. Brown, 102 Mass. 452; Forbush v. Lombard,

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13 Met. 109; *Whitney v. Olney, 3 Mason, 280; Farrar v. Cooper, 34 Me. 394.*

It follows, then, that this deed grants a fee in the mill-yard unless the grant is limited by the words following,—“with the privileges of occupying land in front of said mill and below,” etc. Had it been the intention of the parties to limit the use of this parcel of land for the mere purpose of a mill-yard, or so long as the mill should stand, they would have introduced some words of limitation into the deed; that he should occupy so long as the mill stood, or so long as it was occupied for a mill-yard.

We say that the language,—“the privilege of occupying land * * * sufficient for a mill-yard,”—instead of limiting or qualifying the premises previously granted by the term “mill-site,” amounts to an express grant of the mill-yard. The words “sufficient for a mill-yard” are used as a measure of the quantity of the land conveyed. This particular parcel of land has been used for a mill-yard at least forty-eight years, and its bounds had become definite.

The reasonable construction of the language of the entire deed evidences the intention of the parties to grant the title in fee to the mill-ground.

Farrar v. Cooper, 34 Me. 394; Monmouth v. Plimpton, 1 Me. L. ed. 26 (1 New Eng. Rep. 294), 77 Me. 556; Hale v. Barrows, 22 Vt. 240.

Taft, J., delivered the opinion of the court:

The question in this case is whether the deed of Ephraim C. Parks to Daniel Pike conveyed a fee in the land occupied as a mill-yard. The description in the deed is as follows: “A certain mill-site, situated in Concord, described as follows,—it being a certain piece or parcel of land now occupied by a sawmill, or on which a sawmill now stands, situated a few feet below the gristmill, * * * meaning to convey the land on which the sawmill now stands, together with the mill thereon situate, with the privilege of occupying land in front of said mill and below the same, not interfering or obstructing the right of way to the flour-mill, sufficient for a timber-yard, adjacent to said sawmill.”

It is evident, from the language used, that the grantor intended to convey an interest in the mill and site, differing from the interest conveyed in the land used as a mill-yard. In the one case he conveyed the land, in the other the privilege of occupying the land. If he was to convey a like interest in both pieces, why were the words “privilege of occupying” inserted? The words, in the connection in which they are used in the deed, merely grant an easement,—a right to occupy the yard in front of the mill, in connection with the mill. They are plain, unambiguous, and we construe them as granting an easement only in the mill-yard.

Judgment reversed, and judgment for plaintiff.

CONNECTICUT.
SUPREME COURT OF ERRORS.

John PINCHES

v.

SWEDISH EVANGELICAL LUTHERAN CHURCH.

1. **Compensation** should be allowed for services rendered and materials furnished under a special contract, but not in entire conformity with it, provided the deviation from the contract was not willful, and the other party has availed himself of and been benefited by such labor and materials; and, as a general rule, the amount of such compensation is to depend upon the extent of the benefit conferred, having reference to the contract price for the entire work.*
2. Hence, where the result of the contractor's labor and materials is a structure adapted to the purpose for which it was built, and of which the other party is in the use and enjoyment, but which cannot be made to conform to the special contract except by an expenditure which would probably deprive the contractor of any compensation for his labor, the contractor is entitled to recover the contract price less the amount of the diminution in the value of the building by reason of his deviation from the contract; and the other party to the contract is not entitled to claim as damages the amount it would cost to make the building conform to the contract.

(Hartford—Filed July, 1887.)

A PPEAL by defendants from a judgment of the Superior Court for Hartford County in favor of plaintiff in an action for work and materials. *Affirmed.*

The facts and questions presented are stated in the opinion.

Mr. John Walsh, for defendants, appellants.

Mr. F. L. Hungerford, for plaintiff, appellee.

Beardsley, J., delivered the opinion of the court:

The plaintiff claims to recover upon the counts for work and materials furnished in the erection of a church edifice for the defendants. A written contract was entered into by the parties, providing that the plaintiff should erect the edifice upon the land of the defendants, in accordance with certain plans and specifications. The plaintiff completed the building on the 21st day of January, 1885, when the defendants entered into the full possession and occupancy of the same. The building varies from the requirements of the contract in several material particulars. The ceiling is two feet lower, the windows are shorter and narrower, and the seats are narrower, than the specifications require, and there are some other variations and omissions. The defect in the

height of the ceiling is due to the combined error of the plaintiff and the defendants' architect. The other changes and omissions occurred through the inadvertence of the plaintiff and his workmen. The defendants knew of the change in the height of the ceiling when they took possession of the building, and of the changes in the windows and seats shortly afterwards, and objected to the changes as soon as they discovered them.

The plaintiff, in doing the work and furnishing the materials, acted in good faith, and the building, as completed, is reasonably adapted to the wants and requirements of the defendants, and its use is beneficial to them. It would be practically impossible to make the building conform to the contract, without taking it partially down and rebuilding it.

The defendants, upon the trial of the case, offered evidence to prove the amount it would cost to make the building conform to the contract, claiming that they were entitled to such sum as damages. The court excluded the evidence, and the only error assigned is the exclusion of that evidence. The defendants' claim rests upon the assumption that the liability of the plaintiff to damages is not affected by the fact that his deviation from the contract was unintentional, or by the advantageous use of the building; but that it is the same as it would have been if he had willfully departed from the contract, and they had rejected the building, and received no benefit from it.

The defendants' claim is undoubtedly supported by decisions of courts of eminent authority in England and in this country, which hold that no recovery can be had for labor or materials furnished under a special contract, unless the contract has been performed, or its performance has been dispensed with by the other party.

The hardship of this rule upon the contractor who has undesignedly violated his contract, and the inequitable advantage it gives to the party who receives and retains the benefit of his labor and materials, has led to its qualification; and the weight of authority is now clearly in favor of allowing compensation for services rendered and materials furnished under a special contract, but not in entire conformity with it, provided that the deviation from the contract was not willful, and the other party has availed himself of and been benefited by such labor and materials; and, as a general rule, the amount of such compensation is to depend upon the extent of the benefit conferred, having reference to the contract price for the entire work. *Hayward v. Leonard*, 7 Pick. 181; *Smith v. First Cong. Meeting-House in Lowell*, 8 Pick. 178; *Moulton v. McOwen*, 108 Mass. 591; *Dyer v. Jones*, 8 Vt. 205; *Kelly v. Bradford*, 33 Vt. 85; *Corwin v. Wallace*, 17 Iowa, 374; *White v. Oliver*, 36 Me. 92; *Dermott v. Jones*, 23 How. 220 (64 U. S. bk. 16, L. ed. 442); *Smith v. School District*, 20 Conn. 812; *Blakeslee v. Holt*, 42 Conn. 226; *Lucas v. Godwin*, 3 Bing. N. C. 787; *Chitty*, Cont. 569; 2 Greenl. Ev. § 104; *Pars. Cont.* 523, note 1.

In cases where only some additions to the work are required to finish it according to the contract, or where, as in the case of *Blakeslee v. Holt*, *supra*, the defects in it may be remedied at a reasonable expense, it seems proper to

*See *Presbyterian Church v. Hoopes Artificial Stone, etc. Co.* 1 Md. L. ed. 494 (7 Cent. Rep. 432).

deduct from the contract price the sum which it would cost to complete it, as was done in that case.

In the present case the result of the plaintiff's labor and materials is a structure adapted to the purpose for which it was built, and of which the defendants are in the use and enjoyment, but which cannot be made to conform to the special contract, except by an expenditure which would probably deprive the plaintiff of any compensation for his labor. We think that the court below properly deducted from the contract price the amount of the diminution in the value of the building by reason of the plaintiff's deviation from the contract.

There is no error.

Park, Ch. J., and Carpenter, J., concurred; **Pardee and Loomis, JJ.,** dissented.

Walter F. HINCKLEY *et al.*

v.

John BREEN *et al.*

1. The title to office can only be tried on a writ of *quo warranto*, or proceedings in the nature of *quo warranto*. A bill in equity is not an appropriate remedy.
2. The Practice Act has not changed the law in this respect.
3. A suit for an injunction, to save the equitable and beneficial rights of a school district, by preventing rival parties, each claiming to be committeemen, from making contracts in its name, should be brought by the district, or, perhaps, by a taxpayer of the district; but a suit for an injunction, by individuals having no personal interest in the matter in controversy, except as the right to an office is involved, cannot be maintained.

(New Haven—Filed August, 1887.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas of New Haven County in favor of defendants in a suit for an injunction to restrain defendants from acting as a school-district committee. *Affirmed.*

The case is stated in the opinion.

Messrs. G. Hine and H. C. Baldwin, for plaintiffs, appellants.

Messrs. C. W. Gillette and W. Kennedy, for defendants, appellees.

Carpenter, J., delivered the opinion of the court:

The plaintiffs brought this suit as a committee of a school district. The defendants claim to be committeemen of the same district. It is conceded that Hinckley was duly elected and was entitled to the office. The other plaintiffs received less than a majority of the votes cast at the annual district meeting, but were declared by the moderator elected, and the meeting adjourned without day. The defendants, upon application duly made, were appointed by the board of school visitors to fill the supposed vacancies. This suit was brought to restrain the defendants from acting as members of the committee.

The defendants, in their answer, deny some portions of the complaint, and set up the proceedings of the district at its annual meeting, and the proceedings which resulted in their appointment by the board of school visitors. To this answer the plaintiffs demurred. The demurrer was overruled, and the court proceeded to try the case on its merits. The court made a finding of facts, and dismissed the complaint on the sole ground that the plaintiffs had misconceived the form of action. The plaintiffs appealed. A more particular reference to the facts is unnecessary.

We think the plaintiffs, upon the undisputed facts, are not entitled to a judgment.

Before the Practice Act it is very clear that title to an office could only be tried on a writ of *quo warranto*, or proceedings in the nature of *quo warranto*. A bill in equity was not an appropriate remedy. The Practice Act has wrought no change in the law in this respect. Neither plaintiffs nor defendants have any personal interest in the matter in controversy, except as the right to an office is involved; and as to that right one of the plaintiffs has no interest, for his title to the office is undisputed. The party beneficially interested in procuring the injunction is the district; and the district is not a party. If the object of the suit, therefore, was to save the equitable and beneficial rights of the district by preventing rival parties, each claiming to represent it, from making contracts in its name, the suit should have been brought by the district, or, perhaps, by a taxpayer of the district. The action as it stands seems to confuse the interests of the district with the interests of individuals,—matters quite distinct in their nature, and which should not be confounded. We may, however, disregard the interests of the district, for it is evident that the object of the suit is to permanently restrain the defendants from acting as members of the committee. They might, perhaps, for special reasons, be enjoined temporarily while their title to the office is being tried; but a permanent injunction would be issued only after it had been determined that they were not entitled to the office, and in that issue the district as such is not legally concerned. That, as we have said, aside from the Practice Act, can only be determined by a writ of *quo warranto*, or proceedings of that nature.

Has the Practice Act changed the law? We think not. That Act expressly provides that those sections which unite legal and equitable remedies in one form of action, and authorize the court to administer law or equity as the case may require, shall not affect "flowage petitions, or proceedings of bastardy, replevin, summary process, *habeas corpus*, *mandamus*, prohibition, *ne exeat*, *quo warranto*, or in the nature of *quo warranto*, forcible entry and detainer," etc. The writ of *quo warranto*, or proceedings of that nature, therefore, must now, as heretofore, be resorted to in all cases to which it is applicable. A bill in chancery cannot be substituted for it.

Some questions of evidence were raised on the trial, but, as they cannot affect the result, we have no occasion to consider them.

There is no error in the judgment complained of.

In this opinion the other Judges concurred.

William W. OLMSTEAD

v.

Levi SCUTT.

1. To constitute a **set-off**, the demand must be due the party in his own right, either as original creditor or as owner by assignment.
2. To constitute **ownership of the demand relied upon as a set-off**, the party alleging it must have such a right to it as would enable him to bring suit thereon in his own name as plaintiff; and, if he should recover on it, the avails must be for his own use, pleasure, and benefit.
3. A **chose in action against a plaintiff assigned to the defendant** before suit, without consideration, and merely with authority to him to collect the same in his own name, and to account to the assignor for the amount actually collected, and to reassign to the assignor any balance uncollected, **cannot be allowed as a set-off** in favor of such defendant.

(New Haven—Filed August, 1887.)

APPPEAL by plaintiff from a judgment of the Superior Court of New Haven County in an action to recover a balance due on account. *Reversed.*

The defendant pleaded a set-off, which was allowed by the trial court, and judgment given for the plaintiff only for the balance of his claim over the amount of such set-off.

The nature of the set-off claimed is stated in the opinion.

Messrs. J. W. Webster and J. O'Neill, for plaintiff, appellant.

Messrs. W. Cothren and W. H. Williams, for defendant, appellee:

1. The sole question in this case is whether the *bona fide* claim of Cothren, which was assigned to Scutt in good faith, and notice given, can be set off against the plaintiff's claim.

A hasty glance at the marginal note in *Birby v. Parsons*, 49 Conn. 488, might lead one to think such set-off or counterclaim could not be made. But a closer inspection will disclose that it is a clear and controlling authority in favor of the claim of the defendant. The marginal note reads: "An assignee of a claim, who has paid no consideration for it, but seeks to recover for the benefit of the assignor, cannot maintain a suit upon it in his own name, under the Statute, p. 417, § 6." The section referred to reads: "The assignee and equitable and *bona fide* owner of any chose in action, not negotiable, may sue thereon in his own name; but he shall, in his declaration, allege that he is the actual, *bona fide* owner thereof, and set forth when and how he acquired title thereto." That case turned on the question of *mala fides*. A man had seduced the minor daughter of his employer, and left his service. Then he fraudulently assigned his wages to his father without consideration, in order to avoid a recoupment for damages in a suit by his employer against him. The father brought a suit against the employer for the wages, for the purpose of paying over the same to his son. It was a

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fraudulent assignment, expressly made to avoid a just claim and save the amount for the assignor, which constituted a very gross case of bad faith. He was not the *bona fide* owner of the claim, and so the court held. *Chief Justice Park*, in giving the opinion of the court, says: "These are the facts; and upon them it is clear the plaintiff cannot maintain the suit in his own name, for he is not the *bona fide* owner of the assigned claim within the meaning of the statute. He took the assignment, knowing for what purpose it was made, and took it to assist his son in recovering the claim without paying the damages."

2. In the case at bar the facts are entirely different. The assignment was *bona fide*. Cothren had a just claim of \$581.88 against the plaintiff. The defendant owed a debt to the plaintiff. The assignment was made to furnish him with means to pay that debt, with the agreement to repay the amount he used in paying his said debt. This was done in good faith, and not with the fraudulent design to defeat a just claim. This is all the statute requires; i. e., that the assignee shall be the "equitable and *bona fide* owner." Nothing is said about what the considerations shall be. It may be a money consideration which acquires the chose in action, or it may be acquired by gift, or by any legal agreement, as in this case.

It is certain that Scutt was as truly the *bona fide* owner of this claim as though he had purchased it with money, or as he would have been if he had borrowed so much money, with the agreement to repay the money loaned. It was, in point of fact, a chose in action loaned by Cothren to the defendant to aid him in paying the plaintiff's claim. The court therefore did not err in allowing said set-off to the defendant. It was the only legal course to pursue.

3. By the assignment, the full legal and equitable title to the claim against Olmstead was transferred to Scutt. Nothing remained to Cothren but the contract to account, and convey the balance if any remained. There was no way in which Cothren could regain title to the chose in action except by a reconveyance before pleading it as a set-off in the suit. Of course Cothren could sue for breach of contract if Scutt refused to account or reassign, but he could not get the title back.

See *Smyth v. Ripley*, 33 Conn. 810.

4. Under the present law, as Scutt had the full and exclusive title, *bona fide*, he was free, either to bring a suit on the claim in his own name, plead it as a set-off, or use it as a counterclaim by virtue of the Practice Act.

5. The third reason of appeal directly contradicts the finding of the court, and is entirely untenable. In it the plaintiff alleges that "Mr. Cothren's bill against Olmstead was assigned to this defendant for the sole purpose of collecting the same for Mr. Cothren." But the court and committee find: "there was no consideration for the assignment, and the sole object of the same, as understood and agreed between said Cothren and the defendant, was to enable the defendant to make use of the same as a set-off and counterclaim against the suit of the plaintiff, should one be brought."

No reply to this reason is needed, as it simply contradicts the record, which is a sufficient answer.

Loomis, J., delivered the opinion of the court:

The complaint in this case was brought to recover a balance due on account. A committee to whom the matter was referred found there was due from the defendant to the plaintiff the sum of \$681.47 over and above all legal offsets, subject, however, to whatever legal right the defendant might have to set off a claim, amounting to \$581.88, which William Cothren had against the plaintiff, and which he, before the commencement of this suit, assigned to the defendant by writing, as follows:

Woodbury, February 21, 1882.

For value received, I hereby sell and assign to Levi Scutt, of Southbury, the balance of accounts on book due me against Wm. W. Olmstead, of said Southbury, in the sum of \$2,000, authorize him to collect the same in his own name, account to me for the amount actually collected, and reassign to me any balance that may remain uncollected.

William Cothren.

Notice was given the plaintiff before he commenced his suit. There was no consideration for the assignment, and the sole object of it, as understood and agreed between Cothren and the defendant, was to enable the defendant to make use of the same as a set-off and counterclaim against the suit of the plaintiff, should one be brought.

The court below allowed the defendant to set off this bill, and thereby reduced the plaintiff's claim by that amount, and this presents the sole question for review in this court.

Did the defendant have such an interest in the Cothren claim as entitled him to a set-off? We are constrained to answer in the negative.

One of the first and fundamental principles of set-off is that the demand must be due the party in his own right, either as original creditor or as owner by assignment. The ownership must be such as to stand these two tests: 1. Could he bring a suit in his own name as plaintiff? 2. If he could, would the avails recovered be for his own use, pleasure, and benefit? 2 Pars. Cont. 5th ed. p. 787.

Either of these tests will show that the principle of set-off was misapplied by the court.

1. Could the defendant at the time have maintained an independent action in his own name as plaintiff?

As the claim in question was non-negotiable, the statutory requisites must exist; that is, the defendant must be shown to be "the assignee and equitable and bona fide owner." Gen. Stat. p. 417, § 6.

The defendant is neither an equitable nor a bona fide owner. The most that his counsel (who was also the assignor) claims for the transaction in his brief is that "it was in point of fact a chose in action loaned by Cothren to the defendant to aid him in paying the plaintiff's claim." But how can a mere loan of a chose in action change the title, nothing being paid for it or agreed to be paid? Suppose the defendant had brought his independent action against the present plaintiff, and had set forth, in compliance with the terms of the statute, not only that he was the actual, bona fide owner, but that the claim was loaned to him without consideration, for the sole purpose of ena-

bling him to bring a suit thereon, and to pay over to the assignor all the avails of the suit, and to reassign it if not collected,—would not the complaint be demurrable?

The case is no stronger as a set-off, for it is a fundamental principle that the party must prove precisely the same facts to sustain the set-off as he would if he had brought his action upon the claim. *Waterman, Set-off*, § 44; *Gorham v. Bulkley*, 49 Conn. 91.

2. The second test—that the avails, when recovered, must be for the party's own use, pleasure, and benefit—shows with equal certainty that the allowance of the set-off was erroneous.

The written assignment is restrictive in its terms. The defendant under it could not have sold the claim; he had only the right to collect it and account for the proceeds, and reassign it if uncollected, or to the extent that it was uncollected. Then, the oral agreement states the sole object of the assignment,—to make use of it as a set-off against the suit of the plaintiff.

In the light of these tests, the debt attempted to be set off did not of right belong to Scutt at all, but to Cothren alone; and to allow the set-off we must wrest the statute from its equitable foundation and purpose of protecting an actual honest right of the defendant, and convert it into a mere device to enable a stranger to the suit to enforce his obligations against the plaintiff. The principles recognized by this court in the cases of *Fitch v. Gates*, 39 Conn. 366, and *Birby v. Parsons*, 49 Conn. 488, strongly condemn such a misapplication of the doctrine of set-off; but we cite from other jurisdictions several cases precisely analogous in principle to the case at bar.

In *Clafin v. Dawson*, 58 Ind. 408, the complaint was to recover the amount of two promissory notes executed by the defendant, and belonging to the plaintiff by assignment from the payee. The defendant pleaded a set-off by an assignment of a debt from one Perry against the payee of the notes, before suit and before there was any notice of the assignment to the plaintiff of the notes in suit. The question for review arose upon the charge to the jury on this point, which was as follows: "If the jury believe that the account in favor of William Perry was assigned to the defendant with a view to its use as a set-off in this action, and for no other purpose, and under and pursuant to an agreement between Perry and the defendant, that if it could not be so used, or should not be allowed to the defendant as a set-off to the notes in this suit, the account was to be returned to Perry, and he was to return whatever he received for it,—then the jury will not be authorized to allow the defendant the benefit of the Perry account as a set-off, but on that issue should find for the plaintiff." *Howk, J.*, in giving the opinion, said: "Under our Code a set-off 'must consist of matter arising out of a debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off.' 2 Rev. Stat. 1876, p. 62, § 57. * * * In this case there was evidence before the jury tending to show that the account in favor of Perry, pleaded as a set-off, had been assigned by Perry to the appellant with a view to its use by the latter as a set-off in this action, and for no other purpose. * * *

It seems to us, therefore, that the instruction complained of by the appellant was applicable to the case which the evidence tended to establish, and we do not doubt that the instruction contains a fair and correct statement of the law applicable to such a case. The assignment by Perry to the appellant, of his claim against the appellee's assignor, was not absolute or made in good faith. It was an attempted transfer of the claim in question, by Perry to the appellant, for one specific purpose. As to all other purposes the claim remained the property of Perry. * * * The appellant could not have maintained an independent action on the account assigned to him. Perry was, and the appellant was not, 'the real party in interest' in the account. It would be a strange perversion, as it seems to us, of the equitable grounds in which the law of set-off had its origin, to give judicial sanction to the appellant's claim in this case to set off the Perry account against the appellee's cause of action. The appellant never held the account assigned to him by Perry as the actual and unqualified owner thereof; and, as we construe the provisions of our Code on the subject of set-off, the object and purpose thereof were the protection and defense of the *bona fide* owners of cross-demands."

It is too manifest to require discussion that the forcible reasoning contained in this opinion is all equally adapted to the case at bar.

In *Straus v. Eagle Ins. Co.* 5 Ohio St. 59, the court, Ranney, J., delivering the opinion, said (p. 66): "A set-off can only be allowed for such claims as, in good faith and absolutely, belonged to the party at the commencement of the action; and it does not extend to claims purchased conditionally for the purpose of using them as a set-off, and with an agreement to return them to the seller if they are not so used. The statute was designed to avoid circuitry of action, by enabling the defendant to obtain the benefit of his own just claims against the plaintiff; but it would be a fraud upon it to allow him, in anticipation of a lawsuit, to get the use merely of the claims of others, with which to defeat his adversary."

In Waterman on Set-off, 2d ed. § 59, it is said: "As a set-off can in general only be allowed for such claims as in good faith belonged to the party at the commencement of the action, it follows that it does not extend to claims purchased conditionally for the purpose of using them as a set-off, and with an agreement to return them to the seller if they are not so used;" citing *Adams v. McGrew*, 2 Ala. N. S. 875, and *McDade v. Mead*, 18 Ala. 214.

The judgment complained of was erroneous, and is reversed.

In this opinion the other Judges concurred.

Thomas W. PALMER, *Plff. in Err.*,
v.

Gideon P. CHESEBORO, Conservator.

2. The relation of lessor and lessee is not affected by the fact that the lease for a year was not made until after the expiration of part of the year; and such lease is properly declared on as a lease made on the first day of the demised term, as the date is a matter of no importance.

8. A conservator having the right to lease his ward's premises has the right, as conservator, to recover possession of them at the expiration of the lease.

(New London—Filed July, 1887.)

A PPEAL by plaintiff in error from a judgment of the Court of Common Pleas, in an action of summary process to recover possession of leased premises, by a conservator, begun before a justice of the peace, and brought to the Common Pleas by writ of error. *Affirmed.*

The case is stated in the opinion.

Mr. A. P. Tanner, for plaintiff in error, appellant.

Messrs. S. Lucas and A. B. Crafts, for the conservator, appellee.

Park, Ch. J., delivered the opinion of the court:

This is a writ of error from a judgment of a justice of the peace in an action of summary process to recover possession of leased premises. The suit was brought by the defendant in error as conservator of Emeline P. Stanton, to whom the premises in question belong. The conservator brought the suit as lessor of the premises, under a lease made by him as conservator to Palmer, the defendant in that suit and the present plaintiff in error.

The principal point made in the case by the plaintiff in error is that the conservator had no power to make a lease of the real estate of his ward without obtaining authority from the court of probate, and he relies upon the case of *Treat v. Peck*, 5 Conn. 280, as supporting his claim.

When that case was decided, the statute with regard to conservators gave them authority only "to take care of and oversee" the estates of their wards, and the court held that this did not give them authority to lease the estates of their wards from year to year. But the present statute gives larger authority to conservators. The Act of 1885, which governs this case, provides in one section that conservators "shall have the charge of," and in another, that they "shall manage," the estates of their wards. Sess. Laws 1885, chap. 110, §§ 81, 84.

This is precisely the authority conferred upon guardians appointed by courts of probate, and it is so clearly their duty to make advantageous leases of the real estate of their wards that a guardian would undoubtedly be liable on his bond if he should suffer the estate of his ward to lie idle and unimproved, when a good tenant could with reasonable effort be procured. And there is no reason why the same rule should not be applied to a conservator. Webster defines the word "manage" as meaning "to conduct; to carry on; to direct the concerns of; as, to manage a farm or to manage the affairs of a family."

We think the leasing of a ward's estate, when

that is the best use to be made of it, to be a very important part of the management of his property.

We do not intend to go further in this case than its exigencies require; and all that we decide is that the Act of 1885 confers upon conservators the authority, by virtue of their appointment, to lease the premises of their wards for a reasonable time in view of all the circumstances.

This was all that was in fact done, by the conservator in the present case. Any restriction of a conservator's authority within narrower limits might seriously embarrass the management of the estates of the wards, and deprive them of a reasonable return from their property.

It appears by the finding that on the 1st day of April, 1885, the plaintiff in error was in occupancy of the premises by permission of a former conservator. The defendant in error was conservator from that time, and permitted him to remain in possession, without any special contract, until the 31st day of October of the same year, when the parties made an agreement for the occupancy by the plaintiff in error for the entire year from the 1st day of the previous April to the 1st day of April of the year following, for a rent of \$175, of which the plaintiff in error paid the conservator one half, and agreed to pay the other half at the end of the term; and the plaintiff in error remained in possession until the 1st day of April following, when he paid the conservator the remaining half of the agreed rent.

It is very clear that the relation of the parties as lessor and lessee cannot be at all affected by the fact that the lease was not made until the middle of the year. A lease could just as well be made to cover the part of the year already expired as the unexpired part. And the lease thus made could properly be declared on as a lease made on the 1st day of April, 1885, as the date was a matter of no importance.

Of course, if the conservator had the right to lease the premises, it follows that he had the right, as conservator, to recover the possession of them at the expiration of the lease, and could in his own name, as conservator, bring an action of summary process for the purpose.

Several technical objections are made as to which there is clearly no error in the rulings of the justice court, and which are not of sufficient importance to be discussed.

There is no error in the judgment complained of.

In this opinion the other Judges concurred.

Simeon W. GUNN'S APPEAL from Commissioners.

Hitchcock made a deed of release to Gunn, and Gunn at the same time executed an instrument to the effect that if Hitchcock should cause to be paid to Gunn the sum of \$17,000, with interest, by a certain date, Gunn would reconvey the premises to Hitchcock, "it being understood that the said Hitchcock is to pay to Miles Camp a note he holds against me, the said Gunn, of the amount of \$3,000, with interest, and

that the amount paid thereon shall be in part payment on the above." Held:

(a) That the deed of release and the instrument for reconveyance together constituted a mortgage for \$17,000.

(b) That the payment of the whole of said sum was left optional with Hitchcock, and that this option applied to the note mentioned in the instrument for reconveyance, and that Hitchcock was not bound to pay the same if he did not redeem the land.

Hartford—Filed August, 1887.)

APPEAL from a judgment of the Superior Court of Litchfield County disallowing the claim of appellant from the doings of commissioners on the insolvent estate of George C. Hitchcock, deceased. *Affirmed.*

The claim of appellant against the decedent's estate was for the principal and interest of the Camp note referred to in the instrument set out in the opinion, which the appellant had paid. Hitchcock failed to pay the note, and suit was brought thereon against appellant, in the State of New York, where he resides, and he was compelled to pay the same, and thereupon he claimed the amount so paid by him, from the estate of Hitchcock, as for money laid out and expended for Hitchcock in his lifetime.

Other facts are fully stated in the opinion.

Mr. George A. Hickox, for appellant:

1. The acceptance by Hitchcock of the instrument for reconveyance having been found by the court, the contract of assumption is unequivocal. The word "understood," followed, as it is, by a specific application of it to the matter undertaken, is synonymous with "agreed." The two words are so used in the deed under consideration in *Elting v. Clinton Mills Co.* 36 Conn. 301.

Even though neither of these words had been used, there would have been a sufficient agreement of assumption, as appears from *Randall v. Latham*, 36 Conn. 48, where the court, at page 52, so construes a clause which appears on page 49.

Randall v. Latham, 36 Conn. 48, 52; *Elting v. Clinton Mills Co.* Id. 290, 301; *Foster v. Atwater*, 42 Conn. 244, 250; *Post v. Gilbert*, 44 Conn. 9, 17; *Hubbard v. Ensign*, 46 Conn. 576, 582; *Tuttle v. Armistead*, 1 Conn. L. ed. 317 (3 New Eng. Rep. 581), 53 Conn. 175, 178; *Goodwin v. Gilbert*, 9 Mass. 510, 514; *Newell v. Hill*, 2 Met. 180, 181; *Huff v. Nickerson*, 27 Me. 107.

2. The contract of assumption clearly appearing from the instrument in question, and its acceptance by Hitchcock being proved, his liability is established by numerous decisions of this and of other courts.

The consideration for the agreement of assumption is more than sufficient.

Clark v. Sigourney, 17 Conn. 517, 518.

By his assumption of the Camp note, as between Hitchcock and the appellant, the former becomes liable as principal, the latter only as surety, for its payment (*Boardman v. Larrabee*, 51 Conn. 39, 42); and, on payment of the note by the appellant, Hitchcock became liable to him for money paid for his use.

Ward v. Henry, 5 Conn. 595, 598; *Berlin v. New Britain*, 9 Conn. 175, 179; *Bailey v. Bussing*, 28 Conn. 455, 462; *Post v. Gilbert*, 44 Conn. 9, 16; *Graves v. Johnson*, 48 Conn. 160, 165; *Tuttle v. Armistead*, 1 Conn. L. ed. 317 (3 N. E. R. 581), 53 Conn. 175, 182; *Hunt v. Amidon*, 4 Hill, 345, 349; *Nichols v. Bucknam*, 117 Mass. 488, 491; *Town v. Wood*, 37 Ill. 512.

The Statute of Limitations has not run on this claim; for the finding shows that the death of Hitchcock occurred March 28, 1885, less than six years after the claim accrued on October 2, 1879.

Graves v. Johnson, 48 Conn. 160, 165.

There can be no presumption of payment in the present case, for the court has found as a fact that "said Hitchcock never paid said note or any part thereof, and never reimbursed the appellant for what he had paid thereon."

It has been repeatedly held by this court that the Statute of Frauds does not apply to cases like the present one.

Townsend v. Ward, 27 Conn. 610; *Randall v. Latham*, 36 Conn. 43, 55; *Elting v. Clinton Mills Co.* 36 Conn. 296; *Foster v. Abwater*, 42 Conn. 244, 245; *Tuttle v. Armistead*, 1 Conn. L. ed. 317 (3 N. E. R. 581), 53 Conn. 175, 181.

Messrs. Huntington & Warner, for appellee:

The only reason for appeal alleged is that, by the execution and delivery of the instrument for release in Hitchcock's lifetime, it became obligatory upon him then, and upon his administrator now, to pay the appellant the sum paid by him to Miles Camp on a certain note made by the appellant December 3, 1878. The record and the finding of the court show that said note was the appellant's own individual liability; he alone was liable for its payment, and he did pay it. Hitchcock received no consideration for payment of said note, and it nowhere appears that Hitchcock ever in any way assumed the responsibility for the payment thereof.

There was no new indebtedness created at the time, from Hitchcock to the appellant, by the execution and delivery of said instrument. It was simply an agreement on the part of the appellant to deliver to Hitchcock, his heirs, etc., a warranty deed of the premises, at any time up to October 1, 1888, provided Hitchcock, his heirs, etc., should "cause to be paid to the appellant the sum of \$17,000 with interest," and said Camp's note, if paid by Hitchcock, would have been but part consideration for the said warranty deed.

If said Hitchcock's estate is obliged to pay said note, it will be without any consideration therefor. For the only consideration there could be would be the lands described in said instrument, and that depending upon the payment of \$17,000 with interest.

The estate is insolvent.

The payment, by the appellant to Camp, of his own note and own indebtedness, was not money paid, laid out, and expended for Hitchcock's benefit. The appellant received all the benefit there was derived from his indebtedness to Camp. Hitchcock's failure to pay said note wrought no injury to the appellant.

It would manifestly be inequitable and unjust to allow the appellant to come in with the

creditors of Hitchcock's estate and take a dividend on \$8,000—the present amount of appellant's claim—for which neither Hitchcock nor his estate has received any consideration.

Park, Ch. J., delivered the opinion of the court:

The appellant held mortgages on three tracts of land, given him by one Hitchcock to secure certain indebtedness the latter was owing him. In the month of September, 1878, it was agreed between the parties that Hitchcock should give the appellant a release deed of one of the tracts, for the consideration of \$17,000, and that the appellant should give Hitchcock a release deed of the other two tracts, a receipt in full of all claims against him, and an instrument in writing in the form of a deed, binding himself, his heirs, executors, and administrators, to reconvey the tract so conveyed to him on the payment of the sum of \$17,000, with the interest thereon, on or before 1st day of October, 1888.

The several instruments were executed by the parties at the same time, according to the agreement; and that part of the instrument on which this case hinges, given by the appellant to Hitchcock, binding himself to reconvey the property as aforesaid, was as follows:

"Now, therefore, I, the said Simeon W. Gunn, do by this writing bind myself, my heirs, executors, and administrators, that if the said George C. Hitchcock, his heirs, executors, or administrators, shall cause to be paid to me, my heirs, executors, or administrators, the above-mentioned sum of \$17,000, together with the interest at 6 per cent, on or before the 1st day of October, 1888, then I bind myself, my heirs, executors, and administrators to give to the said Hitchcock, his executors, and administrators, or to any other person he may desire, a clear warranty deed of the above-described premises, free from all incumbrances whatsoever. It being understood that the said Hitchcock is to pay to Miles Camp a note he holds against me, the said Gunn, of the amount of \$8,000, with interest, and that the amount paid thereon shall be in part payment on the above."

The deed of release given by Hitchcock to the appellant, and the instrument of reconveyance given at the same time by the appellant to Hitchcock, together constituted a mortgage of the property for the sum of \$17,000. But, unlike other mortgages, it is said that the last clause in the instrument, with regard to a reconveyance, bound Hitchcock, by his acceptance of it, to pay the appellant's note to Camp at all events, whether he redeemed the property or not.

We do not so understand the instrument. There is nothing in it that obliged Hitchcock to pay all or any part of the \$17,000 mentioned therein. The entire matter is left optional with him. "If the said George C. Hitchcock, his heirs, executors, or administrators, shall cause to be paid to me," etc., is its language. There is just as much obligation to pay the entire amount of \$17,000 as there is to pay any part of it. Payment of the whole or any part of it is optional, as in the case of any other mortgage. We construe the passage in controversy to mean that, if Hitchcock should redeem the property, it was understood that he was to pay to Miles Camp a note he held against

Gunn, and that the amount paid thereon should be in part payment of the \$17,000 and the interest thereon.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

Frederick A. KING, Exr.,

v.

Mary GRANT *et al.*

A will directed the executor to sell the real estate and effects of testator and safely invest the proceeds, and gave the income of the investments, together with so much of the principal as might be needed, for the support of testator's wife during the remainder of her life. The third clause directed "that the income from said investments be equally divided between" testator's sister and two nieces, one third to each, "as long as they remain unmarried." The fifth clause was as follows: "I will and direct that after the previous gifts have been fully met, or at the death of each of the previously-noticed relatives, whatever remains of said investments be turned over to the Second Ecclesiastical Society, to be used, under a trustee, to help in support of preaching, as long as such is kept up as at present." *Held:*

(a) That by the words "real estate and effects" testator meant all his real and personal property.

(b) That the testator intended that his wife should receive the income of his whole estate, both that which might be invested by himself in his lifetime and that invested by the executor after his death.

(c) That (the wife having died before the testator) the testator's sister and two nieces took the income provided for the wife (*i.e.* the income of the entire estate, and not merely that of the investments made by the executor), to be equally divided between them.

(d) That the marriage of one of the parties mentioned in the third clause will only affect the rights of the one marrying, and not those of either of the others.

(e) That the devise in the fifth clause is not void for uncertainty,—there being but one Second Ecclesiastical Society in testator's town, and he having been a regular attendant of it, and it being apparent that, by the words "to help in support of preaching as long as such is kept up as at present," testator meant that the legacy should be enjoyed so long as the religious services by the Congregational denomination of Christians should continue to be held at that place substantially as they were at the time the will was made.

(f) That one third of the estate vests in the Second Ecclesiastical Society in testator's town, on the marriage or death of each of the parties described in the third clause.

(Hartford—Filed July, 1887.)

CASE reserved by the Superior Court of Hartford County for advice. Suit for the construction of a will.

The portions of the will sought to be construed, and the questions presented thereon, are set forth in the opinion.

Messrs. C. M. Joslyn and E. H. Hyde, Jr., for the defendants Mary Grant and Mary H. Francis.

Mr. J. J. Jennings, for the defendant Frances A. Atkins and the heirs at law.

Messrs. J. R. Buck and A. F. Eggleston, for the Second Ecclesiastical Society in South Windsor.

Park, Ch. J., delivered the opinion of the court:

The object of this suit is to obtain a judicial construction of the will of one George Foster. Foster left no children. His wife died soon after the execution of the will, and about two years previously to the death of the testator.

The second clause of the will directs the executor to sell the real estate and effects of the testator, if not sold by him before his death, and safely invest the proceeds thereof; and the testator gives the income of the investments, together with so much of the principal as may be needed, for the "support, care, and comfort" of his wife "during the remainder of her life."

The third clause of the will is as follows: "After the decease of my wife, I hereby will and direct that the income from said investments be divided equally between my sister, Mary Grant, and my nieces, Mary Francis and Mrs. Francis Atkins, one third to each, as long as they remain unmarried."

The fifth clause is as follows: "I will and direct that after the previous gifts have been fully met, or at the death of each of the previously-noticed relatives, whatever remains of said investments be turned over to the Second Ecclesiastical Society, to be used, under a trustee, to help in support of preaching, so long as such is kept up as at present."

The executor asks the advice of this court regarding the proper construction to be given to the second, third, and fifth clauses of the will, and submits for our consideration the following questions:

1. Do the legatees named in the third clause of the will take only the income from the investments made by the executor, or the income from the whole estate?

2. Will the right to the income of each and all the legatees named in the third clause of the will cease and determine upon the marriage of either of them?

3. Is the gift attempted to be made in the fifth clause void for uncertainty?

4. Which Second Ecclesiastical Society is intended as the legatee under the fifth clause?

5. When does the estate given in the fifth clause, if any, vest in and become payable to the legatee? At the death of all the previously-noticed relatives; or at the death of the first one; or does an undivided one-third part of the estate vest in the legatee at the death of each?

The cardinal rule which governs courts in the construction of wills is the intent of the tes-

tator, made manifest by the will. Applying this rule to the present case, it is clear that the testator intended to dispose of all his property by the will; and when he uses the expression, "all my real estate and effects," he means all his real and personal property. He intended that his executor should turn into money all his property that might remain at his death in some other form than investments, and safely invest the amount, so that all his estate should be in money-producing investments.

The testator had no children, and his first and highest object was to make ample provision for the support and comfort of his wife, without subjecting her to any responsibility in managing the estate. He intended that she should have the income of his whole property; and, lest the income derived therefrom might not be ample for the purpose, he provided that she should have so much of the principal of the estate as, together with the income, should be needed for her "best support, care, and comfort."

It seems absurd that the testator should limit his wife's income to that derived from the investments that should be made by his executor, when it was wholly uncertain how much of his property would thus be invested; for he intimates in his will that he himself may invest all his property before the will shall take effect, thus, upon the construction claimed, leaving his wife without any income, when it clearly appears that she was the principal object of his solicitude and bounty.

We think it is clear that the direction of the testator to his executor, to turn all his property that might remain at his decease uninvested into safe investments, was wholly owing to his desire that all his property should become productive of income, and had no reference whatever to any amount of income that his wife should have from his estate. Such being our construction of the second clause of the will, it follows, as a necessary consequence, that, after the death of the wife, the income from the property, to the same extent as was previously given to the wife, was now given to be equally divided between the persons described in the third clause of the will, so long as they should remain unmarried. We therefore answer the first question submitted for our consideration, that the parties named in the third clause of the will take the income of the entire estate.

We answer the second question submitted by saying that we think it is absurd to suppose that the testator intended to make the rights of one of the parties named in the third clause dependent upon the celibacy of either of the others, or that he intended to punish them all for the marriage of one; and therefore we think the marriage of one of the parties will only affect the rights of the one marrying, and not those of either of the others.

We think the gift in the fifth clause of the will is not void for uncertainty.

It is claimed that the phrase, "to help in the support of preaching, as long as such is kept up as at present," being a part of the bequest, renders the whole void for uncertainty. The bequest was made to a denomination of Christians called Congregational. It is well known that that denomination has a particular mode of worship, and a particular set of religious

doctrines. The testator was a regular attendant of the Second Ecclesiastical Society of South Windsor, which was a Congregational society, and had been ever since its organization. To this society the bequest was made. It is evident that all the testator meant by the phrase was that the legacy should be enjoyed so long as the religious services by the Congregational denomination of Christians should continue to be held at that place substantially as they were at the time the will was made. If at any time in the future a question should arise whether the society was entitled longer to the benefit of the bequest, the court can then determine the matter.

The facts of the case clearly show that the bequest was intended to be made to the "Second Ecclesiastical Society in South Windsor," but by mistake or inadvertence the testator described the society as the "Second Ecclesiastical Society." It is claimed that the bequest is void for this reason. The case finds that there is but one Second Ecclesiastical Society in the town of South Windsor, the corporate name of which is the "Second Ecclesiastical Society in South Windsor." The testator omitted a part of the name, but we think the facts of the case so clearly show what society was intended that the bequest is not void for uncertainty. In *Jacob v. Bradley*, 36 Conn. 365, a legacy to "the Episcopal Society in Hampden" was held to be a good legacy to Grace Church, that church being the only Episcopal society in that town. In *Brewster v. McCall's Devisees*, 15 Conn. 273, a bequest to "the Missionary Society of Foreign Missions" was held to be a bequest to "the American Board of Commissioners for Foreign Missions." See also *Ayres v. Weed*, 16 Conn. 301.

We therefore answer the fourth question by saying that the Second Ecclesiastical Society in South Windsor was intended as the legatee in the fifth clause of the will.

In answer to the fifth inquiry we say that a one-third part of the estate vests in the Second Ecclesiastical Society in South Windsor on the marriage or death of each of the parties described in the third clause of the will, and should in that event be delivered to the society.

In this opinion the other Judges concurred.

Bernard FLYNN

2.

Daniel N. MORGAN, Admr., et al.

1. The right, under the statute, to take real estate upon appraisal by the levy of an execution, can be exercised only upon the real estate of a living debtor.
2. The owner of an unsatisfied judgment recovered against an administrator on a debt incurred by the decedent in his lifetime cannot obtain a lien against land belonging to the decedent's estate by filing a certificate under the statute of 1878 (chap. 58).

(Fairfield—Filed August, 1887.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas of Fairfield

County sustaining a demurrer to the complaint in a suit to foreclose a judgment lien. *Affirmed.*

The case is stated in the opinion.

Messrs. D. Davenport and B. Keating, for plaintiff, appellant:

The property, having been fraudulently conveyed away, of course remains the property of Flynn so far as his creditors are concerned. By the statute with regard to judgment liens (Acts 1878, chap. 58), a lien can be filed upon the real estate of a debtor on any unsatisfied judgment, the only limitation being that it must be real estate on which an execution on the judgment could be levied. So that the whole question here is whether an execution on this judgment could have been levied on this real estate.

The real estate of the deceased is assets in the hands of the administrator of the estate for the payment of debts. "The judgment against the administrator must always be to recover of the goods, chattels, and estate of the deceased in his hands."

Mitchell, Ch. J., in *Booth v. Starr*, 5 Day, 289.

The law allows suits against administrators of solvent estates; and the levy of an execution is the closing act in a suit, and as much a part of it as any other.

Tweedy v. Bennett, 81 Conn. 278; *Johnson v. Chapman*, 85 Conn. 552.

"The administrator, under the statute, has the same control of the real estate during the settlement of the estate that he has of the personal property, and the same title to it and possession of it; and, although he holds in trust for the benefit of the estate, the title is still in him."

Nichols v. Dayton, 84 Conn. 66.

Whenever the action against an administrator can only be supported against him in that character, and he pleads any plea which admits that he has acted as such, the judgment against him must be that the plaintiff do recover the debt and costs, to be levied out of the assets of the intestate, if the defendant have so much.

1 Wms. Saunders, 835, note 10 to *Hancock v. Prowd*; 1 Swift, Dig. Rev. ed. 456, 824; 2 Swift, Dig. 720.

When the execution is against the estate of the deceased person in the hands of his executor, if such estate cannot be found, the officer must return *non est inventus*, which lays the foundation of a *scire facias*; but if such estate can be found, it may be levied upon and disposed of in the usual form.

1 Swift, Dig. Rev. ed. 825; *Weeks v. Gibbs*, 9 Mass. 74; *Clark v. May*, 11 Mass. 233.

In *Welles v. Fanning*, 1 Root, 95, this court decided that an administrator cannot compel a creditor to take the land of the deceased in satisfaction of his debt, clearly implying that the creditor might take it if he chose.

From the foundation of the colony, executions against administrators could be levied upon the real estate of the intestate.

Hawley v. Wheeler, Fairfield, C. Ct. Rec. 1702-1734, p. 86; *Newtown v. Moger*, Id. 1762-1764, p. 325; 1755-1757, p. 89; *Bradley v. Gray*, Id. 1785-1791, p. 178; *Perrit v. Gloer*; 1 Stratford, Land Rec. p. 86.

The common law of England was not recognized by the early settlers of Connecticut, especially in regard to land. "This court re-

fers it to the governor and council to prepare against the next General Assembly * * * a bill for direction and limitation of the laws of England, how far to be in force here."

May, 1698; 4 Col. Rec. 261.

At a county court held at New London, September 28, 1698, in an action of trespass, this entry appears: "It is agreed by the plaintiffs and defendants that the laws of England shall be pleaded and made use of in this case, and it is allowed by this court." On appeal to the Court of Assistants this course was severely criticised as being an attempt to adopt and be governed by the laws of a foreign country, when they were sworn to abide by the laws of the colony.

Records of Court of Assistants, vol. 1, p. 112.

"Mr. John Elliot, Capt. James Rogers, Capt. Jos. Wakeman, Capt. James Wadsworth, and Capt. Thomas Huntington, are a committee chosen to consider and draw bills and lay before this House upon these several things, viz.: whether the general reference in our law to the Word of God be a sufficient rule for the administration of justice among us, or whether it be necessary to admit the laws, customs, or maxims of any other people or country into our rules of administration, any farther than the law of God, nature, or reason will clearly enforce them; and if it be, what they are, how much of or what part of them, and draw a bill or bills accordingly."

Journal of Lower House, May 12, 1716.

"On the proposal to the Assembly whether our law, in matters judicial, refers to any law besides the Acts of this Assembly, the Law of God, etc. Resolved in the negative."

Journal of Lower House, May 15, 1716.

Extract from a letter from the governor to agent Wilkes, dated October, 1732 (State Archives, 2 Foreign Correspondence, 157); the draft was by Lieutenant Governor Law, who was chief justice: "The common law of England, which, according to the opinion of her attorney and her solicitor lately given to their lordships, does not extend to the plantations without the Act of their assemblies, and when they have enacted any principle of the common law into a law, that it receives its authority from their own Act."

Jefferson wrote (5 Works, 547): "He [Lincoln] is thought not an able common lawyer, but there is not and never was an able one in the New England States. Their system is *evi generis*, in which the common law is little attended to."

"For the common law of England hath not, as such, nor ever had, any force here."

Fitch v. Brainerd, 2 Day, 189.

Certain principles of it were borrowed by our courts "as rules," at a later period of our history, much as Lord Mansfield borrowed from the law merchant, but always with such exceptions as a diversity of circumstances and the incipient customs of our own country required.

Ibid.

This was not true in Massachusetts and New Hampshire after 1684, when their colonial charters were taken away; for the common law of England then came in and remained until changed by legislation, a circumstance which

should be borne in mind in considering the statutes of those States hereafter cited.

From the beginning, in Connecticut, land could be taken for debts in the same manner as personal estate, except that sundry restrictions were placed upon the manner of taking it. As early as May 25, 1647, provision was made for attaching it and levying executions upon it.

1 Col. Rec. 151.

It was not till 1682 that the officer having an execution was required to resort to the personal estate first.

3 Col. Rec. 110.

In the early days of the colony the widow's share was an absolute estate in the land, the same as in the personal property. In a book entitled "Will and Doom, or the Miseries of Connecticut," written about 1693 by Gershom Bulkley, it is said: "There is no proper heir in Connecticut, but lands are treated as pots and kettles." Until 1723 a married woman's estate in lands acquired by inheritance vested absolutely in her husband, in the same manner as her personal property.

Rev. 1796, p. 265.

The Act of 1699 (4 Col. Rec. 306-308) provides that distribution of the real and personal estate is to be made after debts are paid. Prior to 1696 the administrator could sell, at his own volition, land of the intestate; but in that year it was provided that all sales of land by administrators should be with the approbation of the General Assembly.

2 Col. Rec. 39.

Power was not given to the probate court, or any other, to order sale of lands of deceased insolvent debtors to pay debts, until 1716, nor to order sale of the lands of deceased solvent debtors to pay debts, until 1782, one hundred and thirty-six years from the first settlement of the colony.

5 Col. Rec. 577; Stat. 1808, 269, note 18; 2 State Rec. (Mss.) 1782.

Neither was power given to those courts to limit a time for presentation of claims in the respective cases until those years.

Id.

During the time that preceded these two Acts conferring the power on the probate court in the respective cases, the land stood charged with the debts of the deceased, and lawsuits could be brought and executions issued; and the only means of getting authority to sell land was by resort to the General Assembly by administrators. It is preposterous to suppose that an execution could not have been levied on the land. In 1753 the law was passed that the death of the defendant should not abate the action in case it might have originally been brought against the administrator; and then for the first time execution was stayed on judgment against administrators of estates that had been represented insolvent.

10 Col. Rec. 207.

To this day execution is only stayed against administrators of insolvent estates. In 1732 an Act of Parliament, which was adopted the next year by the General Assembly, allowed debts in all cases to be collected out of real estate the same as personal, and by the General Assembly authority was given to the administrator, if he desired to raise money to pay the debts out of the land, to apply to the General Assembly.

CONN.

7 Col. Rec. 441-443.

In 1696 a certain law was passed in Massachusetts that land should stand charged with debts.

Acts & Resolves of the Province of Mass. Bay, vol. 1, p. 254.

This was copied *verbatim* by New Hampshire in 1719.

N. H. Prov. Laws, 88, 89.

It was also copied *verbatim* by Connecticut in 1711, "which often trotted after the Bay horse," and was continued until the Revision of 1821.

Col. Rec. 1711; Rev. 1808, p. 282.

In 1708, 1704 a certain Act was passed in Massachusetts in regard to executions against executors and administrators, the provisions of which are the same as in our law as laid down by Swift and in *Booth v. Starr*, 5 Day, 428.

Acts and Resolves of the Province of Mass. Bay, vol. 1, p. 536.

This Act was copied *verbatim* by New Hampshire in 1714.

N. H. Prov. Laws, p. 50.

While we had no law, until 1782, allowing probate courts to sell lands of deceased solvent debtors, or limit time for the presentation of claims, the Massachusetts law of 1696 and that of New Hampshire of 1719 contained such a provision. Now in 1759, in Massachusetts, after many executions had been levied on lands of deceased persons under laws identical with ours, except that with us the probate court had no power to order the sale of lands of deceased solvent debtors, while their courts had that power, some astute lawyer raised the question whether executions could be so levied, and whether resort must not be had to the probate court. And the Massachusetts General Assembly, to remove all doubts, passed a declaratory Act that, under the law as it then stood, executions could be levied upon deceased debtors' lands, which Act has been handed down to the present day, and many decisions have been made under it.

Drinkwater v. Drinkwater, 4 Mass. 354; *Steel v. Steel*, 4 Allen, 423.

In *Mead v. Harvey*, 2 N. H. 341, the same construction was adopted by the courts of that State.

But even if an execution at law could not be levied upon this land, yet, having been fraudulently conveyed, the creditor can go against it in equity, and the process of that court would be within the meaning of the term "execution" in § 4 of the Act relating to judgment liens.

1 Am. Lead. Cas. 46; *Salmon v. Bennett*, 1 Conn. 525, note.

Mr. R. E. De Forest, for defendants, appellees.

Pardee, J., delivered the opinion of the court:

The complaint is to the following effect: In 1880 Lawrence Flynn deeded land to his wife, without consideration and in fraud of creditors: he was then indebted to the plaintiff, and had no other property from which the indebtedness could be paid. The wife died intestate in 1881; Lawrence Flynn died intestate in 1883; one defendant is administrator upon his estate; the other upon the estate of the wife. There

were minor children. The plaintiff has recovered a judgment against the administrator upon the estate of Lawrence Flynn; it is unsatisfied; he has placed upon the land records a judgment lien upon the land conveyed by Lawrence Flynn to his wife; and he asks a foreclosure of that lien as against the two administrators and the heirs.

The defendants demurred for the following reasons: "Because it appears from the allegations of the complaint that the plaintiff seeks in said action only to recover judgment of foreclosure of a pretended judgment lien, claimed to be placed upon the property described in the complaint, which property, it appears from said allegations, belongs to the estate of a deceased person, Lawrence Flynn, or else to the estate of another deceased person, Elizabeth Flynn, and which pretended judgment lien, it further appears from said allegations, is founded upon a judgment rendered against said D. N. Morgan, administrator of said deceased person, Lawrence Flynn, and against no other person; and because the said judgment would not in law constitute a lien upon said property under said circumstances."

The court held the complaint to be insufficient. The plaintiff appeals, for reasons as follows: "The court erred in deciding that on a judgment rendered against the administrator of said Lawrence Flynn, in an action upon a debt due from the said Lawrence Flynn, during his lifetime, to the plaintiff, a judgment lien founded upon said judgment could not be filed and foreclosed upon or against the real estate of said Lawrence Flynn, owned by him at the time of his death; also in holding that upon a judgment rendered against the administrator of said Lawrence Flynn, in an action upon a debt due from the said Lawrence Flynn, during his lifetime, to the plaintiff,—the said Lawrence Flynn having, when so indebted to the plaintiff, fraudulently conveyed the said real estate described in the complaint to his wife, the said Elizabeth Flynn, without any consideration and with intent to avoid the said debt of said Lawrence to the plaintiff; and the said Elizabeth Flynn having died while the paper title to said real estate stood in her name upon the land records of the town wherein the same was situated,—the plaintiff could not file a valid judgment lien against the said real estate, and foreclose the same against the heirs at law of the said Elizabeth Flynn and her administrator, and against the heirs at law of said Lawrence Flynn and his administrator."

The statute of 1878 (Sess. Laws 1878, chap. 58) provides in effect that if the owner of an unsatisfied judgment shall file a certificate in the town clerk's office, it shall constitute a lien upon land belonging to the debtor, which may be foreclosed or redeemed in the same manner as a mortgage, if an execution could have been levied thereon.

It is the claim of the plaintiff that Lawrence Flynn made a fraudulent conveyance of land; that as a matter of law it was owned by him at his death; that upon the judgment against his administrator execution might issue and be levied thereon; and that a lien may be imposed and become, and be foreclosed as, a mortgage. Under our system, mortgages are enforced by strict foreclosure; the land goes to the creditor,

without appraisal, unless the debtor redeems.

We cannot accede to this. The right to take real estate upon appraisal by the levy of an execution can be exercised only upon such as is holden by a living debtor. Such right is in derogation of the common law. It is the creation of the statute, and must be exercised in strict accordance with its requirements. These, including the prerequisite unsuccessful search for personal estate, the search for real estate of the debtor holden in his own right, the appointment by him of one appraiser who shall be legally indifferent to him, and the privilege of uniting with the creditor in the appointment of another, all point to a living owner and debtor; none of them to an executor or administrator holding title temporarily for creditors until it shall be determined what portion of the estate these will consume, the remainder to devolve upon devisees or heirs.

Again, during the process of settlement the solvent estate of a deceased person is not to be exposed to creditors contending for precedence in the opportunity to apply land upon their debts upon appraisal. They are entitled to strict justice; full payment according to the legal standard; payment in money. They cannot compel the administrator to permit them to take it upon appraisal. Presumably, as a rule, it is more advantageous to the estate itself to convert the land into money than to allow the creditor to do it. The estate is entitled to this advantage. In the absence of personal estate sufficient for payment of debts, under the order of the probate court the administrator has the privilege of converting land into money for that purpose, by sale so guarded and conducted as to constitute an appraisal, to which no person in interest can object.

When the creditor has by a judgment made certain the sum due to him, he is sure of payment in full; there is no unwilling debtor resisting or postponing him; in due time the law will bring the money to him without action on his part; there is no need of the hastening power of an execution. In its desire to protect the estate of a deceased debtor, the law will not allow the creditor to burden it with the unnecessary cost attending the levy of an execution, nor open to him a chance to speculate upon the privilege of taking land upon appraisal.

Again, in this State, if an executor or administrator enters upon the settlement of an estate as solvent, and subsequently has reason for believing that it is insolvent, the probate court, upon his motion, will order the settlement to be concluded as of an insolvent estate. The record is silent as to the condition of this estate; and until settlement is completed there is possibility that it may be necessary to settle it as insolvent. Should this prove to be the case, the plaintiff cannot, by virtue of his lien, convert his judgment into a statutory mortgage, and foreclose that as an incumbrance prior in time and right to all other debts, and therefore to be paid in full. For, at death, the law, through the instrumentality of the probate court, takes possession of the estate of the decedent for the purpose of application of the same to the payment of creditors equally, each class in legal order of precedence. It favors diligence against living debtors. But, they

being dead, there remains no opportunity for diligence. The creditor cannot obtain a constructive mortgage from a deceased debtor; he cannot draw to himself any additional security or right to preference, at least so far as real estate is concerned; he must stand still and await proportionate payment. Again, neither in the case of a solvent nor in that of an insolvent estate does the cited statute intend to put a mortgage upon the land of a debtor after his death, and compel the administrator or the creditor or the heir to redeem it. Presumptively they would be unable to do so.

The exhaustive research of the plaintiff's counsel has brought to light a few instances, between 1707 and the present time, of the levy of executions upon lands of deceased debtors, upon judgments against executors or administrators. These may well stand upon the presumed acquiescence of all persons interested. But now the heirs challenge the right of the plaintiff to take land without appraisal, instead of money for the debt due to him. If the administrator having land will not convert it and pay, the creditor has an action upon his bond, —security provided by law for such an emergency.

In *Booth v. Starr*, 5 Day, 289, the case was this: A conveyed land by deed with covenants of warranty, died, and his estate was settled and distributed; subsequently his grantee was evicted. The question was whether the administrator was liable in an action upon the breach. Held that he was not. Mitchell, *Ch. J.*, in a dissenting opinion, arguing that it would be no hardship upon him if held liable, said: "But, on the other hand, if the administrator is held accountable, and we consider the bonds from the heirs as assets in his hands, when he has distributed the property there can be no difficulty in any case. His security is ample; he can recover at any length of time. The judgment against him must always be to recover of the goods, chattels, and estate of the deceased in his hands," —meaning that the administrator could not be harmed, because the judgment would not be against his own property but only against that of the estate in his hands, to be enforced in the manner provided by law; that is, under our probate system, by a sale of land under the order of the probate court and payment of the debts in money. He does not say that it is to be done by setting off land upon appraisal by execution.

In Swift's Digest, 325, it is said that, "when the execution is against the estate of a deceased person in the hands of his executor or administrator, if such estate cannot be found, the officer must return *non est inventus*, which lays the foundation of a *scire facias*; but if such estate can be found, it may be levied upon and disposed of in due and usual form;" citing *Weeks v. Gibbs*, 9 Mass. 74. Probably the learned author assumed that this case stated a rule of common law; but there is a statute in that State expressly providing for such levy; therefore the citation is inapplicable unless the statute accompanies it.

In New Hampshire a statute expressly authorizes the levy of an execution upon the land of a deceased debtor; and another provides for the sale of such land for the payment

of debts, by the executor or administrator under an order of the probate court. In *Mead v. Harcey*, 2 N. H. 342, speaking of the combined effect of these statutes, the court said: "The question which this case presents for our decision is whether an execution running against the goods and estate of a person deceased, in the hands of his executor or administrator, can be extended upon the lands which were of the person deceased. It is very clear that at common law there was no way by which a creditor could reach the lands of his deceased debtor by an action against his executor. All chattels, real and personal, went to executors and administrators, and were in their hands assets for the payment of debts; but as soon as the personal estate was exhausted in a due course of administration, a plea of *plene administravit* was a good answer to any action that could be brought against them. They were liable to the amount of the personal estate only, and had nothing to do with the lands. At common law, lands immediately descended to the heir, and became assets in his hands to satisfy debts to the payment of which the ancestor had bound his heir. And the statute of 3 William & Mary, chap. 14, made estate, in certain cases, assets in the hands of devisees to pay bonds and other specialties in which the deceased had bound himself and heirs, and an action was given against the heir and devisee jointly. Lovell, 98; *Wilson v. Knubley*, 7 East, 128; Comyn, Dig. *Assets*, A; *Buckley v. Nightingale*, 1 Strange, 686; *Shettleworth v. Neville*, 1 D. & E. 454; 2 Saund. 7, note 4. Upon recognizance at common law, when the consor was dead, in order to reach the land, the *scire facias* lay only against the heir, or the person to whom the consor had conveyed the land. Shep. Touch. 359; 2 Saund. 6. The extent of an execution running against the goods and estate of a person deceased, in the hands of his executor or administrator, upon lands in the hands of his heir or devisee, is utterly unknown to the common or statute law of England. If, then, there is any law that will warrant such an extent in this State, it is certainly not one which our ancestors brought with them from that country." After citing the New Hampshire statutes the court continues: "Such are the provisions of our statutes now in force on this subject; and we are inclined to think that, if a construction were now for the first time to be given to them, we should be of opinion that they did not authorize the extent of an execution running against the goods and estate of a person deceased, in the hands of his executor or administrator, upon lands. We should have supposed that the real intention of the Legislature was that every man's estate, both real and personal, should be liable to be taken upon execution at any time during his life; but that after his death his real estate should stand charged with the payment of his debts only in case of a deficiency of personal estate, and to the amount of such deficiency, and that such deficiency was to be supplied by a sale of real estate authorized by the judge of probate after notice given to the heirs at law and a hearing of the parties interested. And we were not a little surprised, when we first examined our statutes on this subject, that a different construction

should ever have been put upon them. But upon further investigation we found that our Provincial Acts had been copied from the Provincial Acts of Massachusetts, and that those Acts had there been construed to authorize extents of this kind. For in 1759 the Legislature of that province passed the Act of 32 George II. chap. 271, in which, after a preamble reciting that 'whereas some doubts and questions have arisen upon the construction of some parts of an Act entitled "An Act Relating to Executors and Administrators," whether, by force of the same, real estates of the testators and intestates may be taken in execution for the satisfaction of judgments recovered against their 'estates in the hands of their executors and administrators,' etc., it was enacted 'that real estates of any testators or intestates are and shall be liable to be taken and levied upon by any execution issuing upon judgment recovered against executors and administrators in such capacity, being the proper debts of the testators or intestates;' and it is certain that an opinion has for a long time prevailed very generally in this State that such extents were valid; and it is believed that their validity has never before been called in question in any of our courts. Many such extents have been made within the last twenty years, and are the only foundation upon which the titles to many estates rest. It was said by Lord Coke that 'the judges, in general cases, have great respect and consideration that their judgments shall not impeach the estates and inheritance of many men against ancient and common approbation.' The remark is full of wisdom and sound sense, and the principle applies with all its force to the question now before us. If by a new construction we should defeat the titles of the many inheritances which rest upon extents of this kind, much inconvenience, injustice, and mischief must be the necessary consequence. And we are of opinion that, however erroneous the construction of these statutes might now be thought to be, the long and uninterrupted usage, common understanding, and general acquiescence have made it the true construction, and that it must now be considered as settled that an execution running against the goods and estate of a person deceased, in the hands of his executor or administrator, may be extended upon lands, and that lands must for that purpose be considered as estate in the hands of executors and administrators.

We have not, however, come to this conclusion until after a careful examination of the remedies which the law will afford to heirs and devisees whose lands may be thus taken; and, in the first place, we entertain no doubt that heirs and devisees may redeem lands thus taken, in the same manner that debtors may redeem their lands which have been taken in execution. In the next place, if executors and administrators permit the lands of their testators and intestates to be taken in execution when they have sufficient personal estate in their hands, it is unfaithful administration, and a breach of the condition of their bonds. This is a necessary consequence of the provision of the statute which has made the personal estate chargeable with the debts in the first instance, and the real estate chargeable only in case of a

deficiency of personal assets. 4 Mass. 354, 654; 9 Mass. 376; 10 Mass. 450."

There is no error in the judgment complained of.

In this opinion the other Judges concurred.

William DAVISON, Jr., et al.

v.

Milton D. HOLDEN and Patrick Tate.

1. **Members of an unincorporated co-operative association**, formed for the purpose of buying goods at wholesale and selling them at retail to the members and others, without profit beyond paying expenses, **held individually liable as principals**, for the price of goods purchased for the association by its managers and agents, elected by the members and authorized by them to purchase goods for the association.
2. Under the statute (Gen. Stat. p. 147, § 7) permitting individuals to unite under a distinguishing associate name for trading purposes, such individuals do not acquire either corporate powers or immunity from individual liability; and an action may be maintained against them under the assumed associate name,—when execution will go against common property of the association as such, and not against individual property (Gen. Stat. p. 403, § 9),—or against them individually, when execution will go against the individual property of any.
3. If the plaintiff, in an action against members of such an association individually, names only a part of those who should be named, a plea in abatement may be interposed specifying omitted names; if no such plea is interposed, those who are named are properly sued and must submit to judgment.

(Fairfield—Filed August, 1887.)

A PPEAL by plaintiffs from a judgment of the Court of Common Pleas of Fairfield County in favor of defendants in an action for goods sold, commenced before a justice of the peace and brought into the Common Pleas on appeal by plaintiffs. *Reversed.*

The facts were found by the court as follows:

The goods described in the bill of particulars were sold by the plaintiffs to the Bridgeport Co-operative Association, and the defendants were cognizant of the sale. The association was an unincorporated association of Bridgeport, having that name. It conducted a retail meat-market business under that name, having a sign bearing that name over its place of business, and giving its orders in that name.

The object of the association was to sell goods to its members, and generally to workingmen, at a price not exceeding the actual cost of the goods and of the management of the business. It did, in fact, sell to the public generally. Individuals became members of the association by subscribing such a sum of money—from 50 cents to \$5—as they desired. The individual

members numbered about fifty, in addition to which another association, consisting of about seventy-five members, was a member of said Bridgeport Co-operative Association.

It was not intended that the members of the association should receive, nor have they received, any profit or benefit from the business, other than as above stated; nor was it intended that there should be, nor has there been, any profit whatever to the association in the business.

All the members who obtained goods at the market purchased and paid for the same in the same manner as persons not members of the association.

The members of the association held meetings and elected officers who had the superintendence of the business. They, or some of them, visited the market in the evening, two or three times each week. They employed one or two persons to manage the business. Such manager did the buying and selling, and arranged the business generally, reporting and paying over the receipts of the business to the treasurer or some other officer of the association.

The defendants were members of, and themselves purchased goods of, the association; and, at the time of the purchase of the goods of the plaintiffs, Holden was president and Tate treasurer thereof. It did not appear what amount either of the defendants subscribed to become members of the association.

Except as may appear from the above facts, it did not appear that any of the members of the association ever held themselves out as partners, or as liable as individuals, for the obligations of the association, or that the plaintiffs, or any other persons, ever gave credit to them, either as individuals or as copartners.

Except as herein found, the members of the association entered into no agreement of co-partnership among themselves, and into no agreement or understanding by which they, or any of them, should become personally liable for the debts of the association.

The association failed in business in July, 1884.

Upon these facts the plaintiffs claimed that the defendants were liable, either as copartners or as individuals, for the debt. The court overruled this claim, and held that the defendants were not liable, either as individuals or as copartners.

Messrs. Wheeler & Curtis, for plaintiffs, appellants:

I. The defendants are liable as partners, doing business under the firm name of the Bridgeport Co-operative Association, to the plaintiffs for goods sold by them to the association.

The issue is between men who were members and officers of an unincorporated association carrying on a retail meat-market business and a creditor who sold goods to the association. It is undisputed that the association was formed for the purpose of carrying on trade, and that the goods sold were purchased by the association in the regular course of the business of the association.

The principals in a business may make any or no agreement as to the extent of their liability between themselves; but when the question

of their liability to creditors arises, the law, and not their agreement or lack of agreement, determines their liability.

Everitt v. Chapman, 6 Conn. 347; *Manning v. Gasharie*, 27 Ind. 400; *Sheridan v. Medara*, 10 N. J. Eq. 469; *Berthold v. Goldsmith*, 24 How. 542 (65 U. S. bk. 16, L. ed. 764); *Bucknam v. Barnum*, 15 Conn. 72; *Wells v. Gates*, 18 Barb. 554.

The test of the liability of a person to third parties as a partner is whether or not he was carrying on the business personally, or the other persons carrying on the business were his agents to carry it on.

1 Smith, Lead. Cas. 8d ed. pt. 2, 1299; *Wheatcroft v. Hickman*, 99 E. C. L. 47; *S. C. 8 H. L. Cas. 268*; *Bullen v. Sharp*, L. R. 1 C. P. 86.

The creditor must establish by whom or for whom, as principals, the business was conducted; and when he has done this, he has fastened forever upon whom shall fall the liability for goods sold the business.

Everitt v. Chapman, 6 Conn. 347; *Bodwell v. Eastman*, 106 Mass. 525; *Manning v. Gasharie*, 27 Ind. 400.

Sharing in the profits may help to determine the principals. But when they are found, it is of no importance to the creditor what agreements existed between the principals as to profits and losses,—whether they shared in the profits or whether they intended to make a profit.

Manning v. Gasharie, *supra*.

This association was unincorporated. It was organized by a number of men to carry on a business for a certain purpose under a common name. Each member paying his fee and joining the association joined it for the purpose of conducting a business, and thus gained a community of interest in the business. That the fee paid was not uniform between members is of no consequence.

Robinson v. Robinson, 10 Me. 242.

Since the association was formed to conduct business, the purchase made of these plaintiffs was but a step towards carrying out the intention of every member of the association.

2 Kent, Com. 620; *Manning v. Gasharie*, 27 Ind. 400.

The conclusion is irresistible,—the principals in this business were the members associated together to conduct a business for a certain purpose, and if so associated, the law says these members are partners. Especially partners are these defendants, for they were not only members, but they were officers of this association at the time this sale was made; they hired a manager, they knew of the sale, they actively carried on the business.

Bodwell v. Eastman, 106 Mass. 525.

The courts have uniformly held that the members of an unincorporated association doing business are liable as partners.

Taft v. Ward, 106 Mass. 518; *Bodwell v. Eastman*, Id. 525; *Manning v. Gasharie*, 27 Ind. 401; *Wells v. Gates*, 18 Barb. 554; *Frost v. Walker*, 60 Me. 468; *Bobb v. Reed*, 5 Rawle, 151; *Park v. Spaulding*, 10 Hun, 128; Editor's Note, 13 Am. Dec. 504; *McGreary v. Chandler*, 53 Me. 538; *Boston & A. R. R. v. Pearson*, 128 Mass. 449; *Hoadley v. Essex County*, 105 Mass. 519.

A distinction must be drawn between the case at bar and cases like the following:

Stafford Nat. Bank v. Palmer, 47 Conn. 448; *Fay v. Noble*, 7 Cush. 188; *Central City Sav. Bank v. Walker*, 66 N. Y. 424.

In these cases a number of men attempted to form, and supposed they had formed, a corporation; but owing to some defect in the organization there was no corporation in fact. This was not known to the stockholders whom creditors sought to hold as partners for debts contracted by the agents of the company. The courts held that as the stockholders distinctly intended that the agent should represent a corporate body, and not them, as individuals, he could not be considered as their agent, and they are not bound by his acts.

In the case at bar, and in the cases previously cited, there was no attempt to form a corporation, and all acts were done for individuals, and when the individuals are found, their liability follows as a matter of course.

The doctrine that cash profits, as such, are essential to the formation of a partnership has been exploded. The measure of benefit to a man from the business is the measure of his profit.

Manning v. Gasharie, 27 Ind. 400; *Everitt v. Chapman*, 9 Conn. 347; *Berthold v. Goldsmith*, 24 How. 542 (65 U. S. bk. 16, L. ed. 764); *Bromley v. Elliot*, 38 N. H. 287; *Parker v. Canfield*, 37 Conn. 267.

So far as these creditors are concerned, it matters not whether the profits be large or small, nor does it matter that the business was formed to sell to members and the public. Each purchase by the public lessened the cost of the goods to the members; for the expenses of the management were proportionately less the greater the sales, while sharing in the benefit of buying goods at cost price deprived creditors of a part of the means of securing payment.

Manhattan B. & B. Co. v. Sears, 45 N. Y. 799.

II. The defendants, as members and officers of an unincorporated association, are individually liable for the debts of the association which were contracted, assented to, or ratified by them.

In our complaint we have described the defendants as partners, following the mode of procedure in the case of *Boston & A. R. R. v. Pearson*, 128 Mass. 449.

If the defendants were not partners, the erroneous description is mere surplusage. We have sued Holden and Tate; the judgment in any case would run against the individuals.

Manning v. Gasharie, 27 Ind. 400.

In the early cases against societies and associations, formed for social and benevolent objects, the courts held that these associations, not being incorporated, were mere partnerships in their relations to third parties.

Baumont v. Meredith, 3 Ves. & B. 180; *Babb v. Reed*, 5 Rawle, 158.

The rule has been modified in England and in some of the United States, and in these States,—where all unincorporated associations are not held to be partnerships,—it is held that while the officers, manager, or committee of an unincorporated association formed for social or benevolent purposes are individually liable for any obligation incurred by them, or under their direction, the members are not individually

liable unless they assented to the purchase when made, or ratified it after it was made.

Ash v. Guie, 97 Pa. 498.

In our case the members joined the association for the express purpose of carrying on a business; they therefore assented to every act done by their agents within the ordinary scope of that business.

Manning v. Gasharie, 27 Ind. 400.

But we are suing the officers of the association. They must be held responsible for their own acts, or that of their agent acting within the scope of the purposes of the association.

Re St. James Club, 16 Jur. 1076; *Fleming v. Hector*, 2 M. & W. 171; *Ash v. Guie*, 97 Pa. 498; *Robinson v. Robinson*, 10 Me. 240.

The cases against members of an association wherein the courts refuse to consider the association partnerships are uniformly cases where it is stated that the purpose of the association is not trade, business, or profit, and hence no partnership, and where it is clearly intimated that had the purpose been trade, business, or profit, the association would have been held a partnership.

McMahon v. Rauhr, 47 N. Y. 70; *Lafond v. Deems*, 81 N. Y. 512; and cases above cited.

III. But these defendants, as in the lower court, may here urge that they were not engaged in trade, but were conducting a benevolent institution, and so are not personally liable.

How can this case be made to square with the accepted doctrine of a charity, as given by Mr. Binney in the *Girard Will Case*?

"A charity," says Mr. Binney, is "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense,—given from these motives and to these ends, free from the stain or taint of any consideration that is personal, private, or selfish."

The characteristics of a charity are that its funds are derived from gifts and devises, and that its objects are to aid others than the promoters of the charity.

Bangor v. Rising Virtue Lodge No. 10, F. & A. M. 73 Me. 429; *Gorman v. Russell*, 14 Cal. 538; *Babb v. Reed*, 5 Rawle, 158.

In the case at bar the members paid fees, and shared in the benefits contemplated by the association.

If this Bridgeport Co-operative Association were held to be a charitable association, while it might conclude the question of the partnership of these defendants, it would not, as we have previously shown, prevent the personal liability of the officers who contracted the debt, the members who authorized it, assented to, or ratified it.

Ash v. Guie, 97 Pa. 498.

IV. The defendants may, as they did before, claim that they were a voluntary association, entitled to the privileges conferred by Rev. Stat. 1875, § 7, p. 417, and further claim that, by reason of Rev. Stat. 1875, § 9, p. 403, they, as members of a voluntary association, are relieved from personal liability for debts incurred in the name of the association.

Said § 7 is in these words: "Any number of persons associated together as a voluntary association, not having corporate powers, but known by some distinguishing name, may

sue and be sued, and plead and be impleaded, by such name."

This provision was added to the law in 1864. It did not create voluntary associations,—they had always existed.

Atheater v. Woodbridge, 6 Conn. 228.

Before its passage, suits for and against these associations had to be brought by and against the persons so associated. This section of the statutes remedied the inconveniences of the old method of procedure,—it permitted these associations to sue and be sued by their distinguishing name.

The statute says: "Any number of persons may sue and be sued." It does not say must sue and be sued. It stands side by side with the old method; it leaves that method, in existence before its passage, still existent and untouched.

Voluntary associations, then, may be sued by their distinguishing name, or the members may be jointly sued, for debts of the association.

Rev. Stat. 1875, § 9, p. 403, says: "In suits against such associations as are liable to be sued, * * * the individual property of its members shall not be liable to attachment or levy in such suits."

Section 7 allows voluntary associations to be sued by a distinguishing name.

Section 9 says that in such suits the individual property of the members cannot be taken by attachment or levy. The reason for this statute is that, in suits against the association the members would have no notice, no day in court; but nowhere in this statute does it appear that individual members cannot be sued, and their property taken in such suit. Such was the old method of procedure; it has never been repealed, therefore it is existent. For it is fundamental that subsequent statutes which institute new methods of procedure do not repeal former methods of procedure ordained by preceding statutes, without negative words.

Potter, Dwar. Stat. p. 156.

When the statute provides a summary method for commissioners to oust occupants of land sold,—held, that the common-law remedy of ejectment would still lie.

Candee v. Hayward, 37 N. Y. 656.

So when the statute provides that suit may be brought in the name of the assignee,—held, this did not take away the old remedy of suit in the name of the assignor.

Beach v. Fairbanks, 52 Conn. 178. See *Coe v. Meriden*, 45 Conn. 157; *Hartford & N. H. R. R. Co. v. Kennedy*, 12 Conn. 529.

The law regarding voluntary associations, when first enacted (see Laws 1864, chap. 16), read: "Any number of persons associated together for any purpose, may sue and be sued," etc.

In the Revision of 1866, § 65, p. 14, and in Laws 1867, chap. 65, and in the Revision of 1875, § 7, p. 417, the words "for any purpose" were stricken out.

Does not this indicate that as early as 1866, and ever since then, there have been purposes for which voluntary associations, having the privilege conferred by the statutory law since 1864, have not been allowed to exist?

Our claim is that no voluntary association, such as is contemplated by the statute, can ex-

ist for the purposes of business; and if it can exist, it is a mere partnership.

Messrs. Robert E. De Forest and F. W. Holden, for defendants, appellees:

I. To constitute individual partners, as between themselves, there must be an express agreement or clear understanding between them to become partners, or to do those things which make them partners. That there was no such agreement or understanding here is evident from the finding. Many of the essential elements of a partnership are entirely wanting.

Swift, in the first volume of his Digest, side page 337, defines a partnership as "a contract between two or more persons, by which they join together their money, goods, or labor for the purpose of trade, upon an agreement that their gain or loss shall be divided proportionately."

We find substantially the same language employed by all the standard writers.

8 Kent, Com. p. 24; 1 Pars. Cont. p. 147; Collyer, Partn. Perkins' ed. p. 6.

Here was no joining together of money, goods, or labor for the purpose of trade. Here was no agreement that the gain or loss should be divided. The only payment of money was a voluntary contribution of such small sums as each individual felt disposed to give, ranging from 50 cents to \$5, towards a charitable purpose, upon which contribution he was considered a member of the association.

No division of profits, or profits to divide, were dreamed of, and equally foreign to the imagination of these men was it that by giving small sums to charity they thereby legally obligated themselves to donate much larger amounts on the ground of sharing business losses. The members of the association derived no benefit whatsoever from the market, aside from what the public generally enjoyed.

Upon these facts it is perfectly obvious that no partnership in fact existed.

LaMont v. Fullam, 183 Mass. 588; *Holmes v. Old Colony R. R. Corp.* 5 Gray, 58; *Pillsbury v. Pillsbury*, 20 N. H. 90; *Newman v. Bean*, 21 N. H. 93; *Rice v. Austin*, 17 Mass. 197; *Salter v. Ham*, 81 N. Y. 321; *Perrine v. Hankinson*, 11 N. J. L. *181.

But next, it is equally plain that the defendants, as members of that association, are not estopped from denying that they were partners, as against the plaintiffs.

In order to estop parties from denying a partnership, where in fact no partnership exists, two facts must be established: (1) that the persons estopped held themselves out as partners to the party claiming the partnership; (2) that the party seeking to avail himself of the estoppel by reason of such holding out, has believed in the existence of such partnership, and given credit in the transaction in question upon the strength of such belief.

Collyer, Partn. ¶ 19; *Dickinson v. Valpy*, 10 Barn. & C. 128; *Burgan v. Cahoon*, 1 Penny. 320; *Wood v. Pennell*, 51 Me. 52; *Vice v. Ledy Anson*, 7 Barn. & C. 409; *Dentithorne v. Hook*, 1 Pa. L. ed. 788 (3 Cent. Rep. 124); *McLevee v. Hall*, 2 N. Y. L. ed. 128 (4 Cent. Rep. 368); *Eastman v. Clark*, 53 N. H. 276; 5 Wait, Act. & Def. 118.

In the present case there is no finding of any holding out by the defendants of themselves as partners to anyone.

Not only does it not appear that the members of this association represented themselves to be a partnership, but it does not appear that the defendants represented themselves to be members of the association, or that the plaintiffs or anyone else knew or supposed that they were members. Much less does it appear that the plaintiffs sold the goods on the individual credit of the defendants. Indeed, it is an admitted fact that the goods were sold by the plaintiffs to the Bridgeport Co-operative Association, an unincorporated body.

The very language of the finding effectually precludes the claim that any credit was given here to the defendants as partners or individually.

II. The only remaining question is, Does the finding disclose any individual liability of these defendants for this debt?

We are at loss to know upon what ground the plaintiffs claim such liability. The action was not commenced upon that theory. We have been summoned into court as partners, under the firm name of the Bridgeport Co-operative Association.

A bill of particulars filed in the justice court, where the case was first tried and decided against the plaintiffs, charged the defendants as partners. It appears to have occurred to the plaintiffs in the court of common pleas for the first time that there was an individual liability distinct from a partnership.

The proposition of the plaintiffs upon this part of the case is that these goods were sold and delivered to Holden and Tate individually. There is not the slightest indication anywhere upon the record that Davison Brothers, at the time of the sale and delivery, knew of the existence of Holden and Tate, and it, of course, cannot be inferred that any credit was given to them in the transaction. On the other hand, it affirmatively appears that the credit was given, and that the goods were sold, to the "Bridgeport Co-operative Association, an unincorporated body," a body that, under the statute of the State, could be dealt with, trusted, and sued as though incorporated. There is therefore no conceivable ground upon which the defendants can be individually liable, unless it be that the association was acting as agents for the defendants, as undisclosed principals, who being since discovered can now be held. To maintain this position it would have to be shown, precisely as required in the claim of an actual partnership, that it was really the intention of these defendants individually to purchase, own, and pay for these goods, and that they authorized the association to buy them for them individually. Not only is this claim entirely unsupported, but it is most decidedly refuted by the facts found.

It is perfectly evident that neither of these defendants, nor anyone else, ever imagined for a single moment that they (the defendants) individually were purchasing, or had any title whatever to the articles bought and sold in that market. If this had been so, the defendants would not have purchased portions of these same goods from the association, as found by the court, but could have, and undoubtedly would have, pursued the much simpler and more economical course of helping themselves to the exclusion of everyone else, without the incon-

venient formality of payment; for surely a man may do what he will with his own.

On the contrary, the understanding of the defendants and others belonging to the association was that the association, acting as a corporation, should buy upon its credit, and that each member had no title or interest in or to the stock in trade of the store, more than any other member of the entire public.

Certainly, therefore, there can be no possible foundation for the idea that in reality Holden and Tate were the actual principals,—purchasing, owning, having the right to use or dispose of, and therefore liable to pay for, these articles.

We submit, therefore, upon the whole case, the judgment of the court of common pleas ought to be affirmed.

Pardee, J., delivered the opinion of the court:

The defendants, with sundry other persons, associated themselves under the name of the Bridgeport Co-operative Association, an unincorporated trading association. They established a meat-market. Their purpose was to buy at wholesale, and to retail to any person who would buy, regardless of membership, and to the members, at such a price as would relieve them from paying at least one middleman's profit. Each member contributed something to the starting fund, the amount determined by himself. No profits were anticipated beyond payment of the expenses of management. The members held meetings and elected officers; these employed managers to conduct the business; these last bought and sold, paying the receipts to the treasurer. One of the defendants was president, the other treasurer. Upon request of the managers, the plaintiffs sold merchandise to the association; this suit is for the price thereof.

It did not otherwise appear than from the above facts that any of the members of the association ever held themselves out as partners, or as being liable as individuals for the obligations of the association; or that the plaintiffs or any other persons ever gave credit to them, either as individuals or as partners; or that the members entered into any agreement of co-partnership among themselves; or into any agreement or understanding by which they, or any of them, should become personally liable for the debts of the association. The defendants claimed that they were not liable either as individuals or as copartners.

The determination of the controversy as to the liability of the defendants depends not at all upon the question whether they and the other associated individuals were partners as between themselves; nor upon the question whether, as between all of the associates and strangers, they were such—but upon the law of agency. If the defendants clothed an agent with unrestricted authority to buy, they must pay, regardless of the other questions.

Upon the record, the defendants, with others undisclosed, associated themselves for commercial purposes, for their pecuniary advantage. For convenience they transacted business under an assumed associate name; sent their managers and agents into the market with unrestricted authority to buy goods and pledge their credit under that name; to buy for the

benefit of all jointly and of each individually. In the due execution of the authority conferred upon them they contracted the debt in suit and pledged the joint and several credit of the associates. As a matter of law, the plaintiffs, in giving credit to the associate name, gave credit to the individuals who upon inquiry should be found to stand behind it.

It is of no legal significance that the defendants did not intend to be individually responsible, or that they did not know or believe that, as a matter of law, they would be, or that they intended that the goods, when bought, should become the property of the association. Having given to the agent unrestricted authority to buy, their secret intent as to the ultimate destination of the merchandise is of no avail. The rule that he who instructs his agent to buy can be made to pay, stands quite independent of intent or knowledge; he who buys by an agent buys by himself, and the law imputes to him knowledge that he must pay, and the corresponding intent to pay, for what he buys.

The statute* permits individuals to unite under a distinguishing associate name for trading purposes; but they do not thereby acquire either corporate powers or immunity from individual liability. If they choose so to do, they can institute a suit for the common benefit in the assumed name; also they may be made defendants under the same name. If the latter, execution will go against common property of the association as such and not against individual property. If, disregarding the fact and form of association, the suit is against all of the individuals, execution will go against the individual property of any. A suit may be instituted against them as individuals, as at common law, if the plaintiff will take the risk of naming all, and of naming them correctly. If he names only a part of those who should be named, a plea in abatement may be interposed specifying omitted names; if no such plea is interposed, those who are named are properly sued and must submit to judgment. If the associated persons send an agent into the market with unlimited authority to make purchases and contract debts in the name and for the benefit of the association, and the agent discloses the name of the association and not the names of the individuals composing it, the creditor may, if he is content to look only to the property of the association, as such, for his security, institute his action against the association by its distinguishing name. If he desires to reach the individual property of members, he must institute his suit against such and so many of them as he can name, as individuals; he may do this even if the sale was made and the credit given in form to the association and the name of no individual member was then known to him. He may do this for the reason that he gave credit upon the request of a known agent for an unknown principal. By operation of law, the credit was to the principal from the beginning, to be enforced whenever he can be discovered.

There is error in the judgment complained of.

In this opinion the other Judges concurred.

*See the statutory provisions referred to, set out in plaintiff's brief, *supra*. [Ed.]

Ethan C. ELY

v.

Francis W. PARSONS.

1. A **highway** may exist by **prescription** or long-continued public use.
2. The existence of a **highway** by dedication may be **found from long-continued public use**, and acquiescence in such use,—**even where the land over which the way is claimed is unenclosed and uncultivated**,—in a State where the land is, as a rule, cut up into small farms, and where tracts of uncultivated and unenclosed land are comparatively few in number and small in extent.
3. The Supreme Court of Errors cannot revise any **error in the weighing of evidence**.
4. Whether the facts show an **intention to dedicate the locus in quo** to public use is a **question of fact** for the jury to decide on the evidence in each particular case.
5. **Notice to the landowner** is not a prerequisite to the exercise by a selectman of his right and duty to remove obstructions from a highway.
6. A **public officer** is responsible for the wrongful acts of his subaltern or sub-agent, if he directed or authorized the wrong, or if the subagent does not hold an office known to the law, but his appointment is private and discretionary with the officer.
7. A **selectman** of a town, having been notified that a highway was obstructed by trees, **directed a private individual "to cut the brush and trees, and make the road passable at as little expense as possible,"** leaving it to his discretion what to cut. The person so directed unnecessarily cut some trees which did not interfere with travel. *Held*, that the **selectman was liable to the landowner for damages for the unnecessary cutting**.
8. Where a party has failed in the substantial object of the suit, and has left only a bare technical right to recover **nominal damages**, a new trial will not be awarded him for that purpose.

(Hartford—Filed April, 1887.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas of Hartford County in favor of defendant in an action of trespass to land, commenced before a justice of the peace. *Affirmed*.

The trial court found the following facts:

The land in question is in the northern part of the town of Enfield. There is there a quadrangular tract containing about five sixths of a square mile. It is bounded on the north, west, and south by highways, and on the east by Shaker Pond. The highway on the north is known as the Brinton Allen Road, and is in the State of Massachusetts; that on the west as the King Road; and that on the south as the Brainard Road. Excepting four houses on the

Brainard Road, no houses stand on the tract; and excepting the lands connected with these houses, the tract has never been divided or enclosed by fences. Excepting these lands and a few acres in the southwest part, now owned by the plaintiff, which were cultivated more than twenty-five years ago, the tract was formerly entirely woodland; and now is wholly woodland or land from which the wood has been cut, excepting the lands connected with the four houses.

West of the King Road and adjoining the tract is another tract of unenclosed and uncultivated woodland of about the same area, and north of the Brinton Allen Road and these two tracts is another tract of about 3,000 acres of uncultivated and unenclosed woodland lying in the State of Massachusetts.

The plaintiff owns 100 acres of the first-described tract, lying on the west side thereof, and extending from the Brinton Allen Road on the north to the Brainard Road on the south and bounded on the west by the King Road. The plaintiff's land is unenclosed, and is covered with growing wood, mostly pines and birches.

Across the whole of the first-described tract is the road in dispute, 274 rods in length, subtending the angle made by the junction of the Brinton Allen and King roads. One terminus is on the King Road near the southwestern corner of the tract, and 2,300 feet south from the junction, and the other terminus is on the Brinton Allen Road, 3,500 feet east of the junction. For 115 rods from its southwestern terminus it passes through the plaintiff's land. It is the shortest and most level road between the villages of Thompsonville, in Enfield, and East Longmeadow, in Massachusetts, and saves about a fourth of a mile to those passing between those villages, or in the same course from points beyond or adjacent. It passes over sandy land, and its track is not liable to be out of repair.

For more than sixty years public travel has passed in the same general direction as this road runs, seeking to save in distance and to find a more level track for heavy loads. About forty years ago the termini of the road were at different points from the present,—the southern one on the Brainard Road, and the northern one on the Brinton Allen Road west of the present terminus. But for thirty years past all travel has been in the present line.

About twenty-five years ago the owner of the land dug a ditch across the road at its northern terminus to obstruct travel, but travelers passed around the end of the ditch, which was soon filled up. This ditch was east of the land now owned by the plaintiff. About thirty years since a former owner of the land at the southwest corner of the first-described tract of land, plowed up a portion of it, including a part of the road, and sowed buckwheat, but the public passed over the plowed land and travel was not interrupted. The plaintiff now owns the land where this plowing was done. These are the only attempts by the owners of the land through which the road runs to interfere with public travel, and for twenty-five years last past it has been used by the public continuously for all purposes of travel, with the knowledge of, and without objection by, the

landowners, and especially with the knowledge and acquiescence of the owners of the plaintiff's land.

The road, passing through woodland for a considerable part of its course, is liable to become obstructed by bushes, branches of trees, and young trees bent down by ice and snow, thus interfering with travel. By direction of the selectmen of Enfield, acting for the town, such obstructions had been cut out, and through the land of the plaintiff, twice before 1883,—once in 1867 and once in 1880.

The plaintiff holds his land under three deeds: the first given March 14, 1872, and the last July 29, 1874, by Josiah H. Hall, who told the plaintiff at the time of giving the deed that the road was a public highway, but no reference to it was made in the deed, nor in five deeds of parts of the tract given within twenty-five years, including the three deeds to the plaintiff; which five deeds were introduced in evidence by the plaintiff.

The road in question is one of public convenience and necessity, and is a public highway created by dedication of their lands to the use of the public for a highway by the owners of the lands through which the road passes, and especially by the owners of the plaintiff's land, and by the acceptance thereof by the public as and for a highway. The court came to this conclusion from the facts herein found, derived from all the evidence in the case, and an inspection of the road at the request of the parties.

In October, 1883, while the defendant was a selectman of the town of Enfield, and had charge of the highways in that part of the town in which this road lies, complaints came to him that the road was impassable from trees and brush. One Button also came to him with the like information, and wanted to cut out the obstructions. The defendant, having inspected the road and found it obstructed as represented, directed Button "to cut the brush and trees, and make the road passable at as little expense as possible." Button had cut out the road twice before for the town, and was competent for the work.

Afterwards, in November, 1883, Button, without further instructions and alone, cut out the road for the town. All the cutting which he did was necessary to make the road passable for travel, excepting the cutting of five white birches and a few limbs on the off sides of two pine trees. The birches stood from 14 to 17 feet from any part of the road over which travel passed, and leaned away from the road. The two pine trees stood from 9 to 10 feet away from any part of the traveled road, and neither the birches nor the limbs of the pine trees in any way impeded travel or were likely to do so. The trees cut were valuable only for fuel. Whatever he cut was left on the premises by him for the plaintiff's use. The plaintiff lives in the parish of West Longmeadow, in the State of Massachusetts, about 3 miles from the place where the cutting was done, and no notice was given to him of the intended cutting. This cutting of the birches and pine limbs was clearly unnecessary to make the road passable or convenient, and was not authorized by the defendant.

The plaintiff's damage by the whole cutting,

if the same was unlawful, was \$10. His damage by the unnecessary cutting was merely nominal.

On the trial the plaintiff claimed as matter of law:

1. That in this State a highway could not exist by prescription, and that in case of unenclosed and uncultivated land like the plaintiff's, dedication by the owners for a highway could not be found from mere user of the road by the public.

2. That if the road was a highway, yet the defendant was responsible for the unnecessary cutting by Button.

3. That the failure to give the plaintiff notice made the cutting illegal.

The court overruled these claims, and rendered judgment for the defendant on the facts.

Meers, J. W. Johnson and A. F. Eggleston, for plaintiff, appellant:

1. The court below erred in holding that this wood-road is a highway by dedication. Dedication must originate in the voluntary donation of the owner of the soil, and the intention of the owner to dedicate must be clear, manifest, and unequivocal.

Riley v. Hammel, 38 Conn. 576.

Angell, in his work on Highways, § 151, well states the law on the presumption of dedication of a road to the public, by mere user, over unenclosed woodlands. He says: "It has been decided that dedication of a road to the public over the waste and unenclosed lands of an individual ought not to be inferred from bare user alone. Thus, where a road that had been in existence for more than fifty years had originally passed entirely through woodland, the jury were instructed that mere user by the public, however uninterrupted and long continued, would be insufficient to constitute it a public road, but must be accompanied by acts which showed the use to have been claimed as a right, and not by permission of the owner; such as working on it, keeping it in repair, and requiring the removal of obstructions. To prohibit such use would be considered churlish, and would be ineffectual unless constant watch were kept; and therefore, to subject him to the presumption of dedication from such use, would be to exclude his property from the protection of the law." And in the States where tracts of uncultivated and unenclosed lands exist, the courts have declared the law to be as here stated.

Hutto v. Tindall, 6 Rich. L. (S. C.) 396; *Fox v. Virgin*, 5 Bradw. 515; *Peyton v. Shaw*, 15 Bradw. 192; *Hewins v. Smith*, 11 Met. 241.

In *Kyle v. Town of Logan*, 87 Ill. 64, the court says: "It is neither the temper, disposition, fashion, nor habit of the people, nor custom of the country, to object to the community crossing unimproved lands, until owners wish to enclose."

See also *Commonwealth v. Fisk*, 8 Met. 245.

2. Towns do not have authority in this summary manner to subject to a public easement land not lying within the lines of the highway. "The boughs that overhang the traveled path of a highway are a nuisance, and may be cut off by those having the repair of highways in charge, but the trees cannot be cut, nor can branches thereof be cut lest they should at a future time operate as an obstruction."

CONN.

Wood, Nuis. 277; *Owens v. Crossett*, 105 Ill. 360; *Beardsley v. Hartford*, 50 Conn. 529.

But trees themselves are not a nuisance when growing on private land, outside the limits of the highway. The pine trees, which the court finds to have been 15 or 20 inches in diameter, were probably of forty or fifty years' growth. Other trees, smaller in dimensions, were cut down. In fact there were in all 175 trees cut down. Does it make no difference in law whether these trees stood upon the plaintiff's land outside or inside the limits of the highway, as to the legal right of the defendant, as selectman, to cut them down; and especially when no notice was given to the plaintiff of such intended cutting?

3. The court erred in holding that the defendant is not liable for what the court terms unnecessary cutting. There can be no doubt, upon the facts, that the town is not liable.

Judge v. Meriden, 38 Conn. 90; *Walcott v. Swampscott*, 1 Allen, 101.

And if the defendant is not liable therefor, the plaintiff must look solely to Button, an irresponsible person, and the plaintiff is practically without remedy for the injury. There can be no question that if the defendant did such unnecessary cutting himself, or authorized it to be done, he would be liable.

Tearney v. Smith, 86 Ill. 391; *Elder v. Bemis*, 2 Met. 599; *Wetherell v. Newington*, 1 Conn. L. ed. 185 (2 N. E. Rep. 707), 54 Conn. 73; *Adams v. Richardson*, 43 N. H. 212.

The act done was directly invasive of the private rights of the plaintiff. The discretion which protects an officer of the town in the repair of a highway stops at the boundary where the absolute rights of property begin.

McCord v. High, 24 Iowa, 396.

It being conceded that the defendant himself did not do this unnecessary cutting, were his authority and relations to Button such that the doctrine of *respondet superior* applies? The defendant told Button "to cut the brush and trees, and make the road passable." Was it not equivalent to directing Button to cut such brush and trees as, in his judgment, should be necessary to make the road passable? Did not the defendant commit to Button a discretion in the matter? Button did not act willfully, with a view to further his own interest or to satisfy any private or personal feeling; but he acted honestly, and within the scope of his employment and duties as he understood them. And if there was no express authority given to him to do this unnecessary cutting, yet if the relation of master and servant existed between them, the defendant is clearly liable.

Wood, Mast. & Serv. 544, 585; *Smith v. Webster*, 23 Mich. 298; *Luttrell v. Hazen*, 3 Sneed, 20; *Elder v. Bemis*, 2 Met. 599; *Howe v. Newmarch*, 12 Allen, 49; *Cohen v. Dry Dock, E. B. & B. R. Co.* 69 N. Y. 170.

Public officers are not acting for the public when committing trespasses upon private property.

Wetherell v. Newington, 1 Conn. L. ed. 185 (2 N. E. Rep. 707), 54 Conn. 73.

"With regard to the responsibility of a public officer for the misconduct or negligence of those employed by or under him, the distinction apparently turns upon the question whether the persons employed are his servants,

appointed voluntarily and privately, and paid by him, and responsible to him, or whether they are his official subordinates, nominated perhaps by him, but officers of the government; in other words, whether the situation of the inferior is a public office or a private service. In the former case the official superior is not liable for the inferior's acts; in the latter he is."

1 Am. Lead. Cas. 651; Dunlap's Paley, Ag. 800; Whart. Neg. § 238; *Sawyer v. Corse*, 17 Gratt. 230; *Elder v. Bemis*, 2 Met. 599; *Shepherd v. Lincoln*, 17 Wend. 250; *Nicholson v. Mounsey*, 15 East, 384.

If the trees stood within the highway and interfered with public travel, the defendant had no right to cut them down without first giving notice to the plaintiff to remove them, and the failure so to do made the cutting illegal, and the court erred in holding to the contrary.

Clark v. Dasso, 34 Mich. 86; *Bills v. Belknap*, 36 Iowa, 583.

Messrs. C. H. Briscoe and J. Hamlin, for defendant, appellee:

1. The existence of a highway may, in this State, be shown by prescription.

Beardslee v. French, 7 Conn. 127; *Sherwood v. Weston*, 18 Conn. 51; *Noyes v. Ward*, 19 Conn. 269; *Brownell v. Palmer*, 22 Conn. 118, 121.

And the same in other States.

2 Greenl. Ev. § 662; *Commonwealth v. Low*, 3 Pick. 412; *Odiorne v. Wade*, 5 Pick. 421; *Reed v. Northfield*, 13 Pick. 97; *Stedman v. Southbridge*, 17 Pick. 162; *Williams v. Cumington*, 18 Pick. 313; *Valentine v. Boston*, 22 Pick. 79; *Hicks v. Fish*, 4 Mason, 310; *Commonwealth v. Cole*, 26 Pa. 187; *Chicago v. Wright*, 69 Ill. 318; *State v. Green*, 41 Iowa, 693; *State v. Wells*, 70 Mo. 635; *McWhorter v. State*, 43 Tex. 666.

2. In the case of unenclosed and uncultivated land, a dedication for a highway can be found from mere use by the public.

Ang. Highways, §§ 132, 142, 143; 3 Kent, Com. 451; *Curtiss v. Hoyt*, 19 Conn. 169; *Noyes v. Ward*, Id. 267; *State v. Taff*, 37 Conn. 397, 400; *Cincinnati v. White's Lessee*, 6 Pet. 438 (31 U. S. bk. 8, L. ed. 456); *Barclay v. Howell's Lessee*, 6 Pet. 512 (31 U. S. bk. 8, L. ed. 482); *Morgan v. Chicago & A. R. R. Co.* 96 U. S. 716 (Bk. 24, L. ed. 743); *Valentine v. Boston*, 22 Pick. 81; *Jennings v. Tisbury*, 5 Gray, 73; *Hayden v. Stone*, 112 Mass. 346; *Denning v. Roome*, 6 Wend. 657; *Hunter v. Trustees of Sandy Hill*, 6 Hill, 413; *Niagara Falls Susp. Bridge Co. v. Bachman*, 66 N. Y. 261; *Fairfield v. Morey*, 44 Vt. 239; *Mayor, etc. of Jersey City v. Morris Canal & B. Co.* 12 N. J. Eq. 547; *McCormick v. Mayor, etc. of Baltimore*, 45 Md. 512; *State v. Welpton*, 34 Iowa, 144; *Green v. Bethen*, 30 Ga. 896; *Mayor, etc. of Madison v. Booth*, 53 Ga. 609; *Downer v. St. Paul & Chicago R. Co.* 23 Minn. 271; *Pierpoint v. Harrisville*, 9 W. Va. 215; *Mansur v. State*, 60 Ind. 357; *Mansur v. Haughey*, Id. 364; *Portland v. Whittle*, 3 Oreg. 126.

3. The *locus in quo* being a public highway, it was the duty of the town to remove the trees and brush that incommoded public travel.

Gen. Stat. p. 231, § 1; *Harrison v. New*

Haven, 34 Conn. 142; *State v. Merrit*, 85 Conn. 317.

4. The defendant is not liable for the unnecessary cutting of trees by Button.

1 Rev. Swift, Dig. 71; Story, 1 Ag. §§ 821, 457; *Church v. Mansfield*, 20 Conn. 284; *Ogden v. Raymond*, 22 Conn. 383; *Thames Steamboat Co. v. Housatonic R. R. Co.* 24 Conn. 54; *Crocker v. New London. W. & P. R. R. Co.* Id. 265; *Bachelor v. Pinkham*, 68 Me. 255; *White v. Phillipston*, 10 Met. 110; *Walcott v. Swampscott*, 1 Allen, 102; *Johnson v. Dunn*, 134 Mass. 524; *Hutchins v. Brackett*, 22 N. H. 252; *Conwell v. Voorhees*, 13 Ohio, 523.

5. If the defendant is liable for the acts of Button, yet, as the court has found that the damage from his unnecessary acts is merely nominal, a new trial will not be granted.

Hyatt v. Wood, 3 Johns. 239; *Shipman v. Horton*, 17 Conn. 481, 487; *Gold v. Ives*, 29 Conn. 123; *Cooke v. Barr*, 39 Conn. 305; *Briggs v. Morse*, 42 Conn. 260; *Raymond v. Clark*, 46 Conn. 135.

6. It was not necessary that the court should have found the exact limits of the highway. It found that the highway as used was obstructed, and use determines the width of a highway that is established by use. The presumption in the case of land dedicated for a highway is that enough is dedicated to answer the ordinary requirements of public travel.

Hannum v. Belchertown, 19 Pick. 311; *Hull v. Richmond*, 2 Wood. & M. 337.

Loomis, J., delivered the opinion of the court:

The acts constituting the trespass complained of were committed by one Button, by order of the defendant as a selectman of the town of Enfield, and consisted of the cutting of certain trees and brush which obstructed and hindered the passage of travelers along an alleged highway of the town.

There was no dispute as to the acts done, the official character of the defendant, or the ownership of the land. The chief contention centered around the question whether or not the *locus in quo* was a highway. This we will first consider, and then notice briefly some subordinate questions that were made in the case.

It was conceded that if a highway existed, it had become established by dedication alone. The conclusion of the trial court was as follows: "The road in question is one of public convenience and necessity, and is a public highway created by dedication of the lands through which the road passes, and especially by the owners of the plaintiff's land, and by the acceptance thereof by the public as a highway." This is so full and complete as to preclude further contention on this point unless some error in law intervened to vitiate the result and produce a mistrial. No such error appears, unless the claim of the plaintiff on the trial is correct, as matter of law, "that in this State a highway could not exist by prescription, and that in case of unenclosed and uncultivated land like the plaintiff's, dedication by the owners for a highway could not be found from mere use of the road by the public."

The first part of the proposition as to the effect of prescription, or long-continued public

use, is directly in the face of the uniform tenor of the authorities in this State and elsewhere. In the language of Himan, J., in delivering the opinion of the court in *Sherwood v. Weston*, 18 Conn. 51, "it has long been settled that the existence of a highway may be proved by immemorial usage, or by dedication of the road to the public use, as well as by the record of the original lay-out." *Beardslee v. French*, 7 Conn. 128; *Brownell v. Palmer*, 22 Conn. 118; *Curtiss v. Hoyt*, 19 Conn. 169; *Noyes v. Ward*, Id. 269; *State v. Taff*, 37 Conn. 397; *Guthrie v. New Haven*, 31 Conn. 321; *Commonwealth v. Low*, 3 Pick. 412; *Reed v. Northfield*, 13 Pick. 97; *Stedman v. Southbridge*, 17 Pick. 163; *State v. Green*, 41 Iowa, 693; *Chicago v. Wright*, 69 Ill. 318; *Commonwealth v. Cole*, 26 Pa. 187.

The other part of the plaintiff's claim is that, "in case of unenclosed and uncultivated land, a dedication cannot be found from mere use of the road by the public." In answer to this claim we say:

First, that the court based its conclusion, not only upon a continuous use by the public as far back as living witnesses could remember, coupled "with the knowledge and assent of the adjoining landowners, and especially with the knowledge and acquiescence of the owners of the plaintiff's land," but also upon the facts that the town authorities had distinctly recognized the road as a public highway, and had, as early as 1867, and again in 1880, removed the obstacles to public travel in precisely the same manner as in the case at bar. It is not true, therefore, that the dedication rested on mere user. This answer would be sufficient without controverting the legal proposition upon which the plaintiff relies.

But, secondly, we doubt whether the proposition is sound that as matter of law it is impossible to find a highway by dedication from long-continued public use and acquiescence in such use, where the land over which the way is claimed is unenclosed and uncultivated.

We concede that the plaintiff cites some high authorities in support of his claim,—*Ang. Highways*, § 151; *Hutto v. Tindall*, 6 Rich. L. (S. C.) 396; *Peyton v. Shaw*, 15 Bradw. 192; *Kyle v. Logan*, 87 Ill. 64.

Hutto v. Tindall seems to be the leading case on this subject. The text from the paragraph cited from Angell on Highways, in behalf of the plaintiff, was taken from the opinion of the court in that case, but the principle of that case, it seems to us, is better stated in the head-note, as follows: "Where the mere use of a road by the public through unenclosed woodland is relied upon to establish a right of way in the public, it must be shown that the use was continued for twenty years, and was adverse." Frost, J., in delivering the opinion, explained what was meant by adverse use, namely, "such acts as showed that the way was claimed as a right, and not used by the permission of the owner of the land over which it passed." No fault can be found with such a statement of the law; but in applying the principle to the facts of that case, a mere evidential fact, namely, that the land was unenclosed woodland, was given a conclusive effect to show that the use was not adverse, and that there was no intention to dedicate the way to the public.

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In a few States, where there are large tracts of unenclosed and uncultivated lands, the law has been applied to the same manner for the protection of landowners, and it has also been applied to the uncultivated lands held by the United States government where a way has been used as a highway over them for more than twenty years.

In *Phippe v. State*, 7 Blackf. 512, the court said: "We do not think this doctrine of dedication from user is at all applicable to the extensive, uncultivated domain of the United States. This domain is not in the actual, visible possession of anybody. There is no one to watch and guard against encroachment. It is impossible that the general government should know whether its unseated lands are improperly used for highways or not. There cannot, therefore, exist that consent by the owner to the use of his land for a road, from which dedication can be presumed." The principle invoked in behalf of the plaintiff is here recognized as exceptional, that where the owner is so situated with reference to his land that he cannot know how it is being used, his assent is not to be presumed from such use.

It is obvious that the doctrine under discussion is not, as a rule of law, as well adapted to a State like our own, where the land, as a rule, is cut up into small farms, and where tracts of uncultivated and unenclosed lands are comparatively few in number and small in extent. As a matter of evidence, however, it is unquestionably true, and applicable here as elsewhere, that the fact that the land over which a way by dedication is claimed is unenclosed woodland, ought greatly to weaken, and often to overcome, the presumption of an intention to dedicate, to be derived from the use.

It may be that the trial court did not give this fact the weight it ought to have had; but, if so, this court is powerless to revise any error in the weighing of evidence. In this respect the position of this court is unlike that of the highest courts of some other jurisdictions, where the finding of the court below does not preclude additional and sometimes contrary inferences of fact in the court above. We find little or no disparity in the authorities upon the proposition that it is a question of fact for the jury to decide, on the evidence in each particular case, whether the facts show an intention to dedicate the *locus in quo* to public use. A question of intention must necessarily be a pure question of fact.

But it may be suggested that, as the fact that land is unenclosed and uncultivated is conceded to be very strong evidence to rebut the presumption of an intention to dedicate it, there can be no harm done by making it conclusive. We think it more logical and in better accord with the analogies of the law, and on the whole more just, if the fact is used merely as evidence. Its weight depends on the character and amount and duration of the use, and the purpose which the way used subserves in promoting public convenience; all which, being known to the landowner, may signify to him a use so unmistakably adverse that his assent must be presumed in the absence of any dissent. But were the principle made an absolute rule of law, no such discriminations could be made; it would apply equally to a small and

casual, and to a large and constant, use; to a neighborhood crossing and to a great public thoroughfare; to a small, uncultivated tract and to a large one. And how would the doctrine be applied if we suppose the way used to pass first over cultivated land and then over a small tract of unenclosed and uncultivated land of a different owner, the whole, however, serving some great purpose of public convenience and necessity? Would the first part of the way become by dedication a mere *cul de sac*, or would the use of the whole go for naught because a part was over uncultivated and unenclosed land? Such are only a few of the difficulties attending the application of the principle as a rule of law.

The character, extent, and manifest purpose of the use might as well be made conclusive as the character of the land used. Both must be considered in connection with all the circumstances, to arrive at a just conclusion upon the question whether there has been a concession of the way by the owner of the soil. In this case the fact of dedication, having been found upon proper and appropriate evidence, has been conclusively established.

If, then, the *locus* was a highway, and the trees obstructed the travel over it, it was both the right and the duty of the defendant to remove the obstructions.

But it is said that, as a prerequisite to the exercise of such right and duty, notice to the plaintiff was necessary before the cutting. We cannot accept such a proposition. Public rights were interfered with; public travel was actually obstructed; the town was exposed to liability for damages done to the traveler. Why, then, require the selectman to go 8 miles to notify the landowner before he could take away the hindrance to travel? Delay, presumably, would have injured the public without conferring any benefit on the owner of the land. It is found that the wood was all left on the premises, which the owner had the benefit of without the expense of cutting it himself.

It is well settled that a nuisance which actually obstructs public travel may be abated by anyone who is injuriously affected. The defendant surely cannot be in any worse position because it was his official duty to remove the obstructions to prevent any such injury.

The plaintiff, in his reasons of appeal, also complains because the court omitted to find any definite limits of the highway, and to determine whether the cutting of the trees was within these limits or not. No question as to the limits of the highway was made in the court below, and the case did not depend upon it. The question was whether the trees actually obstructed public travel. It was so found; and this of necessity involved the finding that they projected within the limits of the traveled path, and no one would claim that a highway established by user could be of less extent.

But another claim of law remains to be considered,—whether the defendant was liable for the unnecessary cutting by Button.

The defendant directed Button "to cut the brush and trees, and make the road passable at as little expense as possible." The court finds that "all the cutting which Button did was necessary to make the road passable for travel,

excepting the cutting of five white birches and a few limbs on the off side of two pine trees. The birches stood from 14 to 17 feet from any part of the road over which travel passed, and leaned away from the road. The two pine trees stood from 9 to 10 feet away from any part of the traveled road, and neither the birches nor the limbs of the pine trees in any way impeded travel, or were likely to do so."

The court further finds that "the plaintiff's damage by the whole cutting, if the same was unlawful, was \$10. His damage by the unnecessary cutting was merely nominal."

The defendant invokes for his protection the rule that a public officer or agent is responsible only for his own misfeasance or negligence, and not for the negligence of his subaltern, provided the latter is competent for the work. Story, Ag. § 321; Whart. Ag. § 550.

Although the general language in which the rule is stated in the books may at first seem decisive of this question, yet we think it is not applicable to this case. In stating the proposition that the principal is not liable, a qualification stated in Story on Agency, *supra*, should always be understood; that is, that he is not liable unless he directed or authorized the wrong. Then there is another very important distinction, to the effect that if the inferior or subagent holds, not an office known to the law, but his appointment is private and discretionary with the officer, the principal is responsible for his acts. This distinction is more fully stated in a note to the case of *Wilson v. Peckerly*, in 1 Am. Lead. Cas. 5th ed. marg. 651.

In *Shepherd v. Lincoln*, 17 Wend. 250, it was held, Cowen, J., delivering the opinion, that a superintendent of repairs on the canals of the State is personally liable in an action on the case for damages sustained by an individual through the negligence of workmen employed in making repairs.

In the case at bar, upon the finding, we do not think Button should be regarded as an inferior public officer or agent, but rather as acting solely under the defendant, so that the question we are considering turns on the authority given by the defendant to Button. There was, of course, no express authority as the court finds to do unnecessary cutting, but there was express authority "to cut the brush and trees, and make the road passable." No trees were pointed out, no limits given, no restriction of any kind was mentioned, no indication was given as to the defendant's own judgment, but the work was all committed to the judgment and discretion of Button as to what should be cut. There is no claim or suggestion that Button acted maliciously or wantonly, but he acted on his own judgment, just as, in effect, he was told to do, and so we say he acted within the scope and course of his employment, so that his act was the defendant's act. The case is therefore clearly within the principle of law as given in Wood's Law of Master and Servant, § 288: "When a person puts another in his place to do certain acts in his absence, he necessarily leaves him to determine for himself, according to his judgment and discretion, according to circumstances and exigencies that may arise, when and how the act is to be done, and trusts him for its proper

execution; consequently he is answerable for the wrongful execution of the act, either in the manner or occasion of doing it, provided it is done *bona fide* in the prosecution of his business, and within the scope of the servant's express or implied authority, and not from mere caprice or wantonness and wholly outside the duties imposed upon him by the master." See the cases cited in note 3 of this section; also the case of *Smith v. Webster*, 23 Mich. 298.

We conclude that there was error in holding the defendant not liable for the unnecessary cutting, which would give the plaintiff a new trial if the court had not found that the damage from the unnecessary cutting was merely nominal. The mere fact, however, that only nominal damages can be given, would not be conclusive on this question. Regard must be had to the real purpose and object of the suit. If it was instituted to try some question of permanent right, and the party is found entitled to that right, but it happens that only nominal damages can be given, there can be no objection on that account to giving a new trial; but if the party has failed in the substantial object of the suit, and has left only a bare, technical right to recover nominal damages, a new trial will not be awarded him for that purpose.

The complaint in this suit was manifestly brought to determine whether the plaintiff had a right to the land which was in use for a highway; if error had intervened tending to defeat him in the establishment of this right, the finding that his damages were merely nominal would have constituted no objection to a new trial: but the plaintiff entirely failed in the real object of the suit, but, by reason of the accidental cutting of some brush and trees not necessary to make the highway passable, he has a bare technical right to nominal damages. But substantial justice has been done. Had he asked compensation for the unnecessary cutting, merely, the defendant presumably would have paid him even more than nominal damages, for he had no object except to vindicate the right of the public to use the way.

That a new trial must be denied under these circumstances is abundantly sustained by the uniform tenor of the decision, in this State and elsewhere. *Shipman v. Horton*, 17 Conn. 487; *Gold v. Ives*, 29 Conn. 123; *Cooke v. Barr*, 39 Conn. 306; *Briggs v. Morris*, 42 Conn. 260; *Hyatt v. Wood*, 3 Johns. 239; *Hudspeth v. Allen*, 26 Ind. 165; *Plumleigh v. Dawson*, 1 Gilm. 544.

There was no error in the judgment complained of.

In this opinion the other Judges concurred.

Henry BREWSTER *et al.*

v.

Sarah S. COWEN.

1. A decision of the trial court that the body of defendant is liable to imprisonment is a matter outside of that part of the record which can be brought up for revision upon writ of error, and an assignment of error based thereon is not to be considered.

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2. Under the present law (Acts 1882, chap. 50), an appeal performs the office of a writ of error.
3. When a first writ of error abates through an act of the plaintiff in error, or is in any way put an end to by his act, a second writ of error brought in the same court is not a supersedeas of execution; and this rule is now applicable to appeals.
4. This rule should, perhaps, be qualified so as not to apply to a case where the first writ is withdrawn and a new one substituted for a good cause,—like the making of better service.
5. Where a writ of error is brought for the mere purpose of superseding the execution it should not be allowed to have that effect.
6. If an execution is served and returned too early, it is yet legal as against the special bail, unless it has been injurious to him.

(Hartford—Filed July, 1887.)

CASE reserved in the Superior Court of Hartford County for the advice of this court. Action upon a recognizance of the defendant as special bail. Judgment for plaintiffs advised.

The facts are stated in the opinion.

Messrs. F. Chamberlin and E. S. White, for plaintiffs:

The writ of error is not a supersedeas when brought for the purpose of delay.

Dutton v. Tracy, 4 Conn. 372, and cases cited in the opinion.

It is also held that a new writ of error, substituted for one voluntarily withdrawn, is not a supersedeas.

1 Swift, Dig. 794; *Dutton v. Tracy*, *supra*.

By comparing the assignments of error in the appeal and the writ of error, it will be found that they are identically the same, with the exception of the fifth assignment in the writ of error, which is based on the decision of the court as to the right to levy the execution upon the body of the defendant, which is a matter foreign to the record; and it is well settled that on such matters no writ of error will lie.

Bishop v. Voss, 27 Conn. 7; *Nichols v. Bridgeport*, Id. 465; *Elphick v. Hoffman*, 49 Conn. 331.

An appeal, under our statute (Acts 1882, chap. 50), performs the office of a writ of error.

Schlesinger v. Chapman, 52 Conn. 271.

Messrs. C. E. Perkins and W. W. Perry, for defendant:

The rule of the common law upon which the claim that the writ of error was not a supersedeas is based, refers only to writs of error taken out for the purpose of delay only. This will not be inferred where there is any good reason for the second writ. The finding here does not show any improper purpose of delay, but simply a legitimate intent, fully carried out in act, to ascertain, before surrender, whether or not the judgment was erroneous in any respect. It may be claimed that the appeal first taken was, in effect, a writ of error which abated by fault of the appellant, and that therefore the writ of

error taken out and served March 29, 1884, was not a *superseas*. But the writ of error raised a new question,—the question as to the liability of Pratt's body. Under our present practice that question was, after judgment and before execution, an undetermined question. The purpose of the writ of error was to settle that, in connection with the other questions in the case. It should also be said that the evident intent of the statute, providing for the removal of the stay of execution during the pendency of a writ of error, was to prevent controversy and accurately define the position of all parties in due season. Since the passage of that statute this court has recognized only one exception to the rule that every writ of error operates as a *superseas*; the exception being the case of a writ simply raising questions already distinctly decided by this court.

Tyler v. Hamersley, 44 Conn. 414; *Catlin v. Baldwin*, 47 Conn. 178.

Granger, J., delivered the opinion of the court:

This is an action brought by the plaintiffs upon a recognizance of the defendant as special bail in a suit brought by the plaintiffs against one Henry C. Pratt in the Superior Court in Hartford County. The plaintiffs recovered judgment in that suit in May, 1883. Pratt appealed from that judgment to the Supreme Court of Errors at its October Term in 1883. The appeal was entered in that court at that term, but the appellant had not procured the record printed, and the case was continued to the January Term, 1884, when the appellant withdrew his appeal on the 8th day of the month. On the 31st of January the plaintiffs took out execution on the judgment against Pratt, and placed it in the hands of Chapman, a deputy sheriff of Hartford County, to serve and return. The officer made search for property and for the body of Pratt, but could find neither within his precincts, and on March 29, 1884, returned the execution, with an indorsement of *non est inventus*, to the clerk of the court, the return being made about four o'clock of the afternoon of that day. Earlier on the same day Pratt took out a writ of error from the judgment and caused it to be served upon the attorneys of the plaintiffs the same day at about three o'clock in the afternoon. At the time of the return of the execution by the officer he had no knowledge of the service of the writ of error, and acted in entire good faith in the matter.

The single defense set up against the present suit upon the recognizance is that the writ of error taken out by Pratt was a *superseas* of the execution; and the only question in the case is whether it was so.

On this point it is found that the assignment of errors made by Pratt in his writ of error is the same with the reasons of appeal assigned by him in the preceding appeal in the same case, with the single exception of the following assignment of error, namely, "that the court erred in holding that the body of the defendant in the original cause was liable to imprisonment upon execution, and in ordering the issue of execution against his body."

This assignment of error it is very clear is not a pertinent one, inasmuch as the question whether the defendant was liable to imprison-

ment upon the execution was one lying wholly outside of that part of the record that could be brought up for revision upon a writ of error. It is not an error, if it be one, that entered into the judgment, or upon which the judgment could be reversed. It is therefore to be laid wholly out of the case.

Under our present law an appeal performs the office of a writ of error, there being no matter of error that could be assigned upon a writ of error that cannot be assigned and considered on an appeal. This was clearly intended by the Act of 1882 (Acts 1882, chap. 50), which provided for the carrying up of cases by appeal instead of by motion for a new trial or motion in error, and we so held in the recent case of *Schlesinger v. Chapman*, 52 Conn. 271. Pratt has therefore once been before this court by proceedings in error with the same questions that he brings up again by his later writ of error.

It has been repeatedly held that where a first writ of error abates through an act of the plaintiff in error, or is in any way put an end to by his act, a second writ of error brought in the same court is not a *superseas* of execution. *Dutton v. Tracy*, 4 Conn. 372; *Birch v. Tride*, 8 East, 412; *Entwistle v. Shepherd*, 2 T. R. 78; 1 Swift, Dig. 794; 2 Tidd, Pr. 1083. This rule applied here would seem to determine that the bringing of the writ of error was not a *superseas* of the execution.

The rule, perhaps, should be qualified so as not to apply to a case where the first writ is withdrawn and a new one substituted for good cause, like the making of better service; but this qualification would not affect the present case.

But there are further facts found in the case. It is found that "Pratt supposed that the legal effect of the writ of error would be to supersede the execution, and he caused the writ of error to be served for the purpose and with the intent that the service of the execution should be suspended." Here, in addition to the fact that his writ of error was a second and unnecessary proceeding in error, we find that his motive in bringing the writ of error was to procure a supersession of the execution. This is a motive which the law cannot encourage, and the existence of which defeats its very object.

The authorities are numerous that where a writ of error is brought for the purpose of delay it does not supersede the execution. *Dutton v. Tracy*, *supra*; *Spooner v. Garland*, 2 Maule & S. 474; *Hawkins v. Snuggs*, Id. 477; *Kemiskand v. Macauley*, 4 T. R. 438.

In *Masterman v. Grant*, 5 T. R. 714, the defendant's attorney had said that the reason why he brought the writ of error was that if the defendant should pay the money pending the action he would never get it from the original debtor, but that while the cause was depending he might prevail on him to settle it; and this was held sufficient evidence of the mere purpose of delay to prevent the writ of error being a *superseas* of the execution.

This same principle, as one founded in justice, and as necessary to the administration of justice, has been repeatedly recognized in our legislation. Thus, in our statute with regard to motions in error, passed in 1823, it is provided that such motions may be allowed "if the court

shall be of opinion that they are not intended for delay." Gen. Stat. p. 450, § 14. So in the statute with regard to summary process for obtaining possession of leased premises, it is provided that the defendant may have twenty-four hours after judgment to procure a writ of error, and that "execution shall be stayed during that time if it shall appear to the justice who renders the judgment that such proceedings are not had for the purposes of delay." Gen. Stat. p. 492, § 10. And by a statute passed in 1864 it is provided that "during the pendency of any writ of error in the supreme court the defendant in error may apply to any judge of the court for the suspension of the stay of execution, and that, if it shall be shown that there is no reasonable cause for the allowance of the writ, the judge may order that the levy of the execution shall not be further suspended by reason of the pendency of the writ." Gen. Stat. p. 452, § 23.

Another question was made as to whether, aside from all the objections considered, the officer's return upon the execution was not made too early, and whether, therefore, if the service had been completed before the writ of error was served, the service would not have been inoperative as against the special bail. We think it not necessary to consider this question, both because the ground upon which we have placed the case is sufficient to dispose of it, and because, if the execution was served and returned too early, it would yet have been legal unless it had been injurious to the present defendant. Of course it could not be injurious unless the body of the debtor had been surrendered by the bail or he had surrendered himself to the officer to be taken on the execution before the return day, and no such surrender was made or tendered. *Hall v. White*, 27 Conn. 488.

The Superior Court is advised to render judgment for the plaintiffs.

In this opinion the other Judges concurred.

Sarah H. GOODSSELL'S APPEAL from Probate.

1. The weight of authority is that, in the absence of a statute, **marriage alone**, unaccompanied with the birth of a child, will not revoke a will.
2. The Connecticut Statute of 1821, providing that no devise of real estate should be revoked except by cancellation, etc., or by a later will or codicil, applied to every will containing both devises of real estate and bequests of personal property, as well as to wills containing devises of real estate only.
3. Section 135 of chap. 110, Session Laws 1885, providing that "if, after the making of a will, the testator shall marry, or if a child is born to the testator, and no provision is made in the will for such contingency, such marriage or birth shall operate as a revocation of such will," is not retrospective.

(Fairfield—Filed August, 1887.)

APPEAL from a judgment of the Superior Court for Fairfield County affirming a

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decree of the Probate Court establishing the will of John Goodsell. *Affirmed.*

The appeal from the probate court was taken by Sarah H. Goodsell, widow of the testator; Heman B. Goodsell, heir at law, was admitted as a party appellant in the superior court, and joined the original appellant in the present appeal.

The superior court found the following facts:

The appellant is the widow of the testator. They were married May 29, 1871. The will was made before the testator and the appellant became engaged to be married. The testator died February 14, 1886, never having had a child, and leaving a brother and the son of a deceased brother as his next of kin. The inventory of his estate amounts to \$16,234.91, of which about \$5,800 is personal estate.

In the summer of 1871, and soon after his marriage, the testator told his wife that he had made a will before he had ever seen her, and that he should go to the executor and get it and have it destroyed, because he did not want it to stand the way it was, inasmuch as she was not remembered in it. He said it ought not to stand the way it was. Directly after this conversation he went to Bridgeport, where the executor lived, obtained the will from him, showed the envelope containing it to his wife, and told her that it was not good for anything but to be destroyed, because it left her out. Nothing was ever said between them about the will afterwards, and she supposed it was destroyed; but the testator, during his lifetime, after obtaining the will from the executor, kept it locked up in a drawer in his bureau, the key of which he kept in his own possession. After his death it was found in the drawer, which was locked, and the key in the widow's possession. This drawer contained, besides the will, some title deeds of real estate, a quantity of canceled checks, some pamphlets, old letters, and waste papers. Another drawer in the same bureau, similarly locked, contained some promissory notes and other valuable papers of the testator. The bureau stood in a small room adjoining his living-room.

The appellant offered to prove that when she married the testator she had but a nominal amount of property, which was soon afterwards entirely lost, and that she then remained without means of her own until the testator's death. Upon objection by the appellee this evidence was excluded.

The appellant claimed that the statements of the testator and the facts above referred to amounted to a revocation of the will, in so far as it disposed of personal estate, if not as an entirety; and, further, that the will had been revoked by his marriage; also that the will had been revoked by the statutes of 1875 and 1885, relating to the effect of a subsequent marriage upon a will.

The court overruled these claims of the appellant, and rendered a judgment affirming the decree of the probate court establishing the will.

Mr. J. H. Perry, for appellant, Sarah H. Goodsell:

1. A will may, in this State, be revoked by parol unless that method of revocation is expressly prohibited by statute.

Card v. Grinman, 5 Conn. 164.

If, owing to § 8, p. 403, of the Revision of 1866, devises of real estate could not be so revoked, nevertheless bequests of personal property still remained subject to the rule established in that case. The statute prescribing how wills, both of real and personal estate, shall be revoked, was not passed until 1875.

Rev. 1875, p. 370, § 7.

Wills may be revoked in part (for instance, either as to the devises of real estate or bequests of personal property therein contained) and remain good as to the balance, and should then be admitted to probate only as to the part unrevoked.

Deane v. Littlefield, 1 Pick. 289; *Heath v. Withington*, 6 Cush. 497; *Brush v. Wilkins*, 4 Johns. Ch. 515; *Sheath v. York*, 1 Ves. & B. 390.

Such a qualified probate has heretofore been claimed to be proper by at least one member of the present court.

Irwin's App. 33 Conn. 181.

Mr. Goodsell's will was admitted to probate as an entirety, and therefore erroneously, if by parol or in any other way it had been revoked in whole or in part. The declarations and acts of the testator amounted to a revocation.

Witter v. Mott, 2 Conn. 68; *Card v. Grinman*, *supra*. See also *Sherry v. Lozier*, 1 Bradf. Sur. 442.

2. In those States in which a widow in cases of intestacy receives with the children a distributive portion of her husband's estate, marriage after the execution of a will revokes it.

Tyler v. Tyler, 19 Ill. 151; *American Board of Comrs. v. Nelson*, 72 Ill. 564; *Byrd v. Surlee*, 77 N. C. 435.

The reasons given for the above decisions apply to similar cases in Connecticut, because here also a widow inherits from her husband upon the same principle as a child.

Kingsbury v. Scovill, 26 Conn. 352.

And where there are no children, as in this case, she has a decided preference over the next of kin.

The common law was so that the birth of a child alone after the execution of the will revoked it, because it would not be considered that a man intentionally disinherited any person who, in the absence of a will, would have received a share of his property, and therefore, unless such persons were in a position to inherit when he made his will, and were not mentioned in it, or unless the possibility of their subsequent existence was provided for in the will, it was held that the testator did not intend such a result, and the will was, *ipso facto*, revoked.

Sherry v. Lozier, 1 Bradf. Sur. 437; *Bloomer v. Bloomer*, 2 Bradf. Sur. 345; *Hughes v. Hughes*, 87 Ind. 138, 185; *McCullum v. McKenzie*, 26 Iowa, 510; *Sneed v. Ewing*, 5 J. J. Marsh. 472.

The reason of the above rule, and the reasoning of the courts in the above cases, apply with equal force to the case of a subsequent marriage without children in Connecticut, where the wife, unless expressly disinherited, inherits as a child.

Implied revocations are not within the statute prescribing how express revocations of wills shall be made, and therefore not within the statute of 1866 already referred to. Ac-
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cordingly the revocation implied from the subsequent marriage of Mr. Goodsell revokes the whole will.

Brush v. Wilkins, 4 Johns. 509.

8. If the will had not already been revoked at common law by the marriage, these statutes expressly revoked it. It is entirely competent for a statute to revoke by its provisions a previously executed will.

Moultrie v. Hunt, 28 N. Y. 397, cited with approval in *Irwin's App.* 33 Conn. 138.

The only question open to discussion under this claim is whether the statutes referred to were intended to revoke wills then in existence, by marriages already made; for it must be conceded that they might have that effect if it was so intended; and we suggest that under the admirable reasoning in the case of *Moultrie v. Hunt*, *supra*, the statutes in question must necessarily affect previously-executed wills unless they are expressly exempted from their provisions, and that therefore such was the intention of the statutes.

Further, inasmuch as these statutes simply made that a provision of enacted law which before had been a canon of the unwritten law, they manifestly should apply to cases already affected by that unwritten law. The text-books and decided cases abound in suggestions that most of the States have thought it advisable to take the effect of subsequent marriages and births upon wills out of the unwritten law, and put it where it will be more certainly known and commonly understood. This does not change—it only promulgates—the law, and was especially wise in this State, where no case involving the point at issue has ever been decided by our supreme court.

Again, these statutes, by their terms, may well apply to existing facts. They certainly contain no prohibition against such an application, while the Act regulating the formal execution of wills was carefully excluded from applying to those already executed.

Rev. 1875, p. 369, § 2.

In the next place we suggest that these statutes are remedial, are intended to obviate an evident and gross injustice (as, for instance, the case at bar), and by operating upon already existing cases work no injustice to the testator. Their whole theory and object is to accomplish what every humane consideration requires us to presume the testator desired; namely, that the chief object of his bounty and his principal distributee in case of intestacy should not be disinherited by a will made with no such contingency in view. The law says that such an intention shall not be believed unless the testator expressly states it, and that wills open to this objection are manifestly not the wills of their makers, and shall not be probated as such. We respectfully submit, therefore, that not to require these statutes to apply to all wills not already probated, the execution of which has been followed by a marriage, is to defeat their manifest purpose, to leave the evil which gave them birth largely unremedied, and to carry out what testators presumably never intended.

Mr. G. P. Carroll, for Heman B. Goodsell, heir at law.

Messrs. R. E. De Forest and F. L. Rodgers, for appellees.

Pardee, J., delivered the opinion of the court:

John Goodsell made his will in January, 1871, disposing of real and personal estate. He was married in the following May; he died in 1886; his wife survives; no child was born to them. A brother and a nephew are next of kin. He left the will executed in 1871; it made no mention of his wife; she was not known to him when it was executed. The court of probate approved the will and admitted it to probate. The widow, Sarah H. Goodsell, appealed. The superior court dismissed the appeal and affirmed the decree of the probate court. The widow and a nephew of the testator join in an appeal to this court. The reasons assigned are these: (1) that the court did not hold that the statements and acts of the testator, as set forth in the finding, amounted to a revocation of the will, at least in so far as it disposed of personal estate; (2) that the court did not hold that the will was revoked by chap. 110, §185 of the Acts of 1885, nor by chap. 84 of the Acts of 1875; (3) that the court did not hold that the will was revoked by the subsequent marriage of the testator, at least in so far as it disposed of personal estate; (4) that the court excluded the evidence offered by her in relation to her pecuniary condition, as stated in the finding.

By the common law, marriage and the birth of a child revoked a will. Because of the strong affection of a father for his child, and the presumed absolute dependence of the latter upon the former for the necessities of life, whenever a man marries and a child is born to him, and he dies, having made no change in a will executed previous to marriage, which contains no provision in behalf of such child, the law assumes that it does not speak his mind; that the will, if made under the altered circumstances, would have been different; and sets it aside. Marriage without the birth of a child does not support such assumption, for the wife can protect herself by antenuptial contract, and has done.

In 1 *Redfield on Wills*, 4th ed. 298, it is said: "The question was very elaborately reviewed at an early day by the most eminent of the American chancellors, and the conclusion reached, upon a thorough examination of the cases from the days of Cicero forward, that the subsequent marriage and birth of a child are an implied revocation of a will, either of real or personal estate; but such presumptive revocation may be rebutted by circumstances. It seems that a subsequent marriage or birth of a child, alone, will not amount to a revocation; both must concur. *Brush v. Wilkins*, 4 Johns. Ch. 506. The same conclusion was reached by Shaw, *Ch. J.*, after a careful examination of the authorities, in a case in Massachusetts. *Warner v. Beach*, 4 Gray, 162; 1 Jarm. Wills, 272 (5th Am. ed. with notes by Randolph & Talcott); *Card v. Alexander*, 48 Conn. 504.

Cases in Illinois and North Carolina have been brought to our notice, determining that marriage alone is a revocation, for the reason that if there had been no will, the wife would have been entitled to a distributive portion of the husband's estate; and the court assumes that the husband did not intend, by will, to put her in a worse condition than if he had made none. But

we think that the weight of authority is against revocation by marriage alone, for the reason already given; and that the courts in many States in which the wife shares with the children in case of intestacy, are against revocation by marriage alone.

In 1821 a statute was passed which provided that no devise of real estate should be revoked except by burning, canceling, tearing, or obliterating it by the testator, or by some person in his presence by his direction, or by a later will or codicil. Thereupon, revocation by parol, or by presumptions or inferences drawn from the pecuniary condition of the wife, or from the manner or place of keeping a will, became and continued to be impossible until the statute of 1885 went into operation. The statute of 1821 applied to every will containing devises of real estate, and every will containing both devises of real estate and bequests of personal property. That is, the presence of a devise of real estate protects the bequest of personal property from every other than statutory revocation; and, so far as that statute is concerned, when a testator executed a valid will for the disposition of both real and personal estate, and subsequently married and died, leaving his will unchanged, even if it made no provision for the wife, the law did not revoke a part of it for the purpose of making it express what is assumed, contrary to his written declaration, to have been the real intent of the testator, because thereby would come into operation the assumption that the partial will was contrary to his plan for the division of his estate. Either the scheme of the law is to govern the distribution of the estate in its entirety or the scheme of the testator. A distribution, the result of assumption in part and in part of fact, would be offensive both to the law and to the testator.

In 1885 (Sess. Laws 1885, chap. 110, § 185) a statute was passed, as follows: "If, after the making of a will, the testator shall marry, or if a child is born to the testator, and no provision is made in the will for such contingency, such marriage or birth shall operate as a revocation of such will."

As a rule of interpretation, all statutes are to operate prospectively unless they contain language unequivocally and certainly retrospective. The above statute looks forward, and not backward. It can be said to be a remedial statute only in the sense that all statutes are passed because they are expected to benefit the public either by lifting burdens or conferring privileges. It is not the casting of a common-law rule into the fixed form of a statute, for there was no such rule in existence. It is the gift of a right to a wife to demand and receive a greater share of her husband's estate, under specified circumstances, than she previously could receive. We may be of opinion that the right given to the wife in this statute should have been given to her long before, but that is not a valid reason why a law giving additional rights should operate retrospectively. Possibly estates in like situation with the one before us have been settled and property vested; possibly wrong would be inflicted if we should give retrospective effect to this statute.

There is no error in the judgment of the Superior Court.

In this opinion the other Judges concurred.

Myron KINNEY, *Plff. in Err.*,

v.

Livona M. BLACKMER, Admx. of Louise Robbins, Deceased.

Where the arrangement between the builder of a house and the owner of the land on which it was to be built was that the former should build a house of such character and cost as he chose, and that the landowner should pay him a certain sum and no more, and that the builder should furnish the remainder, and, as compensation, should have the privilege of occupying the house, when completed, with his family and the landowner (who was his mother-in-law), and the plaintiff furnished materials to the builder, and filed a certificate of **mechanics' lien** based on a contract between plaintiff and the builder, and not mentioning the name of the landowner, —*Held*, in an action to foreclose the lien (there being no finding of authority in the builder to bind the landowner), that the **builder must be regarded as the original contractor; that the plaintiff was merely a subcontractor**, within the meaning of Gen. Stat. p. 360, § 11; that the **landowner was not bound as a principal** in the transaction; and that hence the plaintiff was not entitled to a judgment against her.

(Hartford—Filed September, 1887.)

WRIT of error to review a judgment of the Superior Court for Windham County in an action to foreclose a mechanics' lien. *Affirmed*.

The facts are stated in the opinion.

Mr. Charles E. Searls, for plaintiff in error:

1. Certain questions of law which might otherwise arise in this case need no discussion, in the light of the decision of this court in *Paine v. Tillinghast*, 52 Conn. 538.

2. The case at bar, relieved of the embarrassing questions settled in the case referred to, narrows itself down to this: Can Blackmer be regarded, under the arrangement between himself and Mrs. Robbins, as rightfully acting for her within the spirit of the law?

The points of similarity between this case and the case in 52 Conn. are many. In each the money to be furnished by the owner was paid to the party procuring the material before notice had been given the owner that materials furnished had not been paid for. In each there was a limitation as to the amount to be furnished by the owner. In each the whole arrangement was entrusted to the party acting for the owner. In the one case the party procuring the materials was the brother, in the other the son-in-law, of the owner. In each case there was a secret arrangement between the owner and the party ordering the material. In each case the money advanced by the owner was sufficient to pay for the material, and in each nothing was paid therefor.

3. The house constructed under the agreement between Robbins and Blackmer was to be, by virtue of that agreement, the property of

the said Robbins; and a fair interpretation of the arrangement between the parties, as outlined by the committee in his report, is to the effect that Mrs. Robbins, wishing to build a house upon premises owned by her, arranged with her son-in-law to act for her and as her agent in the matter, with this verbal understanding that, if he would take charge of the work, and put into the house whatever money might be required for its completion, over and above the sum of \$200, he might, as a compensation for his services and outlay, occupy the house jointly with her, rent free. If Blackmer failed to do as he agreed, he would lose his right to the occupancy of the house. He was in no sense of the word a contractor. He was acting for Mrs. Robbins in procuring material and employing labor in the construction of a house for her, but under a private arrangement unknown to the plaintiff.

4. Blackmer and Mrs. Robbins were joint builders, and each had an interest in the house when finished, Mrs. Robbins being the legal owner and Blackmer having an equitable right therein; and in that view of the case Blackmer acted for himself and as the agent of Mrs. Robbins. Blackmer's interest has been foreclosed, and we claim that Mrs. Robbins' interest is equally subject to foreclosure.

Mr. M. A. Shumway, for defendant in error.

Loomis, J., delivered the opinion of the court:

The complaint is a writ of error brought to this court, alleging in substance that the plaintiff brought to the May Term of the Superior Court for Windham County, in the year 1881, a complaint for the foreclosure of a mechanics' lien against Ezekiel Blackmer and Louise Robbins (then in life, but since deceased), in which he obtained judgment against Blackmer, but judgment was rendered in favor of Robbins. This last-mentioned judgment he claims was erroneous for the alleged reason that Ezekiel Blackmer, in purchasing lumber and materials of the plaintiff, which entered into the erection of the building on the land of said Robbins, upon which the lien then in suit was placed, acted for and in behalf of, and under the authority of, Robbins, and that she was thereby bound as principal in the transaction.

If the record of the former proceeding discloses any such error, the judgment complained of should be set aside; but no such error appears. On the contrary the facts support the judgment.

The certificate of lien upon which the suit was based states explicitly that the lien claimed is based on a contract between Kinney (the plaintiff) and Ezekiel Blackmer, and the name of Louise Robbins is not mentioned in the certificate. The land is described, upon which the building was erected, but the name of the owner is not stated in the certificate.

The facts in the case were found by a committee, and it appears that the land described in the certificate was in fact the land of Robbins.

The arrangement between Blackmer and Robbins was that Blackmer should build a house on the land, of such character and cost

as he chose; that Robbins was to pay Blackmer the sum of \$200 and no more; and that Blackmer should furnish the remainder, and, as compensation, should have the privilege of occupying the house, when completed, with his family and Robbins, who was his mother-in-law.

The house cost, when completed, \$425. Blackmer bought all the materials and employed all the workmen without the knowledge or direction of Robbins, except that she knew he was constructing the house in pursuance of the agreement. She paid Blackmer the \$200 before she had any notice that the materials furnished by the plaintiff had been so furnished by him, or that they had not been paid for.

All the materials were delivered to Blackmer alone; and the plaintiff knew nothing of the arrangement between Blackmer and Robbins, in relation to constructing the house, until he had ceased to furnish materials.

Upon these facts the court omitted to find any authority in Blackmer to bind Robbins, and in this respect, and in other respects, the case is to be distinguished from *Paine v. Tillinghast*, 52 Conn. 533, upon which the plaintiff relies.

And we cannot say that the facts found in detail are equivalent to a finding of such authority in Blackmer. On the contrary, we think, in view of all the facts referred to, that Blackmer must be regarded as the original contractor with Mrs. Robbins for the erection of the house in question; and that the plaintiff, in furnishing materials to Blackmer, under a contract with him alone, was merely a subcontractor, within the meaning of Gen. Stat. p. 360, § 11; and, as he omitted to give the required notice of his intention to claim a lien, he acquired none.

There was no error in the judgment complained of.

In this opinion the other Judges concurred.

Lewis WHITMAN

v.

WINCHESTER REPEATING ARMS CO.

1. **Where all the evidence on what would ordinarily be a question of fact, and therefore not reviewable on appeal, appears in written correspondence, and depends upon the construction of written instruments,—which is a question of law,—the supreme court can review it.**
2. **Held, on the written correspondence of the parties, that a request to defendant, by a creditor of defendant, to pay the balance, owing him to plaintiff (to whom said creditor of defendant was indebted), amounted to notice of his assignment of such balance to plaintiff; and that where defendant, after such notice, was garnisheed in the suit of a third person against said assignor, and paid such balance over on execution on the judgment in such suit, defendant was still liable to plaintiff therefor.**

3. **A new trial will not be granted merely to enable a party to recover a bill of costs.**

(New Haven—Filed September 10, 1887.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for New Haven County in favor of plaintiff on a complaint for a sum of money owing by defendant to one Williams, and assigned by Williams to the plaintiff. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. Francis G. Beach, for defendant, appellant:

1. The demurrer to defendant's second answer, which alleged payment as garnishee in execution in suit of Moore's Sons against Williams, should have been overruled. The answer was sufficient.

The sum paid on the execution was paid under the statute, which says: "If judgment be rendered in favor of the plaintiff in any suit by foreign attachment, all the * * * debts then due from him to the defendant * * * shall be liable for the payment of such judgment; and the plaintiff, on praying out an execution, may direct the officer serving the same to make demand of such garnishee of * * * any debt due the defendant, and such garnishee shall * * * pay the same, to be taken or applied on said execution," etc.

Rev. Stat. 1875, p. 462, § 39.

The defendant therefore stood on the judgment and execution paid.

The statute quoted makes it the duty of the garnishee to pay upon the execution, if the officer serving the same shall make demand. The defendant, as such garnishee, did pay the officer, upon such execution, in accordance with that statute.

There was no question as to whether or not there was any defect in the attachment, execution, service of the execution, or return of the officer.

The court, in sustaining that demurrer, cast the burden of proof on the defendant, not only to prove payment, but to prove that the execution on which the payment was made was a just one. And, in order to prove that, he must prove that the judgment was correct.

Looking at the complaint, the answer, and the demurrer, the first inquiry that occurs to the mind in regard to the matter of notice of assignment is this: Who claims there was any notice of any assignment? If the plaintiff claims it, why should the defendant deny it until it is so pleaded as to require an answer? It is necessary to the plaintiff's cause of action that he should have given notice of the assignment, since an assignee, until he has given notice, has not done everything incumbent on him to do to complete his title, and he cannot hold as against *bona fide* creditors without notice.

Woodbridge v. Perkins, 3 Day, 364; *Bishop v. Holcomb*, 10 Conn. 444.

If notice of the assignment had been given, it was for the plaintiff to set it up in his complaint, as tending to show that the execution issued on the judgment was unlawfully paid by the company, and because it is essentially a part of the plaintiff's case to prove that he was not postponed.

II. The Winchester Arms Company was not notified of the assignment before February 6, 1885.

1. The evidence touching the question of notice of assignment shows conclusively that the company was not told in so many words, before February 6, 1885, that an assignment had taken place.

There is no evidence recited in the finding, nor was any offered or heard at the trial in the court below, tending to prove that anyone except James G. Williams gave any notice before that time. There was no evidence recited in the finding, nor was any heard or offered on the trial in the court below, tending to prove that Williams gave any notice before that time, except by correspondence. It is not stated in that correspondence that an assignment had been made; but, if any notice is contained in that correspondence, it is to be found in the words, "send balance soon to Lewis Whitman." There is no actual notice contained in those words.

2. There is no equitable notice contained in those words.

The rule as to equitable notice is: Whatever is sufficient to put a party upon inquiry is, in equity, notice of those facts which the inquiry would have elicited.

Bolles v. Chauncey, 8 Conn. 889; *Booth v. Barnum*, 9 Conn. 286.

III. The payment made upon execution in the suit of *Moore's Sons v. Williams*, was a legal payment, and discharged the company, as garnishee, from the amount so paid.

Having received no notice of the assignment, the company was not only justified in allowing the officer to attach the money, but was in duty bound to recognize the attachment. The claim of Moore's Sons, after the attachment had been made, took precedence of the claim of the assignee who had given no notice.

Under the statute (Rev. Stat. 1875, p. 462, § 89), the money attached in the hands of garnishee was held to satisfy any judgment obtained against the debtor, Williams. Judgment was obtained against Williams, and execution issued. The officer serving the execution, being directed by the party praying it out to make demand of the garnishee, did make demand. The company paid the officer, upon such demand, the sum of \$184.91.

Under the statute (Rev. Stat. 1875, p. 465, § 58), "The taking of any effects or debt, by judgment of law, out of the hands of an agent, trustee, or debtor of the owner thereof, by process of foreign attachment, shall forever discharge such garnishee."

The company should be discharged.

The finding of the court that the company paid out the money upon the execution with the intent to favor Moore's Sons, founded on the letter written by Mr. Asher recited in the finding, has no bearing on the case, unless it be presupposed that a garnishee must in every case refuse to pay upon execution and wait till a writ of *scire facias* is brought. That supposition is untenable, as is seen by the case of *Palmer v. Woodward*, 28 Conn. 251.

The provision for the writ of *scire facias* is for cases where the garnishee refuses to perform his duty as set forth in the statute.

Messrs. Harry W. Asher and E. P. Arvine, for plaintiff, appellee:

I. *The demurrer.* The first question presented by the appeal is whether the court erred in sustaining the demurrer to the defendant's substituted answer.

Paragraph 2 of this answer is really a plea of matter in avoidance, and it must be treated as if it confessed the assignment alleged in the complaint.

The defendant may, if he chooses, both deny and plead in avoidance of the same matter, but his answer in avoidance must contain the same allegations as if he had not also denied; that is, the special answer must contain that which would avoid the matter of the complaint, if it were true; otherwise it does not avoid and is meaningless.

The plaintiff alleges that the defendant, on January 27, 1885, owed Williams a certain amount, and that on said day Williams assigned this debt to the plaintiff, and that the debt has never been paid. These facts give the plaintiff a right of action. It is not necessary for him to allege notice to the debtor. Notice is necessary, not to perfect the right of the assignee as against the debtor, but to make it good against the assignor's creditors. As the original creditor could sue the debtor without demand, the debtor is in no worse position because the assignee can sue without notice.

The defendant alleges that on November 7, 1885, almost a year after the assignment, he paid the money over, as garnishee on execution. Manifestly, this is no defense, as it does not avoid the plaintiff's right to recover. It does not appear that the defendant was garnished before the assignment or without notice of it.

Even if the court erred in sustaining the demurrer, the defendant ought not to have a new trial. As he amended, the decision upon the demurrer in no way affects the judgment upon the issue of fact.

II. *The question of notice.* The law of Connecticut, that the debtor must have notice of the assignment, in order to protect the debt assigned from the creditors of the assignor, is exceptional. In most of the States no such notice is required. The law of notice in Connecticut is a part of its peculiar law of the transfer of possession of personal property.

Woodbridge v. Perkins, 3 Day, 376.

The object of notice is that there may be, in theory at least, a transfer of possession; in other words, that the holder of the fund may know that he is holding for the assignee. It follows from this theory of the law that notice is not, of itself, of primary importance. The essential thing is the knowledge that notice imparts. If there is knowledge without notice, notice is unnecessary.

Bishop v. Holcomb, 10 Conn. 444.

In this view, the question, What is sufficient notice? is necessarily one of fact. The real inquiry is, not what the notice was, but what the debtor's knowledge was.

The court below has found that the notice was sufficient, and that the defendant knew of the assignment before the attachment. This would appear to close the case.

But if we are to discuss the question of what amounts to notice, the telegrams and letters of

Williams are of themselves sufficient notice.

Sufficient notice to an attaching creditor is such as puts him upon his inquiry.

It is a familiar principle that a creditor "who, with notice of a previous unregistered conveyance, attaches the estate conveyed as the property of the grantor, conducts himself fraudulently and acquires no lien against the grantee."

Mead v. New York H. & N. R. R. Co. 45 Conn. 225.

On the same principle *Bishop v. Holcomb*, *supra*, decides that even where there is no notice to the debtor of an assignment, if the attaching creditor knows it, his attachment is fraudulent.

The rule of notice in the case of prior unrecorded deeds is the general rule that whatever is sufficient to put a person on inquiry is considered as conveying notice, "as the law imputes to a person the knowledge of a fact of which the exercise of a common prudence and ordinary diligence must have apprised him."

Peters v. Goodrich, 3 Conn. 150; *Booth v. Barnum*, 9 Conn. 286; *Craft's App.* 42 Conn. 149-154.

On principle, the same rule clearly applies to notice of assignment.

Though this precise application has never been made in this State, as no case of the kind has ever come up, elsewhere it has been held that "special notice of an assignment of a chose in action is unnecessary; it is enough if the party has such knowledge of the facts and circumstances as is sufficient to put him on inquiry."

Anderson v. Van Alen, 12 Johns. 343; *Dale v. Kington*, 46 Vt. 76; *United States v. Sturges*, 1 Paine, 525; *United States v. Clark*, Id. 629; *Kellogg v. Krauser*, 14 Serg. & R. 187.

Williams, three times before the attachment, directed the defendant to pay the same definite amount to the plaintiff. Of course the defendant had reason to believe that the plaintiff owned the fund. The natural presumption is, where the creditor directs the debtor to pay what is due him to a third party, that the third party owns the debt.

Facts or circumstances sufficient to raise a presumption of knowledge in the debtor of the assignment have been held to amount to notice.

Wade, Notice, § 438, pp. 191, 192.

An order drawn upon a particular fund, or for the payment of particular money in the hands of the drawee, not otherwise appropriated, followed by notice of such order to the drawee, is an equitable assignment of the money of the drawer in the hands of the drawee, to the amount of such order.

1 Wait, Act. & Def. p. 363, and cases there cited; *Tripp v. Brownell*, 12 Cush. 376; *Mandeville v. Welch*, 18 U. S. 5 Wheat. 285 (5 L. ed. 90); *Robbins v. Bacon*, 3 Me. 346; *Lannan v. Smith*, 7 Gray, 150.

Such an order is an assignment, without acceptance.

Campbell v. Smith, 7 Alb. L. J. 203; *Brill v. Tuttle*, 81 N. Y. 454.

An order disclosed by one who is summoned as garnishee, to pay over the money in his hands, is *prima facie* a good assignment, though not expressed for value received.

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Adams v. Robinson, 1 Pick. 461; *Harrington v. Rich*, 6 Vt. 666.

In such cases the presentation of the order is the best possible notice of the assignment.

It is absurd to say that Williams' letters are not notice of assignment, since the order which they contain is itself *prima facie* an assignment.

Mr. Francis G. Beach, for defendant, appellant, in reply:

The decision of this court allowing the amendment to the finding has narrowed the issues in this cause to the single one, whether or not "the correspondence hereinbefore recited" contains a notice of assignment. And this issue is limited to the single question, whether or not the correspondence contains an actual notice of assignment.

No rule of constructive or equitable notice can be applied in determining this question; because, as has been set out in the main brief of defendant, constructive or equitable notice is imputed only when the party sought to be charged should have made inquiry, but did not do so.

In the case of *Wilson v. Wall*, 78 U. S. 6 Wall. 83 (18 L. ed. 727), the question of constructive notice is considered on page 91. The court there refers to Sugden on Vendors, and quotes:

"In *Ware v. Egmont*, 4 De G. M. & G. 460, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice; namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired, it but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained, the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence."

Constructive notice, being that notice imputed to a person because he has been negligent in not finding out what it was his duty to find out, cannot, therefore, be imputed to the defendant in this case: because the court has not only not found negligence on the part of the defendant, but has distinctly found that the defendant made an inquiry to obtain the knowledge on January 27, 1885, and a second inquiry on January 31, 1885; and has as distinctly found what the answers to those inquiries disclosed.

The main issue, then, being whether or not the correspondence amounts to actual notice, we test what is contained in the correspondence by seeing if the definitions of actual notice include what we find there.

Story's Equity Jurisprudence passes over the question by saying (vol. 1, p. 381, § 399): "Actual notice requires no definition; for in that case knowledge of the fact is brought directly home to the party."

Is the knowledge of the fact that Williams had assigned this money to Whitman brought

directly home to the defendant by the words "send balance soon to Lewis Whitman?"

In *Wade on the Law of Notice*, actual notice is divided into two classes, which are: (1) express, which includes knowledge or information coming to the party to be charged, of a degree above that which depends upon collateral inference or which imposes on him the further duty of inquiry; and (2) implied, which imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them. In other words, where he chooses to remain voluntarily ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest.

Wade, Notice, p. 4, § 5.

The terms of the definition of "express" notice exclude the present case from that class.

If the defendant had not paid any attention to the telegram and postal card sent by Williams to it, then perhaps the definition of "implied" notice would cover the case; but we have seen, and it cannot be too often repeated, that the defendant did everything in its power, in the way of inquiry, to obtain the knowledge with which it is now sought to be charged, and was certainly not negligent in making such inquiry.

It seems to us that this court will be slow to apply any rule of constructive notice against a defendant who has once paid the money upon an execution, in favor of a plaintiff who did not give the slightest intimation that he had any interest in the money so paid.

Messrs. Harry W. Asher and E. P. Arvine, for plaintiff, appellee, in reply:

The defendant in his second brief does not state the rule of notice that prevails in Connecticut.

In *Peters v. Goodrich*, 3 Conn. 150, the court says "that the law imputes to a person the knowledge of a fact of which the exercise of a common prudence and ordinary diligence must have apprised him." The same language is repeated in *Stoughton v. Pasco*, 5 Conn. 446; *Crane v. Deming*, 7 Conn. 896; *Booth v. Barnum*, 9 Conn. 290; *Bosnell v. Goodwin*, 31 Conn. 84; and *Hamilton v. Nutt*, 34 Conn. 509.

This is the prevailing doctrine in America. 2 Pom. Eq. §§ 662-664; Story, Eq. Jur. § 400.

To constitute notice under the Recording Acts, it is necessary to show that the party has received information of facts and circumstances which are sufficient in contemplation of law to put any reasonably prudent man upon an inquiry, so that the inquiry, if prosecuted with due diligence, would lead to a discovery of the truth.

2 Pom. Eq. § 664, p. 110.

Nor is it necessary, as the defendant claims, that the court below should have found negligence. If the circumstances are sufficient to put the party upon his inquiry, and he does not inquire, negligence follows as a necessary and legal inference. If the defendant, by the exercise of reasonable diligence could have found out the truth, it is of no consequence what inquiries he actually did make. The entire argument of the defendant is built upon the assumption that the question what facts amount to notice is a question of law. If it

is not, the finding of the court that the defendant had sufficient notice is conclusive.

But if the rule were just as the defendant states it, it would be no better off. It was guilty of gross negligence. The orders it received from Williams to pay to the plaintiff, according to the authorities cited in our first brief, amounted in themselves, *prima facie*, to notice. If the defendant still had any doubt, it was certainly bound to inquire before payment to J. P. Moore's Sons. An examination of the correspondence between the defendant and Williams will show that the defendant never did inquire whether the fund in its hands, or any part of it, had been assigned to the plaintiff.

Park, Ch. J., delivered the opinion of the court:

It appears in this case that on the 24th day of January, 1885, the defendant was owing one James G. Williams the sum of \$262 and some cents. At the same time Williams was owing the plaintiff a larger amount, and on the 27th day of the same month assigned to the plaintiff the indebtedness of the defendant to him.

It also appears that Williams was owing a firm named "J. P. Moore's Sons" a large sum; and on the 6th day of February, 1885, Moore's Sons brought suit against Williams, and garnished the defendant. On the 6th day of November of the same year Moore's Sons recovered judgment against Williams, and the next day the defendant paid to the officer serving the execution issued on the judgment the sum of \$184 and some cents, which the defendant sought in this suit to set off against the plaintiff's claim.

The principal question on the trial of the case below was whether Williams gave the defendant notice of the assignment of his claim against them to the plaintiff, before their garnishment by Moore's Sons.

The court below found that due notice was so given, and rendered judgment against the defendant; and now it brings the case before this court for review.

Ordinarily the question would be one of fact, which this court could not review, farther than to ascertain whether there was any evidence before the court on which its judgment was based. But the claim is that, inasmuch as it appears on the record that all the evidence on the subject in the trial below appears in the written correspondence between Williams and the defendant; and inasmuch as the construction of written documents is a question of law,—this court can review the question. We are inclined to take this view of the case, and we will therefore consider the correspondence between the parties on the subject.

A telegram sent by Williams to the defendant on the 27th day of January, 1885, was as follows: "Pay Moore's sixty-four, forty-six. Balance soon; Lewis Whitman." The defendant knew that "Moore's" meant Moore's Sons, the firm to which Williams was indebted.

The defendant replied to this telegram, and asked for more specific instructions in relation to the balance; and on January 29 Williams sent the following by postal card, in reply: "Yours of January 27 at hand, and in reply will say the message I sent was not exactly as

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you got it; read: "Pay Moore's \$64.40. Send balance soon to Lewis Whitman. Please do as this card implies, and oblige." Again, on February 3, of the same year, Williams sent to the defendant by letter the following: "Please pay them [Moore's Sons] \$64.40, and no more. * * * Please send the balance immediately to Lewis Whitman."

Thus it appears that, during the interval between the assignment and the attachment of Williams' claim against the defendant, Williams sent to it three written communications, directing it to pay the plaintiff all the indebtedness it was owing him, except the sum of \$64.40.

If the defendant had obeyed the instructions by payment of the claim to the plaintiff, no one would question but that it would have been fully protected in so doing. Payment to the plaintiff would have been, in effect, payment to Williams. His claim against the defendant would have been satisfied.

But it is said that an order to pay the plaintiff does not inform it that the claim had been assigned to him.

The case was susceptible of but two constructions. Either Williams was endeavoring to secrete the money in the hands of the plaintiff to defraud his creditors, which the defendant had no right to assume without evidence, or the plaintiff had a right to the money in payment of a claim that Williams was owing him. This was the only sensible construction that could be given the transaction. The defendant could hardly suppose that the plaintiff was merely the agent of Williams to collect the money when Williams was in a situation to collect it himself, and that, too, when he was endeavoring to get the money paid to the plaintiff, the trouble of effecting which would be as great as it would be to get the money paid to himself.

We think the orders given by Williams to the defendant to pay the balance of his claim to the plaintiff, after making a certain deduction, justified the court below in finding that due notice of the assignment in question was given by Williams to the defendant.

We see no error in the judgment of the court below upon the demurrer to the defendant's substituted answer: and even if there had been error, it is manifest that it could not have done the defendant any harm; for it amended its answer, and went to trial upon the merits of the case. It is true that if the demurrer had been overruled and the answer had been adjudged sufficient, the defendant might have recovered a bill of costs. But it has been frequently held by this court that it will not grant a new trial to enable a party to recover a bill of costs.

There is no error in the judgment appealed from.

In this opinion the other Judges concurred.

Edward COWLES, Exr.,

v.

George H. PECK.

1. A guaranty indorsed on a note in the following words, "I guarantee the
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within note good till paid," is a conditional **guaranty of collection only**, and not an absolute guaranty of payment.

2. A **complaint on such guaranty**, which fails to show that the holder of the note used diligence to collect it of the maker, or that the note was not collectible, is **demurrable**.

3. A **complaint on a guaranty** is demurrable, which fails to disclose any **consideration** for the guaranty.

(New Haven—Filed September 10, 1887.)

A PPEAL by plaintiff from a judgment of the Superior Court for New Haven County in favor of defendant upon demurrer to the complaint in an action upon a guaranty of a promissory note. *Affirmed*.

The facts and questions presented are stated in the opinion.

Mr. E. F. Cole, for plaintiff, appellant:

1. The production of the note and proof of defendant's signature establish, *prima facie*, the right of recovery thereon.

Negotiable notes are presumed to have been given for a valid and adequate consideration, and whether they purport to have been given for value received or not, it is unnecessary for the plaintiff, in the first instance, to allege or prove a consideration.

Between the original parties the consideration may be inquired into, but the burden of proof lies on the defendant to rebut the presumption raised by implication of law.

Edw. B. & N. 311, 312, and cases cited.

In the case of bills of exchange and promissory notes, the expression "for value received" raises a presumption of a legal consideration.

Raymond v. Sellick, 10 Conn. 483.

Between the original parties it is wholly unnecessary to establish that a promissory note was given for such a consideration; and the burden of proof rests upon the other party to establish the contrary, and to rebut the presumption of validity and value which the law raises for the protection and support of negotiable paper.

Story, Prom. Notes, 209; Bristol v. Warner, 19 Conn. 7.

The defendant, however, does not claim that his brother, the maker of the note, did not get value received for his note; he merely denies the sufficiency of the consideration as to himself.

The note and guaranty, in legal contemplation, were executed at the same time, for the same consideration, and are inseparable. The delivery of the note constituted the consummation of the contract. The fact that the writings all bear one date is *prima facie* evidence that it was all one transaction, unless the contrary is proved.

Bushnell v. Church, 15 Conn. 414, 415.

2. The claim in the demurrer that we ought to have collected the note of the maker by the use of due diligence, etc., is precisely the defense that he would have set up had he been merely an accommodation indorser. He claims that a blank indorsement and this written guaranty are synonymous and convertible terms. If words mean anything, the addition of the words "I guarantee this note good till

paid" mean something more than a mere signature. If this defendant intended to restrict his liability to a minimum, why not simply have signed his name?

8. If this note be regarded as something more than a four months' note; this security, as a continuing security,—it was an absolute engagement on the part of the guarantor that the note should be paid by the maker or by himself; and that demand and notice were not necessary.

Breed v. Hillhouse, 7 Conn. 523.

This guaranty is an absolute and unqualified guaranty in accordance with the law laid down in *City Savings Bank v. Hopson*, 53 Conn. 454, unless the word "good" therein be the sole thing that makes this guaranty bad,—worthless.

4. These counts are *mutatis mutandis* copies of forms in the Practice Act. Form 334, page 192, reads as follows: "Against the maker, acceptor, indorser, or drawer of a bill of exchange, promissory note, due-bill, bond, bank note, check, or certificate of deposit, or other written instrument for the payment of money only. One hundred dollars is due to the plaintiff from the defendant on an instrument, of which a copy is hereto annexed, marked 'Exhibit A.' The plaintiff claims \$125 damages."

The defendant may possibly have a good defense to this action,—forgery, failure of consideration, payment, etc.,—but under the Practice Act the plaintiff is not obliged to anticipate each and every defense that the defendant may possibly or probably make, or have his complaint held bad on demurrer.

Messrs. Wooster, Williams, and Gager, for defendant, appellee:

1. Is the guaranty in question an absolute or a conditional contract? If the latter, it must be conceded that the demurrer is well taken.

The defendant claims that this guaranty is "a conditional one, and that the condition is precedent and an essential part of the contract, and that the burden of proof was therefore on the plaintiff to show by appropriate evidence, either that he first exhausted all legal remedies without success, or that the maker was insolvent, or that the guarantor in some proper manner waived the legal proceedings."

See opinion of Loomis, J., in *Allen v. Rundle*, 50 Conn. 22.

There is but one fair and reasonable construction to be given to the words of the contract in this case, and that is that it means that the note is good against the maker, and that by the exercise of due diligence the same may be collected from the maker at maturity. The terms "good" and "collectible" as used in such contracts are synonymous.

"Guaranties are either absolute or conditional."

"If A. guarantees the collectibility or goodness of B.'s note to C., he does not absolutely guarantee its payment, but only that he will pay it in the event that C. shall test the collectibility or goodness by regular prosecution of suit against B., and shall be unable, by due and reasonable diligence, to enforce its payment," etc.

Allen v. Rundle, 50 Conn. 20.

The words, "I guarantee the collection of the within note," and "I promise that this note is good and collectible after due course of law,"

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and "I warrant this note good," are phrases of similar import, binding the guarantor only upon condition that the guarantee acts with due diligence in prosecuting the collection of the note."

2 Dan. Neg. Inst. § 1769, and notes; 1 Edw. B. & N. marg. 235. See *Hammond v. Chamberlin*, 26 Vt. 406; 2 Pars. N. & B. 140, 141.

The plaintiff, in the lower courts, relied upon *City Sav. Bank v. Hopson*, 53 Conn. 455. The form of the guaranty in that case was as follows, viz.: "For value received we guarantee the within note until paid." While the contract in this case is "I guarantee the within note good till paid."

Breed v. Hillhouse, 7 Conn. 523, was cited by this court in *City Sav. Bank v. Hopson*, *supra*. In *Breed v. Hillhouse*, *supra*, the form of the guaranty was as follows, viz.: "I hereby guarantee the payment of this note within four years from this date."

2. This contract of guaranty does not import a consideration on its face, and is not under seal.

All contracts not by law importing a consideration, as deeds, bills of exchange, and notes, require the consideration to be stated in pleading, as it is one thing which must be proved.

Bliss, Code Pl. § 268.

As a guaranty is an independent contract, it must be made upon sufficient consideration.

2 Pars. N. & B. 125.

The contract of guaranty, like every other contract, requires a consideration to support it, unless it be under seal,

De Col. Guar. *19, 151.

The declaration must disclose a legal consideration.

Colburn v. Tolles, 14 Conn. 343. See Practice Act § 92, form 138; also p. 106, form 165.

Loomis, J., delivered the opinion of the court.

This is a complaint to recover upon a guaranty in writing signed by the defendant on the back of the note given August 3, 1878, by one Robert Peck, and payable to the order of David M. Cowles, the plaintiff's testator, since deceased. A demurrer to the complaint, which was sustained in the court below, raises two questions for our consideration:

First. Was the guaranty an absolute or a conditional one? It was in these words: "I guarantee the within note good till paid."

The complaint is framed upon the assumption that it is an absolute guaranty of payment, that required no action on the part of the payee or the plaintiff; while the demurrer, on the other hand, assumes that the guaranty is conditional, and means that the note is capable of being collected by the use of ordinary diligence. We think the defendant's construction must be accepted as the true one.

All the authorities agree that there is a broad distinction between guaranties of payment and guaranties of collection; the former are an absolute, unconditional undertaking on the part of the guarantor that the maker will pay the note, while the latter are an undertaking to pay if payment cannot, by reasonable diligence, be obtained from the principal debtor.

There is some disagreement in the authorities as to the precise steps to be taken by the holder of a conditional guaranty in order to

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subject the guarantor; but this distinction is of no importance in this case, inasmuch as the complaint, in effect, concedes that no steps whatsoever were taken to collect the note of the maker, and there is no averment that it was not a collectible note.

There has been no case before the court where the words of the guaranty were precisely like this. That of *Allen v. Rundie*, 50 Conn. 20, comes nearest to it; but there the words were "good and collectible," and they were construed as constituting a conditional guaranty. We do not think the addition of the word "collectible" controlled that case, for the words "good" and "collectible" are of similar import when used in such connection.

The plaintiff, in support of his position, cited *City Sav. Bank v. Hopson*, 53 Conn. 455, where the guaranty was in this form: "For value received we guarantee the within note until paid," which was held to be a guaranty of payment. In view of this case the plaintiff's counsel, with a suggestive play upon the words, asked, "How can the insertion of the word 'good' in a guaranty make it bad?" It cannot make it bad, but it may determine the class to which the guaranty belongs. Had the plaintiff used ordinary diligence in collecting the note of the maker, or shown that it was not collectible, he could have recovered provided, of course, there was a good consideration. The simple question is, What does the word "good" in such a connection import?

It seemed to us unnatural to give it all the force that attaches to the word "payment," for the latter refers to the act of the debtor alone, irrespective of any steps taken by the creditor, while the former word refers to and qualifies the note. The maker of a note may pay it when no one would have considered the note good; and, on the other hand, a note may be considered perfectly good which the maker would not pay till compelled to do so. The accepted test of the goodness of a note is its capability of being collected, independent of any voluntary act of payment on the part of the maker, and the use of ordinary diligence on the part of the holder is implied where diligence would avail.

In *City Sav. Bank v. Hopson*, *supra*, there was no word to limit the extent of the guaranty except the words "till paid." The court therefore considered the guaranty as belonging to the stronger class of absolute guaranties, requiring actual payment, and the case was likened to that of *Breed v. Hillhouse*, 7 Conn. 523, where the word "payment" was used.

Our position receives strong confirmation from distinguished text-writers, and from decisions in other jurisdictions.

In *Edwards on Bills and Promissory Notes*, side page 235, it is said: "I warrant this note good," means that it is collectible, that the maker is responsible; it is not an engagement that the note will be promptly paid at maturity; and it is therefore incumbent on the holder of such note and guaranty, in order to charge the guarantor, to prove by legal evidence that the maker was not responsible.

In 2 *Daniel on Negotiable Instruments*, § 1769, it is said: "The words, 'I guarantee the collection of the within note, and I promise that this note is good and collectible after due course of law,' and 'I warrant this note good,' 1 CONN.

are phrases of similar import, binding the guarantor only upon condition that the guarantor acts with due diligence in prosecuting the collection of the note."

In *Hammond v. Chamberlin*, 26 Vt. 406, "I hereby guarantee this note good until January 1, 1850," was held collateral, and not an absolute undertaking, and that the contract meant that the makers of the note should be in that condition that payment could be enforced against them if legal diligence was used for that purpose.

In *Curtis v. Smallman*, 14 Wend. 231, a guaranty, "I warrant this note good," indorsed by the payee on the note, was held to be a guaranty that the note is collectible, and not that it will be paid on demand.

In *Cooke v. Nathan*, 16 Barb. 342, it was held that a contract, "This note is good," meant that it could be collected by due course of law.

The case of *Koch v. Melhorn*, 25 Pa. 89, has been cited by text-writers as opposed to the construction given above, and so far as we have noticed, it is the only opposing case. It seems to us, however, that it is distinguishable from the cases cited. It was an action on a parol warranty of a note, where the words used were that the note was "just as good as if he would give him (the plaintiff) the money; that he would insure it as good as gold and silver."

It will be seen that the meaning did not depend on the word "good" alone; there is specially made an extra standard of the goodness intended; that is, it was just as good as if he would give him the money, which is actual payment; and when it was added, "as good as gold and silver," it referred to money in hand. Such language might well be held equivalent to a warranty of payment, as it was by that court.

The conclusion already reached amply sustains the judgment of the court below. It is therefore unnecessary to consider the other question relative to the consideration; but, as our silence might imply that we consider the question doubtful, we will say that it is essential to a valid contract of guaranty that there be a sufficient legal consideration, and as in this case there is no consideration set forth, and none appears on the face of the guaranty, and there is no averment that it was executed contemporaneously with the note, or that the latter was accepted on the faith of it, and as no other fact appears from which a consideration may be legally presumed, we think the demurrer upon this ground also was well taken.

There was no error in the judgment complained of.

In this opinion the other Judges concurred.

James H. WELLES

v.

Henry A. BAILEY *et al.*

1. The law of accretion and reliction is the same in the case of both navigable and non-navigable rivers.
2. If a particular tract of land was originally cut off from a river by an intervening tract, and such intervening tract is gradually washed away until the remoter tract is reached by the water, the

latter tract becomes riparian as much as if it had been originally such; and the general principle by which a riparian owner takes all accretions from the gradual change of a river bed is applicable to such tract.

3. The title of a riparian owner on a non-navigable stream, to accretions, is not limited by the middle line of the stream.
4. Whenever a portion of a riparian lot is washed away by the river, the riparian owner becomes entitled to the land under the water as far as the centre of the stream, without any reference to the original limit of his land or to his upland lines. He takes whatever front upon the river its change of bed gives him, and by lines that run from the termini of his upland lines at right angles to the centre line of the stream.

(Hartford—Filed September, 1887.)

A PPEAL by defendants from a judgment of the Superior Court for Hartford County in favor of plaintiff in an action for trespass on land and for cutting and carrying away wood therefrom. *Affirmed.*

The questions presented are stated in the opinion.

Mr. Roger Welles, for defendants, appellants:

1. The plaintiff's grant, by deed, of a tract immediately adjoining the *locus in quo* on the north, is not riparian.

(a) It is a grant of flats.

While a flat may become attached to the upland by accretion, we submit that it is going too far to claim that one flat may become attached to another flat by accretion. We have not found any authorities to sustain such a view of the law. It could not, in 1808, be known that the west channel of the river would afterwards again submerge both of these tracts of land, which would in a few years again emerge on the west side of the river.

(b) This grant is bounded on all sides by the lands of others.

The river is not mentioned as a boundary, which shows it was not the intent of the parties to make the river a boundary, and therefore the grant was not riparian. It is what is called a limited grant. Such a grant is thus described in Hough on Rivers, § 252: "A limited field (*ager limitatus*) is a tract of land conveyed by artificial lines of mensuration, or by fixed boundaries, whether the contents be set forth or not."

The same author, in § 256, after quoting from Niebuhr on the Roman Land Law some peculiarities of limited fields, ends the quotation in these words: "In other respects the limited fields had certain legal peculiarities, concerning which scarcely any other express statement is presented than that they had no right to alluvial land."

1 Bracton, p. 78, bk. 2, chap. 2, f. 9, b.

In Gould on Waters, § 195, he says: "The legal effect of the conveyance is determined by the terms employed." And the boundaries in the deed are held to determine whether the grant is riparian or not.

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Mill River, etc. Co. v. Smith, 34 Conn. 463; *N. H. Steamboat Co. v. Sargent*, 50 Conn. 203; *Dunlap v. Stetson*, 4 Mason, C. Ct. 365; *Schools v. Risley*, 10 Wall. 110 (77 U. S. bk. 19, L. ed. 850); Britton, bk. 2, chap. 2, § 7, p. 218.

The grantor could convey no rights, riparian or otherwise, which he did not own, and he owned no rights in the lands of his adjoining proprietors. The description in a deed is a covenant binding upon grantor and grantee, and they are estopped to deny its recitals.

Bigelow, Estop. 270.

(c) The river was not in fact a boundary of the plaintiff's grant in 1803.

Gould, Waters, §§ 143, 149.

The fact was otherwise. How far the west channel had shifted towards the east it is impossible to tell. It did not reach the plaintiff's land till some years after. So the grant was not riparian in terms or in fact, when made. Did the owner ever acquire any right to accretion over the dividing line to the south so as to transfer our land to him? If so, how was it done?

2. The subsequent submergence of the two tracts of land for a few years effected no change in the title to the lands.

It will be admitted that a temporary submergence will not effect any change of ownership. The annual floods of the Connecticut River are familiar examples of this truth. When does a submergence cease to be temporary and begin to be permanent? Where is the line to be drawn? No limit of time has ever been fixed. Practically there is no limit. In the late case of *Mulry v. Norton*, 1 Cent. Rep. 748 (100 N. Y. 424), which in some important respects is similar to this, Ruger, *Ch. J.*, in the course of a very well-considered opinion, says, p. 751 (434): "It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or suffices to enable another to acquire it, for the erosion must be accompanied by a transportation of the land beyond the owner's boundary to effect that result, or the submergence followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained. When portions of the mainland have been gradually encroached upon by the ocean, so that navigable channels have been extended thereover, the People, by virtue of their sovereignty, having authority over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them, in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of water by artificial means, that its proprietorship returns to the original riparian owners. Ang. Tide Wat. 76, 77; Hough, Riv. § 258. Neither does the lapse of time during which the submergence continued bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship. Ang. Tidewat. 77, 80, and cases cited."

Gould on Waters states the circumstances

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under which land may be wholly lost, as follows, p. 158: "But if the sea gradually and imperceptibly encroach upon private lands, or the bounds are lost, and the situation and extent of the lost land cannot be ascertained, it belongs to the Crown, at common law, and in this country to the State."

But it is evident this state of facts does not exist in the case of our lands, which are well known.

The rule is stated in *Houck on Rivers*, § 258, referred to in the above opinion of *Mulry v. Norton*, as follows: "Nevertheless, it is possible that, by the action of the sea, or a change of the channel of a river, the land so granted may be partly lost. No doubt, in case, afterwards, the land should be washed up again, it would belong to the former owner, to the extent originally purchased, and no further."

The right of ownership of soil under the Connecticut River was early recognized by this court. In the case of *Adams v. Pease*, 2 Conn. 488, the soil under the river at Suffield, above the ebb and flow of the tide, was held to belong to the plaintiff to the middle of the river. In the case of *Middletown v. Sage*, 8 Conn. 221, the title to the bed of the river at Middletown, where the tide ebbs and flows, was held to be *prima facie* in the State, but only *prima facie*.

In the case of *Browne v. Kennedy*, 5 Harr. & J. 195, published in 9 Am. Dec. 503, 510, Buchannan, J., says: "If one has an estate through which a private river runs, and an island should arise in the river, it will belong to him; so, if he has the property in the soil of a public river, and an island springs up, it will equally belong to him. Again, if, in the case of a private river, the bed is left bare by a sudden recess of the water, the relicted land remains the property of the former owner; and so, if one had the property in the soil of a public river, and the bed is left bare by a sudden recess of the water, the relicted land will remain his, because in each case the property in the soil is in him. And for the same reason all islands, relicted land, and other increase arising in navigable rivers, belong in England to the King; here, to the State, where the property to the soil has not been appropriated; but where it has become private property either by grant or prescription, the same rules do or should apply to it that govern other private property of the same nature. It is subject to the same law of descents, and liable to be transferred by the same mode and form of conveyance, and is subject to none of the rules applicable to lands not granted or distributed out."

In *Phear on Waters*, cited in *Houck*, p. 169, note 1, the principle is laid down thus: "It need hardly be added that, if an island makes its appearance, it is the property of the person, whether king or subject, to whom the soil on which it rests belonged."

This principle was held to apply and vest in the State an island emerging in the navigable waters of the Thames, by this court, in *Tracy v. Norrich & W. R. R. Co.* 39 Conn. 382.

In the case of *Mayor, etc. of Mobile v. Eslava*, 9 Porter, 577, published in 38 Am. Dec. 325, 329, Collier, Ch. J., says: "The king may grant the soil of tidewaters to an individual, yet the grantee cannot so exercise his right of prop-

erty as to injure the paramount right of navigation. The interest of the grantee has been aply compared to that of a person who owns the fee simple of a road, who, when the road is discontinued, may appropriate the ground to his own purposes, but, until then, he cannot obstruct its passage. Lord Hale says that the *jus privatum* of the proprietor is subject to the *jus publicum* of the community. How far the grantee of the soil may make reclamations, so that he does not disturb navigation, is an interesting question, about which there is a want of entire harmony in the *dicta* and decisions on this branch of the law. All, however, agree that, as the shore becomes derelict by the receding of the waters, he may appropriate it to private purposes."

In Bacon's Abridgment, *Prerogatives*, B., 1, it is said: "If land be drowned, and so continue for divers years; if it be after regained, every owner shall have his interest again, if it can be known by the boundaries."

In Comyn's Digest, *Prerogatives*, D., 62, it is said: "But if the sea overflows the land of any person, and after forty years flows back again, the owner shall have the land, and not the King."

See Hale, *De Jure Maris*, 16, 34-36.

Blackstone says: "If the whole soil is the freehold of any one man, as it usually is whenever a several fishery is claimed, there it seems just (and so is the constant practice) that the eyots, or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil."

2 Bl. Com. 261.

Ejectment will lie for land covered with water.

Gould, *Waters*, § 471; also *Trespass*, 1 Chitty, Pl. 174, 175.

In the recent case of *Rowe v. Luddington*, 51 Conn. 185, Pardee, J., says: "To encourage the planting of oysters, the State has assigned portions of the bed of Long Island Sound to private and exclusive ownership."

It is no objection to this grant that it is covered permanently by the Sound. How can it be an objection to our grant that it has become temporarily covered? Could we not have planted oysters on our overflowed land, if the water had been salt, without a new grant from the State? Could the State have made an express grant of our overflowed land to the plaintiff? We claim that it could not; the submergence did not give the State our title to the soil.

The doctrine of estoppel applies to a State as well as to a private person.

People v. Soc. Prop. Gosp. 2 Paine, 545;

Gould, *Waters*, §§ 23, 36, 37.

In *Chapman v. Kimball*, 9 Conn. 41, Daggett, J., says: "The general rule is that the land which is relicted and left dry by the receding of the water is the property of the sovereign, as being part and parcel of that which was previously the domain of the sovereign; and the *jus proprietatis* or ownership of the soil which is covered with water is not changed because the water has receded from it."

But when the sovereign has granted his domain to a subject, the same rule gives the ownership of the relicted land to such subject; his ownership is not changed. This distinction is recognized in *Mulry v. Norton*, *supra*. Ru-

ger, *Ch. J.*, says, p. 486: "The sovereign succeeds to the ownership of such islands and formations only as are originally created and located in tideways outside of the boundaries of property which has been the subject of individual ownership."

See also Hale, *De Jure Maris*, p. 15.

The same rule is laid down in Schultes on Aquatic Rights (8 Law Library, N. S.), pp. 117, 122.

According to *Judge Swift*, the principles involved in this case have already been decided and adopted in this State in accordance with our claims. He says: "A principle has been adopted in this State that where a navigable river has gradually shifted its whole bed, so that a man's land has risen on the opposite side, he is entitled to it. Connecticut River is constantly varying its channel; and instances have occurred, within the memory of man, where the soil has reappeared within the original bounds of a proprietor, on the opposite bank of the river. Where it has been practicable to prove the fact, such proprietors have been able to assert and enforce their claims, and recover the land."

1 *Swift*, Dig. 111, 112.

One such case is related in *Barber's Hist. Col.* pp. 113, 114. See also *Ang. Watercourses*, § 57, note 4.

3. No accretion across dividing lines.

If the plaintiff is entitled to accretion at all, all the rules relative to the division of alluvion were disregarded, and the plaintiff was allowed to have the increase to his land, across the line of his adjoining proprietor down stream, even to the extent of swallowing it up entirely. The general rule is thus stated in *Gould*, § 163: "When the general course of the shore or river bank approximates to a straight line, alluvial deposits, as well as flats, are divided among the coterminous proprietors by lines perpendicular to the general course of the original bank, or of the original highwater mark of the shore."

The plaintiff's land lies in the form of a parallelogram, its east and west lines marking its sides, and its south terminus the line dividing his tract from ours. A line drawn "perpendicular to the general course of the original bank," from the southeast corner of the plaintiff's tract, easterly, would escape our land entirely.

Knight v. Wilder, 2 Cush. 209; *Hopkins Acad. v. Dickinson*, 9 Cush. 544, 548, 550; *New Haven Steamboat Co. v. Sargent*, 50 Conn. 199, 208; *Armstrong v. Wheeler*, 52 Conn. 428.

It may be claimed that, as the west channel of the river became the sole channel after the east channel filled up, the original bank of the east channel has nothing to do with the case. If this be true, the same reasoning proves that the plaintiff's land was never upon the original bank of the west channel, and therefore never riparian, as already claimed.

The jurisdiction line of 1770 was established as the centre of the east channel, as it ran in 1692, and as there was no process of erosion going on in this east channel, but a process of gradual filling up, there is no reason to suppose there had been any change in the high-water mark of the original shore of the east channel from the time of the original grants of the three-mile lots in 1640. The original bank

must have been there, high and dry, while the ancient bed had become a low swale. The west channel is the unruly one. That has changed so constantly that its bank is never the same for two consecutive years. It has no known original bank. Is it not the duty of the plaintiff to show that the decision of the lower court was based upon some equitable rule? The only safe rule is that the accretions to the south of the dividing line belong to the adjoining proprietor.

In *Mulry v. Norton*, *supra*, *Ruger, Ch. J.*, says, p. 753 (486): "It would seem to follow, from the principles referred to, that the owner of Long Beach could not, even if the process of its enlargement and extension was affected by accretion, claim beyond the point where such accessions began to be made upon the property of adjoining owners, and as the line of each successive owner of uplands was reached in the process of extension, a new obstacle to the appellant's claim would seem to arise."

In *Saulet v. Shepherd*, 4 Wall. 508 (71 U. S. bk. 18, L. ed. 442), it is said: "Before there can be a right to accession or accretion, there must be an estate to which the accession can attach."

In *Bates v. Ill. Cent. R. R. Co.* 1 Black, 206 (66 U. S. bk. 17, L. ed. 158), the court says: "Before a proprietor can set up his claim to accretions and the like, he must first show that he owns the shore, and if he fail first to establish his ownership, judicial inquiry respecting his rights in or under the waters adjoining are abstractions, and useless."

At what point of time did the plaintiff acquire any ownership in Benton lot? Was it before or after its emergence? South of the division line the accretion attached to our estate, for the plaintiff admits he had no estate south of the line till the accretion had attached and raised it. But this accretion attached to our land under the water, as well as to his, and both emerged at about the same time. One rule should apply to both.

Where the boundary is a river, the line is not a fixed, but a shifting one, and it is because the line is not stationary and established, and cannot be, in the very nature of the case, that the imperceptible increase by accretion is allowed to apply and to change the line under the fiction that, as you cannot see any change in the line, there really is none. "That which cannot be perceived in its progress is taken to be as if it never had existed at all," is the maxim.

Re Hull & Selby R. Co. 5 M. & W. 327.

But there is a qualification to the extent to which this doctrine will be carried, even in riparian grants.

In *Attorney-General v. Chambers*, 4 De G. & J. 55, 68, *Lord Chelmsford* says: "Although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived."

It is admitted that the *locus in quo* is a part of Benton lot, and formerly belonged to us. There is no question as to the boundary. Also the increase is very large and very rapid. If

there ever can be a case for the application of this doctrine propounded by *Lord Chelmsford*, the case at bar would seem to be such a case, if the doctrine of accretion applies at all.

But here the dividing line is a fixed, straight line, established and agreed to between adjoining proprietors on the same side of the river in 1808, and now subject to the same changes, mutations, and freaks wrought by the west channel.

The doctrine of accretion, so far as it favors one proprietor at the expense of another, has its proper application to riparian proprietors upon opposite sides of a river which runs between them, and forms a natural boundary between them. But the river never ran between these proprietors. There is no space between them. They touch each other; and the whole philosophy of the doctrine of accretion is opposed to the application of any such doctrine to these adjoining proprietors on the same side of the river as against and between each other, between whom the river was never a boundary. In our examination we have not found such an application of the doctrine in a single case or opinion in report or text-book, and we challenge the other side to produce one. The rule is comprehensively laid down by Lord Hale, *De Jure Maris*, Part 1, chap. 1, as follows: "If a fresh river, between the lands of two lords or owners, do insensibly gain on one side or the other side, it is held (22 Ass. 93) that the propriety continues as before in the river. But if it be done sensibly and suddenly, then the ownership of the soil remains according to the former bounds. As, if the river running between the lands of A and B leaves his course, and sensibly makes his channel entirely on the lands of A, the whole river belongs to A,—*aqua cedit solo*; and so it is, though if the alteration be by insensible degrees, but there be other known boundaries, as stakes or extent of land (22 Ass. pl. 93), and though the book make a question whether it hold the same law in the case of the sea or the arms of it, yet certainly the law will be all one, as we shall have occasion to show in the ensuing discourse." And see further, *Id.* chap. 6, p. 32.

Ford v. Lacey, 30 L. J. Exch. 351-354.

If this be good law, it is certainly fatal to the plaintiff's claim; first, because the river never was a boundary between him and us; and second, because the boundary between us is "known" and acknowledged.

4. The lands temporarily and conditionally riparian.

We admit that, when the river submerged the lands of the parties to this suit, they became riparian proprietors so far forth that when their lands came out of the water they could at once regain them, and to the extent that they were submerged, but not beyond their exterior lines. They were made riparian by the arrival of the river, and ceased to be riparian by its departure.

But if by any possibility they could extend in any direction beyond their lines, which we deny, this direction must be to the eastward, but not sideways or cornerwise, so as to pass over the line between them, as already claimed. The map shows that all the old lots east of the river run east and west, and any accretion, if allowed, must be in the same direction and

within their dividing lines, these lines being known.

Gould, Waters, § 194.

5. The State never acquired any interest in our land by its temporary submergence by the shifting of the river channel.

(a) The State granted our land to us: first, by the grant to the town by the Colony, October 10, 1639 (1 Col. Rec. 36); second, by the patent to Wethersfield (Col. Rec. 1678-89, pp. 177, 178).

(b) It has confirmed the grant by statute to the "grantees, their heirs, successors, and assigns forever."

Rev. 1808, 432-434; Gen. Stat. 351, § 1.

(c) The courts of this State have formerly reasserted and reaffirmed the title in the grantees as heretofore shown in similar cases.

(d) Such grants have always been held by courts inviolable, and the rights of the private owner ever respected and protected, as shown.

Judge Kent lays down the general rule as follows: "If the river should then forsake its channel and make an entire new one in the lands of the owner on one side, he will become owner of the whole river, so far as it is enclosed by his land."

8 Kent, Com. 428; *Mulry v. Norton*, 1 Cent. Rep. 748, 100 N. Y. 486; *Foster v. Wright*, 4 C. P. Div. 438.

(e) The State makes no claim to resume this land—it could not in equity; and if it could claim our land, it could for the same reason claim the land of the plaintiff.

The plaintiff, then, cannot claim that the State gained our land from us, and that he gained it from the State. We conclude this division of the subject by another citation from the highest authority upon this branch of the law.

Lord Hale, after stating the general proposition that the King hath the title to "increase *per alluvionem*" and "*per relictionem*," on page 14, says, on page 15: "But this hath some exceptions. * * * If a subject hath had by prescription the property of a certain tract, or creek, or navigable river, or arm of the sea, even while it is covered with water, by certain known metes or extents, this, though it should be relicted, the subject will have the propriety of the soil relicted. For he had it before, though covered with water; and although the sea is a fluid thing, yet the *terra* or *solum subjectum* is fixed; and by force of a clear and evident usage a subject may have the propriety of a private river."

As prescription is founded upon a supposed grant, this exception applies with equal and perhaps greater force to an express grant, such as exists in our case. The general doctrine of accretion in favor of the sovereign has this exception, therefore, that the State, by accretion, cannot invade the domains of the subject.

See also *Mulry v. Norton*, *supra*.

Mr. S. W. Adams, also for defendants, appellants:

As to the present channel (which takes the place of both the old ones), it is very doubtful whether it is to be considered as "navigable," or an "arm of the sea," within the meaning of the law, above Rocky Hill. Between Wethersfield and Hartford there is, much of the time, no tide at all; and this court has decided

(*Adams v. Pease*, 2 Conn. 488) that Connecticut River, at Suffield, is not "navigable;" although, as is generally known, the river is navigated at that point. But, supposing the river to have been "navigable" at the point contiguous to the lands in suit? Is there any public ownership of the soil under it, as soil simply? Has the State ever assumed the right to take meadow lands, formerly under the river bed, and sell them or use them for purposes of cultivation? Does anyone suppose the State proposes to do anything of this kind? And, even for purposes of navigation, the State has less interest as owner than the United States; for the latter assumes, and rightfully, the control of operations in and along the banks of the river, intended for the improvement of its navigation.

There have been cases where islands have arisen in the middle of an arm of the sea, as in the case of Tracy's Island, in the River Thames (*Tracy v. Norwich & W. R. Co.* 39 Conn. 393), where it was held that such island belonged, *prima facie*, to the State. But there the river banks had not changed, and no riparian owner had lost any land he had ever occupied. Such was also the case in *Middle-town v. Sage*, 8 Conn. 222. But Wright's Island has been private property from the first settlement of Wethersfield.

Wethersfield "proprietors" obtained their title to the territory within the first plantation limits (extending three miles east of the river) from the natives, and not from the colony; indeed, their title is older than the first existence of the colony. The original deed of cession from the Indians included "the islands;" and the confirmatory deed, from the same tribe, in 1673, includes, by express terms, the "rivers" within the township lines.

1 Col. Rec. 5; 2 Weth. Land Rec. 202.

The plaintiff, admitting that relicted lands become private property, says that such lands do not belong to the former owner, from whom they were despoiled by the elements, but that they may be instantly and continuously appropriated, so long and to whatever distance the process of reliction may extend, by that landowner whose tract adjoined the relicted tract before the latter's original submergence. A shorter form of expressing his title is that of "accretion," the result of reliction and upheaval, or alluvion. In making this claim, the plaintiff invokes, in his own behalf, the application of a rule which would be reasonable or applicable only in case he were a littoral proprietor by the shore of a sea or great lake; or a riparian proprietor (in certain cases only) by the margin of a river. In point of fact, however, he occupies neither the one position nor the other.

He whose land adjoins the seashore ought (certainly as against all excepting the public) to have such land as forms by reliction on his own water front. We do not complain of this rule; for no land is taken thereby from any adjoining neighbor. And the rule of accretion adopted in such cases has no application here.

So, too, where two parties own lands on opposite sides of a stream, each piece, in express terms, bounded by the stream; in such cases each riparian owner will be presumed to own to the thread of the stream, or to the water's

edge, as the case may be; notwithstanding any ordinary, natural, and immaterial changes that may occur in the line of his water front. This results from two reasons: (1) because this will be assumed to have been the understanding of the parties when they took their title deeds; (2) because the law does not concern itself about trifles. This latter reason is stated by Blackstone (2 Com. p. 262, and note) as being the foundation of the law of accretion.

In the case last supposed, one proprietor might get additional land, but it would not be at the expense of his opposite neighbor so long as he went no farther than the old thread of the stream. The other might lose in the same proportion; but it would be only to the extent that his land was covered by the encroaching stream. "Neither party shall lose his land."

Schultes, *Aquatic Rights*, 136, as quoted by Chitty, in the note to Blackstone, above cited.

The plaintiff's lot was never riparian. It was bounded, in express terms, east, south, and west, by dry land belonging to other parties, and its northern bounds were "unknown." If the river had at first bounded it on the north, that would have been named as its northern boundary. Nor did it in 1817, or subsequently, become riparian in any legal sense of the word, for it was still bounded at least on the east, west, and south sides, by lands of the said other parties, on all which lands, in the mean time, the waters of the river had encroached, and held them temporarily in a state of submergence. And the amount of land submerged was varying from year to year.

It cannot be claimed that the constant loss of land on one side, and corresponding growth on the other side, goes on day by day and is imperceptible. This court knows, just as well as if it were so stated in the finding, that it does not go on at all in the winter season, when the river is bound with ice, as with fetters of iron. It also knows, without being so informed by the court below, that this tremendous wear and tear on the one side and upheaval on the other occurs only during the spring and other freshets. And even if the steep alluvial bank of the east side is also undermined by the "swash" of passing steamboats; or the current of the stream is diverted by the stone piers which are placed in the river for the improvement of navigation—all these causes are not the "natural and ordinary" incidents of a watercourse. Since about 1845, some 20 acres of our land have become transferred to the west side of the river. And yet the grand result of all these violent agencies, by which we are losing about a half an acre annually, is claimed to constitute a case of "gradual accretion." We claim it is rather a "series of avulsions," if there ever was one.

See *Perry v. Pratt*, 81 Conn. 435-437, 442, 443, where that term is applied to a "gradual" change in the channel of a creek, through a long series of years.

It would seem as if the owner of Wright's Island, which is the riparian lot opposite to the Benton lot, would be entitled to claim our land by accretion, if anyone can claim what we have lost. But he is satisfied with holding up to the thread of the old east channel. On the other hand, the plaintiff claims to acquire, by accretion, whatever land forms within the bend

north, east, and south of the new-found-land piece. He utterly ignores the rights of other actual riparian proprietors; and yet, on his own theory, his own lot would have accrued to the owners of the lots adjoining his on the west and north!

"When the denudation of the soil is sudden and perceptible the title is not changed. * * * Though the overflow continues for forty years, yet, if the water recedes, the owner has his land again."

Gould, Waters, 290, and cases cited.

Where the old line is determinable, the law favors its continuance, notwithstanding a change of the river line.

Gould, Waters, 290.

When the cause of a change is a freshet, the original thread of the stream continues to mark the limits.

Id. 291.

If the old bed of the river, being gradually deserted by the current, fills up and new land is formed, such newly-formed land belongs to the opposite riparian proprietors, respectively, to the thread of the old river.

Ang. Watercourses, 66; *Hopkins Acad. v. Dickinson*, 9 Cush. 544-547.

This last case also decides that land in a bend, cut off by the new channel, remains the property of the original owner, though the opposite riparian owner thereby lost his water front.

We claim that: (1) the law of accretion does not apply at all in this case; (2) that if it does apply, it is not in favor of the plaintiff, but is in favor of the owner of Wright's Island, who was our riparian opposite neighbor.

We claim, further, that where one gains land by accretion, the result of reliction, it must be in one of the two following ways: either the angle formed by the shore lines of two riparian owners is to be bisected, in a direction toward the water; or else the side lines are to be extended in the same course to the water. This court (in the case of *Armstrong v. Wheeler*, 52 Conn. 432) has rejected the first of these methods, where, as in this case, the shore line is a fluctuating one.

And there would be a like result if the second method were adopted. For the south line of the plaintiff's lot, if extended easterly, would intersect his east line, extended southerly, and leave his lot with the same area as when it was dry land. The same result is obtained if we go farther back, when the river ran across the middle of plaintiff's lot; for then, if the east and west lines of his lot were extended southerly (other landowners having the same right to extend their side lines) he could extend his side lines no farther than to the north side line of the Benton lot; the northwest corner of which lot emerged and had a water front before the southeast corner of the new-found-land had emerged. And if the water front thus formed on the Benton lot did not belong to the owner of that lot, the owner of Wright's Island, and not the plaintiff, had the prior claim to it.

If a third principle, recognized in *New Haven Steamboat Co. v. Fargent*, 50 Conn. 199 (when the side line was extended in a direction which would be the nearest to reach the mid-channel), were adopted, the plaintiff could have but a
1 Conn.

very narrow water front, which must have been maintained of the same breadth, and in a direction parallel with the shore line.

We have been assuming thus far, for the sake of argument, that the plaintiff is to be treated as a riparian proprietor. But if he is not, as we claim must be the case (seeing that, by the terms of his grant, he was bounded on all sides by lots owned by other parties), then, of course, there can be no claim of gain by accretion.

Messrs. Charles E. Perkins and William T. Goslee, for plaintiff, appellee:

The first question in the case is whether, under the facts found, the plaintiff and his grantors acquired title to the land in question by accretion.

I presume no question will be made as to the general principles of the law of alluvion, or accretion, as it is often called.

Gould, Waters, § 155, p. 234, states it as follows: "Land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made."

Perry v. Pratt, 81 Conn. 442; Ang. Watercourses, § 53, p. 49; *St. Clair County v. Lovington*, 23 Wall. 46 (90 U. S. bk. 23, L. ed. 59); *Gerrish v. Clough*, 48 N. H. 9.

We do not understand this general rule to be controverted, but an attempt is made to establish an exception in the case of rivers, when the bed has shifted so far that land formerly on one side of the river has appeared on the other side; that is, that so long as the river does not shift more than its own width, the doctrine of accretion applies, but as soon as it has shifted more than its width, that principle ceases, provided it can be shown by surveys, or otherwise, where the original lines were.

It is for the defendant to show that such an exception exists, and we submit that such a claim is contrary to the principle upon which the doctrine of accretion is founded, and that no court of last resort has ever maintained such a doctrine.

1. The principle of accretion is that land bordering on a river has annexed to it, as an inherent and constituent part of it, the right to so continue.

Gould, Waters, § 155, p. 233, says: This right of access is not lost by the gradual formation of new soil upon the margin of the water, caused by the action of the tides or currents. Estates bordering upon navigable waters often derive a great part of their value from that circumstance, and the riparian owners, if deprived of the benefit of that situation by extraneous addition, would suffer hardship and injustice, even when they obtained the full proportion of the land measured by the surface.

In *Lyon v. Fishmongers Co.* L. R. 10 Ch. 679, 1 App. Cas. 662, Lord Shelbourne, as Gould says "thus states what is now to be regarded as established law upon this subject: 'The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure natura*, because his land has by nature the advantage of being washed by the stream; and if the facts of nature constitute the foundation of

the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream."

In *St. Clair County v. Livingston*, 28 Wall. 46 (90 U. S. bk. 23, L. ed. 59) on p. 68, the court says: "The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of the flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim *qui sentit onus debet sentire commodum* lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his."

See Ang. Watercourses, §§ 92, 93, as to these and other rights in water being parcel of the land.

In *Gerrish v. Clough*, 48 N. H. 9, the court says, on p. 11: "It is very well settled that land formed on one side of a stream of water by the variations in the channel caused by the natural flowing of the water therein belongs to the owner of the land on that side of the stream. These natural accretions are entitled to the same protection, when once acquired, that the original enclosure would have been."

This right of accretion, therefore, is as much a natural right as the right to the use of the water.

In *Wadsworth v. Tillotson*, 15 Conn. 373, the court says, of the right to water: "This right is not an easement or appurtenance, but is inseparably annexed to the soil, and is parcel of the land itself."

In *Johnson v. Jordan*, 2 Met. 239, Shaw, Ch. J., says of the right to use water: "It is inseparably annexed to the soil and passes with it, not as an easement or as an appurtenance, but as a parcel."

This being the principle upon which the doctrine of accretion is founded, that it is an "inherent and essential attribute" of land bordering on a river that it should continue to have a river front, it is evident that a claim that when the river has shifted more than its own width, the doctrine should no longer apply, is untenable and inconsistent with that principle.

If it is an "inherent attribute" of land fronting on a river to continue so to front in spite of accretion, how is the land to be deprived of that attribute?

The only thing that can be said is that it is a hardship that a person owning land upon a river should be deprived of it by the river washing it away; but that is a necessary hardship, arising from the laws of nature, and necessarily connected with the ownership of land bordering upon a river, or so situated that by gradual changes it may border on a river.

It is well settled, also, that if a riparian owner's land is liable to be so washed away, he may protect it by rubbleing, or otherwise.

Gerrish v. Clough, 48 N. H. 9.

It would certainly be as great a hardship to the plaintiff to be deprived of his river front as it would be to the defendant to be deprived of some of his land and still keep his river front.

There is hardship to some one in the application of either rule.

2. This exception is contrary to the decisions upon this point, so far as any have been made.

Gould, p. 286, says: "The rule is the same when the old boundaries are not known, and when they can be ascertained;" and see cases there cited in note.

There is no case that we have been able to find where this claim, as to a different rule being applied when the river has shifted more than its width, has been decided or even made.

As Lord Abinger says in *Re Hull & Selby R. Co.* 5 M. & W. 331: "If the Crown cannot adduce the authority of many decided cases in support of its claim, it is because in principle no doubt could be entertained upon it."

It has always been held, however, as Gould on Waters says, p. 291, § 159: "If an unnavigable stream, in which the title of the riparian owners extends *ad flum aquae*, slowly and imperceptibly changes its course, the boundary line is at the centre of the new channel."

See also § 198, p. 350.

In *Hopkins Acad. v. Dickinson*, 9 Cush. 544, Chief Justice Shaw says, on p. 548: "Where there is a gradual accretion on one shore, forming an alluvion and permanent addition to the shore, it must tend to change the thread of the river, by carrying the medium line towards the opposite shore. If, at the same time with such accretion on one side, there be a wearing away of the opposite bank, the thread of the stream will be moved an equal distance in that direction."

2 Bl. Com. 262, says: "In the same manner, if a river running between two lordships, by degree gains upon the one and thereby leaves the other dry, the owner who loses his ground thus imperceptibly hath no remedy."

See many cases cited in Gould, p. 291.

This doctrine is well settled, but its principle is decisive of the case at bar.

There is no difference in principle between the case of a navigable and an unnavigable stream, in the application of the doctrine of accretion, except that in a navigable stream the case would be much stronger, for there the bed of the stream is in the State.

Middletown v. Sage, 8 Conn. 221; *Tracy v. Norwich & W. R. R. Co.* 39 Conn. 382.

As the bed of this river shifted to one side or the other, the title to the land under the water also shifted.

Gould, p. 284, says: "Conversely, land gradually encroached upon by navigable waters ceases to belong to the former owner."

This must necessarily be so; for otherwise, as the river shifted, the State, and thereby the public, would not be able to remove obstructions or bars in the bed, or even use the water for navigation, fishing, or any other public use.

In the case at bar, therefore, as the river ate into the land of the defendants, and it came under water, they lost their title to it, and it became absolutely the property of the State.

It has always been held that when a river is the boundary between towns, counties, or even States, gradual and imperceptible changes by reliction on one side and accretion on the

other do not affect the boundaries. Whether the change is small or great does not affect the principle.

There are no decisions, however, that sustain the claim of the defendants.

As we understand the claim, as set out in the fifth reason of appeal, it is that the doctrine of accretion does not apply in any case where the original boundaries of the land in question can be ascertained. This view is directly opposed to the principle upon which the doctrine of accretion is founded, and to the authorities.

Gould, p. 286, says: "The rule is the same when the old boundaries are now known and when they can be ascertained." In the note he cites a large number of decisions to that effect. Without going over in detail the authorities to which the defendants' counsel refer, from Bracton down to 100 N. Y., it will be found that none of them limit the full application of the doctrine of accretion, but, on the contrary, the principles laid down in them are founded upon it.

We submit that, according to every well-settled principle of law, the land in question belonged to the plaintiff.

Loomis, J., delivered the opinion of the court:

This case involves the application, in circumstances somewhat peculiar, of the principle of accretion and reliction, growing out of changes in the bed of the Connecticut River.

About the year 1700 the Connecticut River, between the towns of Wethersfield and Glastonbury, flowed at a certain point in two channels, with an island, known as Wright's Island, between them. By the year 1770 the east channel had been left by the river, which now ran wholly in the west channel. The land left by this reliction in the east channel passed into private ownership (the history of the matter being unimportant), and in the year 1802 Samuel Welles, the ancestor of the plaintiff, acquired by purchase a strip in the old channel, containing about four acres, bounded west upon its centre line, east upon sundry former riparian proprietors, and south upon a part of a lot known as the Benton lot, and which is now owned by the defendants. There was no northern limit of this lot given by the deed, but it was described as bounded, "North by bounds unknown." It in fact extended on the north to the line of the river, which by a gradual change of its bed was working to the southward and eastward, and beginning to encroach upon the lot at that end.

By a gradual change of its bed the river has made a sweeping curve, until in 1885, when the present suit was brought, it had worked its way through the entire Welles lot and a large part of the Benton lot south of it, replacing on its other side, by alluvial deposit, the Welles lot and a large part of what was the Benton lot, leaving between the Welles lot and the present channel a quantity of land within the original limits of the Benton lot. The question that arises in the case is as to the right to that part of the original Benton lot which now lies between the Welles lot and the river, but entirely on the other side of the river from that on which it originally lay.

As the river changed its bed to the eastward

and southward, it encroached, as has been stated, upon the Welles lot, which had originally reached it at its north end, until its whole width was within that lot; and before the south end of it had disappeared, the north end had begun to emerge on the west side of the river, which, by its bend, was now running at this place in a southwesterly direction; and when the southern end of the lot was washed away, and the Benton lot began to be encroached upon, a considerable part of the Welles lot, so far as original boundaries are concerned, had been restored on the west side of the river.

Precisely what would be the right of the original owner to this restored land, as between himself and other proprietors who might claim it by accretion, it is not necessary for us to consider; for it is conceded that the plaintiff and those under whom he claims have been for a long time in possession of this restored land and hold an undisputed title to it.

It is not necessary for us, in our inquiry into the rights of the parties, to consider whether the Connecticut River is at this point, in law, a navigable or non-navigable river. It is in constant use for purposes of navigation, and the tide slightly ebbs and flows there, which would seem to make it at common law a navigable river, and especially would it be so under the rule generally adopted in the States of the Union, though never formally adopted in this State, that rivers that are navigable in fact are so in law. The only difference between the rights of riparian owners in the one case and the other is that in a non-navigable river the title of the riparian proprietors extends to the middle of the stream, while in navigable rivers it extends only to the line of high water. The law of accretion and reliction, which is the only law we are called upon to consider, is precisely the same in both cases. Gould, Waters, § 162.

It is claimed on the part of the plaintiff that, as the Welles lot now on the west side of the river was increased by constant accession at its southern extremity, all this accretion belonged to this lot, not merely until its original limit was reached, but, regardless of all ancient boundaries and of all original rights, that it continued to follow the receding river, taking, as a riparian lot, whatever the river deposited in its front; it being found by the court below that the change in the river bed was entirely by gradual accretion and reliction.

The defendants admit the general principle by which a riparian owner takes all accretions from the gradual change of a river bed, but contend that that principle is not applicable to the peculiar circumstances of the present case. We will notice in their order the claims which they make with regard to the matter.

They say, in the first place, that the law of accretion applies only to the case of riparian land; and that, as the plaintiff's lot did not originally bound upon the river, but was conveyed to him by distinct lines and boundaries (at least upon the side affected by the present question), it cannot become, by any changes of the river, riparian land.

We cannot accede to this claim. If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the

latter tract would become riparian as much as if it had been originally such. This follows necessarily from the ordinary application of the principle. All original lines submerged by the river have ceased to exist; the river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation, and is not affected in any manner by the relations of the river and the land at any former period. If, after washing away the intervening lot, it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that it had taken from the intervening lot, the whole, by the law of accretion, would belong to the remoter, but now proximate, lot. Having become riparian, it has all riparian rights. This general principle is recognized by all the text-writers and by numerous decisions of the English and American courts. The river boundary is treated in all cases as a natural boundary, and the rights of the parties as changing with the change of its bed.

The defendants claim, in the next place, that though a riparian owner may take by accretion to the middle of a stream, or, in the case of a navigable river, to high-water mark, yet, that that being the limit of his original title, and in the case of a non-navigable river the line of the adjoining owner, he cannot take such accretions beyond that line. This claim is utterly without support.

The dividing line between the owners of the opposite sides of a non-navigable river is the middle of the river, but that middle line is merely an imaginary one and changes with every change in the bed of the stream. Thus, in Gould on Waters, § 159, it is said that "if an unnavigable stream, in which the title of a riparian owner extends *ad flum aque*, slowly and imperceptibly changes its course, the boundary line is the centre of the new channel." And numerous cases are cited in support of the position.

The final claim of the defendants, which is substantially involved in the claim last considered, is that, as the part of the plaintiff's land which was last left by the receding stream was an upland corner made by the converging lines, the plaintiff was entitled to no more than the restoration of this corner after it had been washed away, leaving all beyond it to accrue to the Benton lot from which it was originally taken.

So far as this claim is founded upon the fact that this corner was originally upland and not riparian, we have already considered and disposed of it. It is only as the corner has become submerged and afterwards restored on the other side of the river that the claim presents

any matter for further consideration. The defendants' idea, as we understand it, seems to be that the right of a riparian owner is like the right of an owner of land upon a highway. The latter owns to the middle of the highway upon the theory that the highway was originally taken out of the adjoining land, and on this ground it reverts to the original owners if the highway is discontinued. The claim of the defendants seems to be that the right of a riparian owner extends under the water on his upland lines in the same manner, and that those lines are decisive of his rights in case of a recession of the river. But the two cases have nothing in common. They rest upon entirely different theories. The riparian owner takes the land under the stream because the stream is a natural boundary, and not because the land was once his. Whenever a portion of a riparian lot is washed away by the river, the riparian owner becomes entitled to the land under the water as far as the centre of the stream, without any reference to the original limit of his land or to his upland lines. He takes whatever front upon the river its change of bed gives him, and by lines that run from the termini of his upland lines, at right angles, to the centre line of the stream. All the authorities agree in this.

Thus, in Gould on Waters, § 162, it is said that "every proprietor is entitled to frontage of the same width on the new shore as on the old shore, and at low-water mark as at high-water mark, without regard to the side lines of the upland. * * * In general the lines of division are to be made to the channel in the most direct course from the lateral boundaries of the several tracts of upland to which the flats are appended. * * * So also in the case of unnavigable streams, which are the property of the riparian proprietors *usque ad flum aque*, the side lines are extended to the centre of the stream from the termini on the bank, at right angles with the general course of the river." Numerous authorities are cited in support of these positions.

It necessarily follows from this reasoning that the land of the plaintiff took by accretion all that lay between its river front on the west side of the river and the receding bed of the river, and within lines drawn from the termini of its side lines at right angles to the channel of the river. And within these lines falls the land in dispute.

As the view we have taken disposes of the case, it is not necessary that we should consider the question presented by the record, with regard to the rights acquired by the plaintiff by adverse possession.

There is no error in the judgment of the Superior Court.

In this opinion the other Judges concurred.

1 CONN.

MASSACHUSETTS.
SUPREME JUDICIAL COURT.

Annie STAIGG
v.
George ATKINSON.

1. For the purposes of the **construction of a will**, it is legitimate to consider the time when and the circumstances under which the will was made. The law under which it was made is one of those circumstances.
2. Where a **testator made his will in a State where a certain gift or bequest therein made to his wife would be in addition to dower** unless he expressed the contrary, and he did not express the contrary, such will does not acquire a new meaning upon his subsequently moving into a State where testamentary gifts are in lieu of dower, unless shown to be in addition to it.
3. The **Massachusetts statute compelling a widow to elect between her dower and a provision for her in her husband's will does not affect lands outside of the State**, either by way of construction or otherwise.
4. A **widow's right of dower in lands in Minnesota** is bound to contribute to the payment of debts secured by mortgage upon the **Massachusetts lands** of her deceased husband, where they both were domiciled in Massachusetts at the time of his death, and where, by the statute of Minnesota, such dower interest is made subject, in its just proportion with other real estate, to the payment of such debts of the deceased as are not paid from personal estate.
5. The **testator's general direction to pay debts** does not indicate an intent to charge the interests passing by the will in exoneration of such dower interest, even as to general residuary devisees.

(Suffolk—Filed June 28, 1887.)

ON report. *Judgment for plaintiff.*

Action by a widow against the executor of her deceased husband for money had and received. The case was heard in the Superior Court by Barker, J., upon an agreed statement of facts, who found for the defendant, and reported the case for the decision of the Supreme Judicial Court.

The facts are stated in the opinion.

Messrs. John C. Gray and William L. Putnam, for plaintiff:

At common law a widow can accept the provisions of her husband's will, and also her dower or other statutory interest, unless the will expressly declares the contrary.

2 Scribn Dower, 2d ed. 439 *et seq.*; 4 Kent, Com. 53; 1 Jarm. Wills, 5th ed. 458 *et seq.*; *Re Gozian*, 34 Minn. 159, 163, 164.

If legacies to a widow are conditional on renouncing her rights in lands situated in an-

other State, she cannot take the legacies if she retains any of those rights.

Trotter v. Trotter, 4 Bligh, N. S. 502; *S. C.* 3 Wils. & Sh. 407.

In determining the right of a widow to legacies under her husband's will, it is necessary for the courts of testator's domicile, at his death, to decide whether the widow is put to her election as to any of her right; and if so, what election she has made.

Shannon v. White, 109 Mass. 146, 148; *Van Steenwyck v. Washburn*, 59 Wis. 438; *Washburn v. Van Steenwyck*, 32 Minn. 336.

Whether a will exists or not must be determined as to real estate by the *lex loci*.

Nutt v. Norton, 1 Mass. L. ed. 471 (2 New Eng. Rep. 243), 142 Mass. 242, 245; *Marston v. Roe*, 8 A. & E. 14.

The *lex rei sitæ* must govern as to the construction of a will.

Sevall v. Wilmer, 132 Mass. 131; *Yates v. Thomson*, 3 Cl. & F. 544, 588; *Jennings v. Jennings*, 21 Ohio St. 56; *Applegate v. Smith*, 81 Mo. 166; *McCartney v. Osburn*, 6 West. Rep. 793; *Eyre v. Storer*, 37 N. H. 114; *Knox v. Jones*, 47 N. Y. 889.

If the question of the construction of a will is raised, and that question is not to be determined by the *lex loci rei sitæ*, it must be determined by the law of the place where testator was domiciled when the law was made.

Holmes v. Holmes, 1 Russ. & Myl. 660; *Atkinson v. Staigg*, 13 R. I. 725; *Harrison v. Nixon*, 34 U. S. 9 Pet. 433, 505 (9 L. ed. 201).

The place of the actual domicile, and not of transient residence, is to be considered.

Anstruther v. Chalmer, 2 Sim. 1.

The statute imposing a condition on the holding of an interest in land has no extraterritorial operation.

Story, Conf. Laws, § 454; *United States v. Crosby*, 11 U. S. 7 Cranch, 115 (3 L. ed. 287); *Kerr v. Moon*, 22 U. S. 9 Wheat. 565 (6 L. ed. 161); 1 Jarm. Wills, 5th ed. 1, note.

If the residuary devise is charged with the payment of debts, the residuary devisee of the lands must bear debts, before an heir to whom land has descended, owing to a partial intestacy.

Hays v. Jackson, 6 Mass. 149.

Where two pieces of property are equally liable to creditors, but a debt is secured by a mortgage on one of them, that one is not entitled to contribution from the other.

Hallivell v. Tunner, 1 Russ. & Myl. 633.

Mr. John C. Ropes, for defendant:

The provision in a will in favor of a widow is presumed to be in lieu of dower, unless it clearly appears it was intended in addition to it.

Merrill v. Emery, 10 Pick. 507, 510; *Reed v. Dickerman*, 12 Pick. 146, 148, 149; *Jennings v. Jennings*, 21 Ohio St. 56, 77, 78; *Thompson v. Egbert*, 2 Harr. (N. J.) 480; *Dow v. Dow*, 36 Me. 211, 216; *Durham v. Rhodes*, 23 Md. 233, 242; *Price v. Dewhurst*, 4 Mylne & C. 76, 82.

The meaning and interpretation of a will established in place of testator's domicile must be adopted in all other jurisdictions.

Trotter v. Trotter, 4 Bligh, N. S. 502, 505; *Enoch v. Wylie*, 10 H. L. Cas. 1, 12-14; *Wallace v. Atty. Gen.* 33 Beav. 384; *Washburn v. Van Steenwyck*, 32 Minn. 336.

As regards personal property, the surplus not needed for payment of creditors in foreign

jurisdiction is always remitted to the principal administrator, to be disposed of according to the will as construed by the courts of the testator's domicile.

Enohin v. Wylie, supra; Jennison v. Hapgood, 10 Pick. 77, 100; *Fay v. Haven*, 3 Met. 109, 115; *Sheggog v. Perkins*, 34 Ark. 117; *Parsons v. Lyman*, 20 N. Y. 108.

There can be but one election by a widow between the provisions for her benefit in the will and her dower in the lands of her husband.

Jones v. Gerock, 6 Jones, Eq. 190, 195; *Aperson v. Bolton*, 39 Ark. 418, 429; *Washburn v. Van Steenwyk*, 32 Minn. 336, 357; *Shannon v. White*, 109 Mass. 146, 148.

The failure of a widow to file a waiver of the provisions for her benefit in the will is an election.

Mass. Pub. Stat. chap. 127, § 18; *Pratt v. Felton*, 4 Cush. 174; *Reed v. Dickerman*, 12 Pick. 146, 148; *Adams v. Adams*, 5 Met. 277; *Atherton v. Corliss*, 101 Mass. 40.

An election may be implied from actions.

Dewar v. Maitland, L. R. 2 Eq. 834; *Dundas v. Hitchcock*, 53 U. S. 12 How. 256, 265, 271, (13 L. ed. 981).

A devise of the residue of the land to the residuary legatees does not entitle them to hold it free from Incumbrances.

Blaney v. Blaney, 1 Cush. 107; *Wilcox v. Wilcox*, 13 Allen, 252, 256; *Thayer v. Wellington*, 9 Allen, 283, 296; *Witman v. Norton*, 6 Binn. 395.

Holmes, J., delivered the opinion of the court:

This is an action brought by a widow to recover one third of the proceeds of land in Minnesota, formerly belonging to her husband, and sold without prejudice. The defense is that she is barred by having accepted the provisions of her husband's will. The husband made a will while domiciled in Rhode Island, providing for the plaintiff, but not declaring the provision to be in lieu of dower, and then changed his domicile to Massachusetts, where he died. If he had died domiciled in Rhode Island, and the land had been situated there, the provisions of the will would not have prevented the plaintiff from recovering dower, and it has been decided, in a case between the same parties, that the change of domicile did not affect her right in Rhode Island land. *Atkinson v. Staigg*, 13 R. I. 725. If he had been domiciled and had made his will in Minnesota, the plaintiff would have been entitled by statute to the one third which she claims; and, as there is no statute to the contrary, the provisions of the will would not have put her to an election. Gen. Laws Minn. 1875, chap. 40; *Re Gotzian*, 34 Minn. 159, 168, 164; *Reed v. Dickerman*, 12 Pick. 146, 149. If, finally, the land had been situated in Massachusetts, and the will executed there, the plaintiff would have been compelled to elect between her dower and the will. Pub. Stat. chap. 127, § 20; Stat. 1861, chap. 164, § 1. So far, there is no dispute between the parties.

On the foregoing statement, it is obvious that the defendant cannot prevail unless the rule which would govern if the land lay here also governs the present case. It is contended that that rule does govern, on the ground that the Massachusetts statute is a statute of con-

struction, reading a claim of universal application into the will, to the effect that the provision made for the widow is in lieu of dower, or substituted statutory interests, in all lands, wherever situated; that the will is to be construed by the law of the domicile of the testator at the time of his death; and that if the will, so construed, makes an acceptance of its provisions a waiver of dower, etc., the law of Minnesota would enforce the election made by such acceptance. *Washburn v. Van Steenwyk*, 32 Minn. 336.

But we cannot admit that a rule of construction, properly so called, not known to the law of the party's domicile when he made his will, is necessarily to be imported into it by reason of his dying domiciled elsewhere. For purposes of construction, it is always legitimate to consider the time when and the circumstances in which the will was made; and we think the law under which it was made is one of those circumstances. We are speaking only with reference to a case like the one before us, not to a question like that in *Harrison v. Nixon*, 34 U. S. 9 Pet. 483, 504 (9 L. ed. 201). The testator was at liberty to make his gift to his wife in lieu of or in addition to dower as he saw fit. Which it should be he had to consider, if he ever considered it, when he drew his will. He drew his will under a system by which the gift was in addition to dower, unless he expressed the contrary, and he did not express the contrary. We are at a loss to see why his words should be held to acquire a new meaning, upon his moving into a State where testamentary gifts are in lieu of dower unless shown to be in addition to it. *Atkinson v. Staigg, supra; Holmes v. Holmes*, 1 R. & M. 600.

In view of our construction of the Massachusetts statute, it is not necessary to consider what was the effect of moving into Massachusetts with regard to Massachusetts land. The plaintiff has never made any claim upon it. See *Shannon v. White*, 109 Mass. 146. Neither need we pass upon the plaintiff's argument that the general laws of Minnesota should be accepted here as determining the construction of the will, so far as concerns the effect of accepting its provisions upon the plaintiff's right to Minnesota land. It would follow from that argument that the plaintiff would have been barred of her dower in the Massachusetts land even if the testator had not moved from Rhode Island.

The case of *Jennings v. Jennings*, 21 Ohio St. 56, relied on by both sides, was the case of a West Virginia will, giving the wife certain interests in land in Ohio, and it was intimated that, with regard to Ohio lands, she was put to her election between the will and her dower, although West Virginia preserved the common-law rule allowing her to claim dower in addition to what was given by the will. We understand this case to go on the ground that the law of the place of the land, given to the widow by the will, was to determine whether she was put to an election or not,—at least with regard to land in the same jurisdiction, claimed outside the will. Thus construed, the case helps neither party. The case of *Washburn v. Van Steenwyk*, 32 Minn. 336, which was put in evidence, is opposed to the plaintiff's contention. See *Van Steenwyk v. Washburn*, 59 Wis. 483, 510.

But we need not pursue this branch of the case further, because in our opinion the Massachusetts statute does not purport to affect lands outside the State, either by way of construction or otherwise.

The language of the Public Statutes, chap. 127, § 20, is as follows: "A widow shall not be entitled to her dower in addition to the provisions of her deceased husband's will, unless such plainly appears to have been the intention of the testator." In the Statute of 1861, chap. 164, § 1, the language is: "If she makes no such waiver, she shall not be endowed of his lands, unless it plainly appears by the will to have been the intention of the testator that she should have such provisions in addition to her dower." Both of these Acts in form are directed at dower, not at the construction of wills. The statutes give the widow dower (Pub. Stat. chap. 124, § 3; Rev. Stat. chap. 60, § 1), and allow her six months in which to waive the provisions made for her by will (Pub. Stat. chap. 127, § 18; Stat. 1861, chap. 164, § 1; Rev. Stat. chap. 60, § 11). They then go on to say that she cannot have her dower unless she waives the will, but add that the husband may make his bounty an addition to her dower if he sees fit.

No doubt the statute was intended to change the common-law rule. But the fact that it approaches the subject from the side of dower, and not from the side of the will, shows that it was only intended to operate with regard to Massachusetts lands, whether described as a statute of construction or as a statute relating to dower. Of course Massachusetts would not attempt to legislate concerning dower in another State. Taking the view which we have expressed, we have not considered whether the statutory one third in fee, given by the law of Minnesota, would be included under the word "dower" in our statute.

It was suggested for the defendant that the widow could not claim under the will in one jurisdiction, and against it in another. But on our construction of the will and the Massachusetts statute, she does not claim against the will by claiming her third of the Minnesota land outside of it.

We are of the opinion that the plaintiff's interest is bound to contribute to the payment of debts secured by mortgage upon the Massachusetts lands. By the old law, until changed in England by Stat. 17 & 18 Vict. chap. 113, if other land was charged with the payment of debts, it had to exonerate land which the testator had mortgaged. And this rule was not based upon the fact that the devise of the mortgaged land was specific,—as it would have been, even if residuary,—or upon any notion of the intention, to be drawn from the will. Undoubtedly land not passing by the will, but acquired and mortgaged after the will was drawn, would have been exonerated. The rule was put upon the ground that the debt was a general debt, like any other, and the mortgaged land only a security; and therefore that the funds liable for general debts must pay it. *Burtholomew v. May*, 1 Atk. 487; *Treedale v. Coventry*, 1 Bro. C. Ct. 240; *Serie v. St. Eloy*, 2 P. Wms. 886; *Heves v. Dehon*, 8 Gray, 215, 217; *Plimpton v. Fuller*, 11 Allen, 139. It followed that when other land and

the mortgaged land were both charged together, they were held to contribute ratably. *Carter v. Barnadiston*, 1 P. Wms. 505; *Middleton v. Middleton*, 15 Beav. 450; *Harper v. Munday*, 7 De G. M. & G. 369. And the same principle would apply when all the lands are charged by statute instead of by will.

By the Minnesota statute the plaintiff's interest is "subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate." So that, apart from the will, the plaintiff's one third would stand no better than the other two thirds. Taking into account this, and the general course of legislation which makes land liable for debts, we think that it would be too artificial to interpret the testator's general direction to pay debts as indicating an intent to charge the interests passing by the will in exoneration of the plaintiff's one third,—even as against residuary devisees (*Heves v. Dehon*, *supra*). See *Harris v. Watkins*, Kay, 438; although we assume that the residuary devise was not specific, so far as it affected the Minnesota land, as it was not with regard to the land in Massachusetts. *Blaney v. Blaney*, 1 Cnsh. 107; *Thayer v. Wellington*, 9 Allen, 283, 296. The plaintiff prevails upon a somewhat technical principle, and hardly can complain if she is held to stand upon the footing on which the Minnesota statute meant to put her.

Judgment for plaintiff for \$2,205.69.

ATTORNEY-GENERAL, *ex rel.* John R. BULLARD *et al.*

Alonzo B. WENTWORTH *et al.*

The warrant for an annual town meeting contained the following articles, among others: "To see if the town will choose the selectmen surveyors of highways." "To choose all necessary town officers. The following are chosen by ballot: selectmen, assessors, overseers of the poor. * * * All of said votes to be on one ballot." At the beginning of the meeting it was voted "to ballot for five selectmen, who shall also be assessors, overseers of the poor, and highway surveyors." *Held:*

(a) That the articles were sufficient to support such vote.

(b) That, after such vote, no voter could, if he so desired, vote for distinct boards of assessors, overseers, and surveyors.

(c) That, while ballots containing other names for the offices of assessor, overseer, or surveyor, than those given for selectmen were irregular, they could be rectified by rejecting as surplusage the portion thereof relating to such offices; and that the portion thereof containing names for the office of selectman should be counted as votes for selectmen.

(Norfolk—Filed September 7, 1887.)

INFORMATION in the nature of *quo warranto*. *Judgment of ouster*.

The parties, for the purpose of presenting a case stated, agreed upon the following statement of facts:

The allegations of the amended information are true. After the announcement by the moderator at the annual meeting in March, as set out in the record, of the election of himself and other respondents, it was discovered, though not known to the moderator at the time of the announcement, that, upon an addition of the various returns made to the moderator by the tellers—including the rejected ballots for selectmen—there was a tie between said Wentworth and Thomas P. Murray for the office of selectman, as stated in the information. It was again, later, after the filing of the information, discovered, upon examining the sheets of the tellers, that, in making up their returns to the moderator, the tellers had made an error of addition of the votes for selectmen, which when corrected would—counting all the ballots for selectmen—have given said Murray a majority of 10 votes over said Wentworth for the office of selectman; and upon a count made at the adjourned town meeting of April 4, it appeared that, if all the ballots had been counted and the result announced, the said Thomas P. Murray would have been declared elected selectman, surveyor, overseer, and assessor, in place of the respondent Wentworth; that H. Smith would have been assessor in place of the respondent Fuller, and H. Colburn would have been overseer in place of the respondent Fuller; *i. e.*, the selectmen would have been Norris, Fuller, I. W. White, M. Smith, Murray; the surveyors would have been Norris, Fuller, I. W. White, M. Smith, Murray; the assessors would have been Norris, H. Smith, I. W. White, M. Smith, Murray; the overseers would have been Norris, H. Colburn, I. W. White, M. Smith, Murray.

It has been the custom of the town, with exceptional instances in the decennial year when the State valuation is made up, to elect the same five persons for the offices of selectmen, surveyors, assessors, and overseers of the poor, under a vote passed at the beginning of the meeting, which vote in the years 1882 to 1886, was in substantially the following form: "Voted: To choose 5 selectmen, 5 assessors, 5 overseers of the poor, 5 surveyors of highways, 5 members of the board of health; a town clerk, etc., * * * all to be voted for on one ballot." And in the years 1876 to 1881 in substantially the following form: "Voted: To choose 5 selectmen who shall be assessors, overseers of the poor, and board of health; a town clerk, etc., * * * all on one ballot."

Prior to the annual meeting in March of this year, two caucuses were held, at the first of which it was voted to put in nomination different persons for the said several boards, and at the other of which it was voted to nominate 5 selectmen, who should also serve as surveyors of highways, assessors, and overseers of the poor. The first of the above caucuses was held on Thursday night preceding the town meeting, and there were present at this caucus about 100 voters. The result of this caucus was reported in the Boston daily papers of Friday, and in two local papers published on Saturday, and in connection with said report in one of said local

papers appeared the following paragraph: "The executive committee were given full power to fill vacancies and make such changes or otherwise as in their discretion seemed best for the interests of the town. A prompt attendance at the opening of the polls on Monday morning is also requested."

The action of the other caucus was reported in the Boston Sunday papers preceding the day of the election. Under a by-law passed in the town meeting of 1886, there was at the annual meeting of this year, for the first time in the history of the town, a committee to be appointed by the moderator, to whom should be referred all the articles in the warrant excepting those relating to the election of officers, which committee should report at the April adjournment of the meeting, at which time the articles so referred were to be acted on by the town. When the motion set out in the record in relation to separate or joined boards was discussed and voted on, there were present about 260 voters, as shown by the vote for moderator. This was an unusually large number. The total number of voters present and voting during the day, as registered by the ballot box, was 949.

The amended information and the answer are made a part of the case stated.

[A]

Town Meeting Warrant.

[Seal.] Commonwealth of Massachusetts.

Norfolk, ss. To either of the Constables of the Town of Dedham, in said County. Greeting:

You are hereby required, in the name of the Commonwealth aforesaid, to notify and warn the inhabitants of said town of Dedham, qualified to vote in town affairs, to assemble at Memorial Hall, in said town, on the first Monday in March, (being the 7th day of said month), A. D. 1887, at 7 o'clock in the forenoon, then and there to act on the following articles, namely: * * *

Art. 2.—To see if the town will choose the selectmen surveyors of highways, and authorize and instruct them to employ a superintendent of highways. * * *

Art. 4.—To choose all necessary town officers. The following are chosen by ballot: Selectmen, assessors, overseers of the poor, board of health, town clerk, town treasurer, collector of taxes, school committee, auditors and constables—two school committee for three years each. All other town officers are to be chosen for one year; all of said votes to be on one ballot. * * *

By-laws of the town require the polls to be open at 7 o'clock, and remain open till 30 minutes past 4 in the afternoon.

Hereof fail not, but make return of this warrant, with your doings thereon, unto the selectmen, on or before said day and time.

Given under our hands, and the seal of said town, at Dedham, aforesaid, this 24th day of February, A. D., 1887.

Howard Colburn, Andrew J. Norris, Thomas P. Murray, Alonzo B. Wentworth, Michael Smith,	} Selectmen of Dedham.
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A true copy—Attest:

Eustis Baker, Constable of Dedham.

2 MAR.

On the foregoing warrant the following return was made:

Norfolk, ss. Dedham, March 5, 1887.

By virtue of this warrant, I have notified and warned the legal voters of the town of Dedham to meet at the time and place, and for the several purposes specified in said warrant, by posting attested copies thereof in each of the post-offices in said town, and in twenty other public places in said town, seven days at least before the day of said meeting, and by causing an attested copy thereof to be published twice before the time of said meeting in the Dedham Transcript, a newspaper published in said town.

Eustis Baker,

Constable of Dedham.

Information.

Commonwealth of Massachusetts.

Norfolk, ss. Supreme Judicial Court.
Attorney-General, *ex rel.*

v.

Alonzo B. Wentworth, Andrew J. Norris, Michael Smith, Isaac Wallace White, and Willis C. Fuller, of Dedham, in the County of Norfolk.

To the Honorable the Justices of the Supreme Judicial Court, within and for the County of Norfolk:

Respectfully informing, shows unto your Honors, Edgar J. Sherman, Attorney-General of the Commonwealth, at the relation of John R. Bullard, Thomas P. Murray, Winslow Warren, Alfred Hewins, W. F. McQuillen, Albert Hale, Edward P. Burgess, Timothy Baker, Horatio G. Turner and Allen Colburn, all residents, voters, and taxpayers of Dedham, in said County of Norfolk, as follows:

1. That on the 24th day of February, 1887, the then selectmen of Dedham directed under their hands and the seal of said town, to either of the constables thereof, a warrant for a town meeting, of which warrant a copy is hereto annexed, marked "A;" that notice thereof was duly given by Eustis Baker, one of the constables of said town, and a meeting of the inhabitants of said town was thereafter, upon the first Monday of March (being the 7th day of said month, A. D. 1887) held in pursuance of said warrant at Memorial Hall, in said town; and Alonzo B. Wentworth, an inhabitant of said Dedham was duly chosen moderator.

2. Under article 2 in the warrant it was voted to choose the selectmen surveyors of highways, and authorize and instruct them to employ a superintendent of highways.

3. Under article 3 in the warrant, action was taken by the town not material to the matters involved in this information.

4. Upon taking up article 4 in the warrant, Elisha Greenhood, an inhabitant of said Dedham, moved "that the town proceed to ballot for 5 selectmen, who shall also be assessors, overseers of the poor, and highway surveyors;" and also for certain other officers not involved in this information, "all on one ballot." To this motion Alfred Hewins, an inhabitant of said Dedham, offered the following, viz.: "To choose 5 selectmen, 5 assessors, 5 overseers of the poor, 5 surveyors of highways;" also certain other officers, being the same as named in said Greenhood's motion, "all on one ballot." Said amendment, having been voted upon was

declared by the moderator lost, and said original motion, having been voted upon, was declared by the moderator to have been adopted. At the time when said votes were taken, many inhabitants of said town being legal voters and taxpayers therein, who afterwards came into said town meeting and participated therein, were not present.

5. The moderator thereupon appointed certain persons to assist him as tellers in receiving, assorting, and counting the ballots, and the same were sworn by the town clerk. Before the balloting began, the moderator ruled and announced to the meeting "that all ballots must be in conformity to the vote passed by the town on the motion of Mr. Greenhood aforesaid, and that the same persons must be named thereon for said offices of selectmen, assessors, overseers of the poor, and highway surveyors, and that any ballots containing the names of more than five different persons in the aggregate to fill all said four offices were not in conformity with said vote, and legally could not be counted; against which ruling certain citizens formally protested; and the said moderator also, thereafter, during the continuance of said balloting, in reply to inquiries addressed to him by various voters in said town, before casting their ballots, stated and repeated to said voters his said ruling, and notified them that if they should in their said ballots vote for more than five persons in the aggregate for said offices, he should refuse to have said ballots counted, and should direct the tellers to disregard them. And the attorney-general, upon relation as aforesaid, shows unto your honors that, in consequence of said ruling of said moderator, and the repetition thereof by him during said balloting, many voters who desired to vote, and who otherwise would have voted, for more than five different persons for said offices, were constrained against their will, in order not to lose their ballots altogether, to vote for five persons only for said offices; and that the persons who were thereafter declared to have been elected to said offices would not have been so declared, and would not in fact have received the number of ballots cast for them for said several offices, had it not been for the said vote above mentioned, and the ruling of said moderator thereon.

6. At half-past four o'clock in the afternoon it was voted that the polls be closed in ten minutes. Before the polls were so closed, John R. Bullard, an inhabitant of said Dedham, presented a protest in writing, signed by himself and by seven other taxpayers and inhabitants of said Dedham, in the following form:

"Whereas, it was declared by the *viva voce* vote of a majority of voters present and voting, before balloting for town offices began, that the selectmen should serve as assessors, overseers of the poor, and surveyors of highways; and whereas the moderator of this meeting has ruled that under said vote the town is bound to elect the same persons to all these offices, and that ballots each for different persons for said offices shall be of no effect as to some of said offices, and that the same shall not be counted as legal votes therefor; now the undersigned legal voters who have cast their ballots for different persons to fill said several offices hereby protest against said ruling, because it is wrong in law,

and deprives them of their constitutional and statutory right to ballot for different persons to fill said several offices; hereby demand that said votes shall be counted as legal votes; that their number shall be declared to the meeting; and that if the persons named on said ballots have a majority of all the votes cast for candidates for any of said offices, said persons shall be declared elected. And they further demand that all ballots cast at this meeting be sealed up and preserved, and that this protest be made part of the record of this meeting."

At forty minutes past four in the afternoon the polls were closed; and the tellers thereupon, under the direction of the moderator, proceeded to examine the ballots which had been cast.

7. The attorney-general further shows unto your honors, upon relation as aforesaid, that there were among the ballots so cast at said meeting two distinct classes, viz.: ballots strictly in the form required by said vote and the ruling of said moderator, each one containing five names only for all four of said offices; and on the other hand very many ballots not containing five names only for all of said offices,—some of them containing different names for the different offices, and some of them containing the same names for two of said offices, and some containing the same names for three of said offices, but none of them containing the same names for all four of said offices. That, notwithstanding said protests and request to have said last class of ballots counted, the same were by direction of the moderator excluded and thrown out by the tellers, and said ballots were not treated as legal ballots for said offices, and were excluded from the count. And that, on the other hand, there was only considered in determining the result of the election the other class of ballots, containing the same five names for all four of said offices; and the said five respondents, Alonzo B. Wentworth, Michael Smith, Isaac Wallace White, Willis C. Fuller, and Andrew J. Norris, having by this method of counting received the highest number of votes, were declared elected to said four offices as aforesaid.

8. The attorney-general, however, further shows unto your honors that, while in determining the result of the election all ballots not strictly in accordance with said vote and ruling of the moderator were excluded from consideration as aforesaid, nevertheless the said moderator caused to be determined, and, in declaring the result to the meeting, stated, the number of votes received for the office of selectmen upon said ballots so excluded by him as aforesaid; from which announcement it appeared, as is set forth in the record made of said meeting in the records of the town, that one of these relators, to wit, Thomas P. Murray, received, if all the ballots cast for him were counted, as many votes, viz., 441, as the respondent, the said Alonzo B. Wentworth, received upon counting in like manner all ballots cast for him; but, notwithstanding this fact, the said votes upon said excluded ballots for said Murray were disregarded, and the said Wentworth declared himself elected. As to the other officers, however, voted for on said excluded ballots, no determination of their number was made or permitted by the moderator, and no statement, therefore, of the same appears on the records.

9. The attorney-general further shows that the said respondents, assuming to have been duly and properly elected to said four offices by virtue of the said pretended election and declaration of said moderator, did, prior to the filing of this information, appear before the town clerk of said town, and were by him sworn into their respective offices, and have been and are now assuming to be the selectmen, surveyors of highways, overseers of the poor, and assessors of said town, and have possessed themselves of the records of said several offices, and have usurped and continue to usurp said offices, and pretend to discharge the duties thereof; that the town officers of the past year, being deprived of their offices and functions as above by usurpation, are not actually in charge of the affairs pertaining to said four offices; and that there are no active and legal selectmen, surveyors of highways, assessors, or overseers of the poor of said town, and its affairs are in confusion and uncertainty, and its interests suffer, and its public obligations are not legally discharged.

Wherefore the attorney-general, at the relation above set forth, prays that the said Alonzo B. Wentworth, Andrew J. Norris, Michael Smith, Isaac Wallace White, and Willis C. Fuller, may be commanded to appear before this honorable court, and make full answer to the matters and things herein set forth, but not under oath, which is waived; and that they be required to show by what warrant of law they respectively assume to be, and are exercising the functions of, such officers of the town of Dedham as aforesaid; and that they may be enjoined by decree of this honorable court from further exercise of said offices, and that all other and further relief may be granted in the premises as the circumstances of the case and law and justice may require.

Edgar J. Sherman,
Attorney-General.

The relators stipulate that they will be responsible for the costs of this information.

By their Attorneys,
Gaston & Whitney.

Filed March 12, 1887.

Commonwealth of Massachusetts.
Norfolk, ss. Supreme Judicial Court.

Attorney-General, *ex rel.*,

v.

Alonzo B. Wentworth *et al.*

Motion to Amend.

And now comes the attorney-general and moves to amend the said information heretofore filed by striking out of the fifth paragraph thereof that portion of said paragraph beginning with the words "and the attorney-general upon relation as aforesaid shows unto your honors," and ending with the words "the said vote above mentioned, and the ruling of the moderator thereon."

And the attorney-general further moves to amend the said information by adding as supplemental thereto the following:

"And the attorney-general further shows unto your honors, upon relation as aforesaid, that, after the count made by the said tellers at the said town meeting in March, all said ballots (both those counted and those not counted

as aforesaid) were by order of the moderator placed in sealed envelopes or packages, and retained in the custody of the town clerk from that time down to the adjournment of said town meeting, to wit, to the adjourned town meeting of April 4, 1887, at which time, by direction of said moderator, said packages were unsealed, and a count was by direction of said moderator made by said tellers of all ballots which had as aforesaid at the said March meeting been excluded from the count by the said moderator. And the attorney-general shows unto your honors that by this count it appeared that the said Thomas P. Murray would, if all the ballots cast should be counted, be elected to the offices of selectman, surveyor, overseer, and assessor, in place of the respondent, the said Alonzo B. Wentworth; that H. Smith of said Dedham would have been elected assessor in place of the respondent Fuller; and that H. Colburn of Dedham would have been elected overseer in the place of the respondent Fuller."

Edgar J. Sherman,

Attorney-General.

By Harvey N. Shepard,

Asst. Attorney-General.

May be filed and allowed.

April 6, 1887.

A. B. Wentworth.

Filed April 6, 1887.

Respondent's Answer.

Commonwealth by Attorney-General

v.

Alonzo B. Wentworth, etc.

Respondents for answer to said information come and say that they were duly chosen to the offices named in said information, and duly declared elected and qualified; and respondents rely for their title to said offices upon the record annexed to said amended information, and the agreed statement of facts filed herewith; and respondents admit that these statements contained in said amended information are correct, but deny that they have usurped said offices as therein alleged.

By their Attorney,

Alonzo B. Wentworth.

Filed April 6, 1887.

Amended Answer.

Commonwealth of Massachusetts.

Norfolk, ss.

Supreme Judicial Court.

Attorney-General, *ex rel.*,

v.

Wentworth *et al.*

And now the respondents in the above cause move to amend their answer heretofore filed by substituting therefor the following:

The respondents for answer to said amended information come and say that they were duly chosen to and are properly occupying the offices named in said information, and rely for their title to said offices upon the facts set forth in the amended information, and upon the agreed statement of facts, and the exhibits annexed thereto, filed herewith.

A. B. Wentworth,

For Respondents.

Messrs. Gaston & Whitney, for the Attorney-General.

Mr. A. B. Wentworth, for respondents.

2 MASS.

Devens, J., delivered the opinion of the court:

The contention of the relators is that it was not within the power of the town to vote that there should be elected only selectmen who should be or should act as assessors, overseers, and surveyors; and, further, if the town might do so under a proper warrant for the meeting, it could not do so under the warrant as framed. There was a distinct article in the warrant "to see if the town will choose the selectmen surveyors of highways," etc., under which the town voted to "choose the selectmen surveyors of highways."

There is nothing incompatible in these offices. Surveyors of highways are not required by law to be chosen by ballot; the duties of such officers may properly be performed by the selectmen; and the warrant fully brought to the attention of the town the question whether such duties should be imposed on the selectmen. We do not understand the relators to insist that this might not properly have been done; but they especially urge that it was not within the power of the town, by vote, to prevent the inhabitants from voting for distinct boards as assessors of taxes and overseers of the poor. Assuming, for the moment, the sufficiency of the warrant in this respect, it was, we think, competent for the town to determine that the selectmen should be assessors and overseers. The town officers who shall be chosen, their number, and the duties they shall perform, are left, to a certain extent, to the vote of the town. Before any ballot could be proceeded with, it was necessary to determine by vote how many selectmen (whether three, five, seven, or nine) should be chosen; and if the town intended to choose distinct boards as assessors or overseers, the number who should constitute these boards was to be first determined. These preliminary questions are necessarily to be decided by those who are present when the meeting is organized and ready to proceed with the business of the town. Those voters who subsequently arrived must necessarily conform to every lawful vote thus taken as to the order or manner of the election, or the officers or number of them to be chosen. The vote of the town was "to ballot for five selectmen, who shall also be assessors, overseers of the poor, and highway surveyors,"—an amendment which was proposed, to ballot for distinct boards, being first rejected. The claim of the relators, that it was the right of such voters as so desired thereafter to vote for distinct boards, cannot be maintained. There is no statutory requirement that distinct boards of assessors and overseers shall be chosen; and the language of the vote passed followed closely the language of the statute, which provides that "the selectmen shall be assessors of taxes, and overseers of the poor in towns where other persons are not specially chosen to those offices."

The relators contend, however, that if this vote could properly have been passed under a sufficient article in the warrant, the terms of the article did not authorize any such vote. While a town is limited in the transaction of business by the articles in the warrant, yet a liberal construction has always been given to their language, so as to include all that is prop-

erly, even if incidentally, embraced in the subject to which they relate. "The articles inserted in warrants for calling town meetings," says Mr. Justice Hubbard, "presenting the various subjects for the consideration of the inhabitants, are, from the very nature of the case, general in their construction, and are oftentimes inartificial in their construction. They are the mere abstracts or heads of the propositions which are to be laid before the inhabitants for their action; and matters incidental to and connected with such propositions are alike proper for their consideration and action." *Haven v. Lovell*, 5 Met. 85, 41.

It is not necessary that the warrant for a town meeting shall specifically state that the inhabitants will be called to act on the question of granting money for a particular purpose, in order to render a grant valid, if the subject to be acted on is distinctly stated, and is one which will be likely to require a grant of money. *Blackburn v. Walpole*, 9 Pick. 97.

An article in a warrant, to see if a town will appropriate money to a particular object, authorizes a vote to raise, as well as appropriate it. *Torry v. Millbury*, 21 Pick. 64.

The article in the case at bar was "to choose all necessary town officers." It then names those which are to be chosen by ballot, states the length of the respective terms, and adds that "all of said votes are to be on one ballot." This was sufficient to authorize the town to determine the number of officers to be chosen, the duties to be imposed on them, so far as it might lawfully do so, and to deal with the whole subject of their election in any appropriate manner.

Where a warrant for the annual town meeting held by law for the purpose of choosing officers contained articles "to choose all necessary town officers and to choose all necessary committees," and the statute allowed of two modes of choosing committees, it has been held that, under these articles, the town was authorized to determine which mode should be pursued, and to pass a vote that each school district choose its own committees, this being one of the modes provided by statute. *Williams v. Lunenburg School Dist.* No. 1, 21 Pick. 75; *Kingsbury v. Quincy Centre School Dist.* 12 Met. 99.

A specification in a warrant for an annual town meeting, that it is called "to elect all necessary town officers for the ensuing year," and to raise and appropriate such sums of money as may be necessary to defray town charges for the coming year, and pay any indebtedness of the town, is sufficient, under Gen. Stat. chap. 18, § 22, to authorize the town to vote at the meeting, in conformity with Gen. Stat. chap. 18, § 73, to invest the duly-chosen collector of taxes with all the powers which a town treasurer has when appointed collector of taxes. "The subject of choosing officers includes," says Chief Justice Chapman, "as an incident, any special authority that the town is authorized by statute to confer upon them in the exercise of their official duties." *Sherman v. Torrey*, 99 Mass. 472.

Indirectly the town could determine that the persons chosen selectmen should also be assessors and overseers, by choosing selectmen only, and leaving them to become assessors and over-

seers, by the operation of the statute. There is no apparent reason why this might not also be done by a direct vote which, in determining the number of the selectmen, also provides that they should be assessors and overseers.

The article in the warrant was sufficient, and, when we examine the facts, appears to have been fully understood by the voters of the town. Whether there should be a single board of selectmen only, or whether the other boards also should be chosen, was discussed at the caucuses held previous to the election. "An unusually large number were present" when the vote on this matter was taken at the beginning of the town meeting and before the balloting, and there was no objection to or protest against the vote until just before the closing of the polls.

There remains the question whether, in counting the votes, all those ballots should have been rejected which, in addition to those persons named as voted for as selectmen, contained also the names of the same or some of the same persons or other persons, as assessors, etc. The declaration of the moderator, that any ballots which contained more than five names should be rejected, could not enlarge the vote of the town, the meaning of which was that selectmen only should be voted for, who should be *ex officio*, assessors, etc. Ballots containing the names of certain persons as selectmen, and certain as assessors, etc., under this vote, were irregular, but there was no difficulty in ascertaining for whom the voter intended to vote as selectmen. The same difficulty is not presented as that which would be found if a voter should vote for seven selectmen when only five were to be elected. The ballots in the case at bar, cast by these voters for selectmen, were readily distinguishable from the other portion of the ballot; the voters had a right to give them for the selectmen upon whom the town had imposed the duties of the other offices; and there does not appear to have been any fraudulent purpose in placing names for the other offices on the ballot, nor, by so doing, was any serious embarrassment occasioned. There is no difficulty in rejecting as surplusage all that portion of these ballots which relates to the boards of assessors, etc., as selectmen only were to be voted for.

It may be said that those votes for selectmen should be rejected where other names were on the ballot, because, by voting for different persons to constitute distinct boards of assessors, etc., the voter depositing it indicated clearly an intention not to vote for selectmen who should have the powers of the other boards of officers. But the ballot must be construed in conformity with the vote of the town. While the voter sought by such a ballot to assert his right to vote for distinct boards, if he could not rightfully do this, it must be held that, in voting for selectmen, he had voted for them with such powers as the town had by vote conferred upon them.

It will not be necessary to consider the various classes of these ballots. It is not in dispute that if all the votes for selectmen are counted, including those upon ballots where there are also votes for assessors, etc., the relator Murray would be elected, and not the respondent Wentworth. The result therefore is that Mr. Murray was duly elected to the office of selectman.

and, on taking the necessary qualifying oaths, should be admitted to exercise it, in connection with the other lawfully-chosen selectmen; and that there should be a judgment of ouster against Mr. Wentworth. *Strong, Petitioner*, 20 Pick. 484; *Conlin v. Aldrich*, 98 Mass. 557.

Judgment of ouster accordingly.

William C. COTTON, Exr. of Arria Cotton, Deceased,

v.

ATLAS NATIONAL BANK and Frank B. Cotton.

1. The mere acceptance of a negotiable note for a secured debt will not discharge the debt, although the new note includes a new debt.
2. The owner of certain corporate stock transferred it to a bank as collateral security for a note of her son to the bank. The note was not paid, but successive renewal notes were given. In the meantime the owner of the stock died, and one of the renewal notes made after her death not having been taken up at maturity, a new note for a different amount was made by the son, covering the amounts then due on the debt represented by the original notes and on another debt of his to the bank. Thereafter the executor of the deceased owner of the stock which had been pledged as collateral, brought suit against the bank to compel it to transfer the stock to him, claiming that the transactions between the debtor and the bank constituted payment of the debt for which the stock was pledged; and that, if the debt was not extinguished, the conduct of the pledgee—in giving time to the debtor by accepting renewal notes, and in mingling the debt and security with another debt and security in the consolidated note—was such as to release the security, on the theory that the owner of the pledged stock stood to the bank in the relation of surety upon the original note, and that any conduct of the bank in relation to the note, which would discharge a surety upon it, would release the security pledged by her. Held, that the facts and circumstances of the case, in view of the relations and intentions of the parties as disclosed thereby, failed to support either of the claims, of payment or release, and that therefore the suit was not maintainable.

(Suffolk—Filed September 7, 1887.)

CASE reserved for the full court, after hearing by a single justice, W. Allen, J., *Bill dismissed*.

Bill in equity for an injunction, and seeking to compel the transfer of certain stocks to plaintiff and to Frank B. Cotton jointly, as co-executors of the will of Arria Cotton.

2 MASS.

The facts and questions presented are fully stated in the opinion.

Messrs. E. R. Hoar and G. W. Estabrook, for plaintiff:

There is to be decided in this case the question of the authority of the judge before whom the case was heard, and who reserved it for this court to discharge the reservation and reopen the case; for this determines how much of the evidence reported is before the court.

See Pub. Stat. chap. 151, § 20; *Taft v. Stoddard*, 1 Mass. L. ed. 487 (2 New Eng. Rep. 345), 141 Mass. 150.

"The report takes the place of an appeal."

See Pub. Stat. chap. 151, § 18; *Cobb v. Rice*, 128 Mass. 11.

"As soon as the appeal is claimed and entered before a single justice, the cause is at once pending before the full court." On a reservation, it is submitted that, as soon as the case is reserved, it is pending before the full court, and can be treated only by the full court. It is only in special cases of accident or mistake "that the full court may grant leave to parties to exhibit further evidence."

Pub. Stat. chap. 151, § 26.

The plaintiff claims that in this cause no special case of accident or mistake is shown, and that no leave has been granted to exhibit further evidence. If the court declines to consider the additional evidence, or regards it as not affecting that first exhibited, then it appears: (1) either the note for \$50,000, dated December 27, 1877, has been paid; or (2) the time of payment has been extended, or the note renewed, or its terms changed.

As to F. B. Cotton's knowledge: since the transaction related to his own debt, and the bank knew it, it was put on its inquiry as to whatever related to the known property of others, and he could not prejudice Mrs. Cotton's rights or the rights of the estate, as executor or as general agent, by any unauthorized acts.

Shaw v. Spencer, 100 Mass. 382.

If the note has been paid, of course the securities are released from the pledge and must be returned and accounted for. Assuming that the note was extended or renewed, the result is the same. When one pledges or mortgages his property to secure the debt of another, to one who knows the fact, the pledgor, to the extent of the property pledged, stands in the position of a surety or guarantor, and any act which would discharge him as such will release the pledged or mortgaged property as if it were such surety or guarantor.

Mitchell v. Roberts, 17 Fed. Rep. 776; *Christner v. Brown*, 16 Iowa, 180; *Rowan v. Sharps Rifle Mfg. Co.* 33 Conn. 1; *Ryan v. Shawneetown*, 14 Ill. 20; *White v. Ault*, 19 Ga. 551; *Robinson v. Gee*, 1 Ves. 251; *Royal Canadian Bank v. Payne*, 19 Grant, Ch. 180; *Hasborton v. Bennett*, Beatty (Ir. Ch.), 386; *Bowker v. Bull*, 1 Simons, N. S. 29.

Whenever a debt is extended, renewed, or altered in its terms, without the consent of a surety or guarantor thereon, he is discharged, and the court will not inquire whether the renewal, extension, or alteration is to his advantage or not.

Huse v. Alexander, 2 Met. 157; *Greely v. Dow*, Id. 176; *Appleton v. Parker*, 15 Gray,

178; *Gifford v. Allen*, 3 Met. 255; *Horne v. Bodwell*, 5 Gray, 457; *Veazie v. Carr*, 3 Allen, 14; *Brooks v. Wright*, 13 Allen, 72.

Even if the old note had been retained by the bank, taking the new note, payable at a later time, extended the time of payment, disabled the bank from suing Mr. Cotton before the expiration of the extended time, and released the property pledged.

Appleton v. Parker, 15 Gray, 173; *Brooks v. Wright*, 13 Allen, 72; *Gifford v. Allen*, 3 Met. 255.

The debt was consolidated with another. The bank received other money of the estate and should account therefor.

See *Shaw v. Spencer*, 100 Mass. 382.

As to the position of the parties: Mr. Cotton was not agent for Mrs. Cotton to borrow this money. The bank knew Mrs. Cotton was either the principal or the pledgor of stocks for the note of her son; in either event the contract contained in the note could not be changed without her consent. The transaction was not for Mrs. Cotton's benefit. If Mrs. Cotton was ever liable to Mr. Cotton or the bank, that liability is discharged. Mr. Cotton has lost any right to indemnification from Mrs. Cotton. The note was not discounted for Mrs. Cotton. It is well-settled law that the bank cannot offer evidence to show that she was principal, and sue her on the note, but is bound by the terms of the note. The present attempt of the bank is merely an effort to obtain the same advantage by indirection, and is within the mischief the rule is intended to prevent.

Stanison v. Loring, 5 Allen, 340; *Barlow v. Congregational Soc. in Lee*, 8 Allen, 460; *Trucker Mfg. Co. v. Fairbanks*, 98 Mass. 101.

If Mr. Cotton had authority from Mrs. Cotton to renew or extend notes or pledge stocks, that authority terminated with her decease, with notice of which the bank is affected, and any subsequent renewal or extension discharged the securities pledged. Giving the consolidated note discharged the security.

Messrs. A. L. Soule and George M. Stearns, for defendant, Atlas National Bank:

1. The justice sitting at the hearing in this case determined that all the conditions upon which the granting of the defendant's motion depended existed. The only question presented under that branch of the case is as to his power so to do.

The reservation of the case was an order or decree in an equity case, which the justice might modify, vacate, or enlarge at any time, under the general powers given in Pub. Stat. chap. 151, §§ 12, 20.

Section 13 applies only to appeals. In such cases the action of a party has intervened under a right given by statute, independent of the control or action of the court, and perhaps beyond the power of the court to change.

Exceptions allowed in chancery may be amended.

Dan. Ch. Pr. 4th ed. 764; *Dolder v. Bank of England*, 10 Ves. 284; *Northcote v. Northcote*, 1 Dick. 22.

All interlocutory decrees are considered as resting in minutes until final decree is made and recorded.

Gibson v. Crehore, 5 Pick. 146-156; *Park v. Johnson*, 7 Allen, 378.

604

At law exceptions have frequently been amended after allowance, by consent of parties; and upon hearing, by the judge who allowed them.

But if the single justice could not reopen the case for further hearing, this court can. The additional evidence is of grave importance. The case involves a large sum of money, and the single justice determined that there was no laches or fault which deprives defendant of the benefit of the testimony.

If the court is of the opinion that the power did not obtain in the single justice to grant the motion, the defendant here and now asks that the same be granted.

Perry v. Braed, 117 Mass. 155.

2. Upon all the evidence the defendant asks the court to find that the plaintiff's testatrix had such an interest in the loan made in the name of Frank B. Cotton that she cannot, in equity, assert that her stocks were pledged simply as surety for the debt of Frank B. Cotton. Also, that the stocks were pledged by Frank B. Cotton as her agent, acting for her in that behalf, and in her interest. Also, that the form of the note, as the debt of Frank B., was a mere matter of convenience, and that in reality the transaction was for her. Also, that she knew the original note was not paid, and understood that her stocks were held by the bank as collateral to the renewals, and assented thereto.

3. Apart from the effect as evidence of a complete understanding by the executors that the loan from the bank was Mrs. Cotton's, the defendant claims that the executors should be estopped, by receiving the benefits of the collateral pledged to Frank by Hunt, from asserting that the transaction was that of Frank B. It was all one transaction; either the loan from the bank and to Hunt of this \$50,000 was Frank's business or his mother's. The money was undoubtedly borrowed to lend Hunt, and all constituted one transaction. Hunt gave the 150 shares of South Boston Iron Works stock as collateral to the person who borrowed that money for and lent it to him. He was president of the bank, and all parties understood the borrowing from the bank and the lending of the proceeds of the loan as one transaction. The executors cannot repudiate one part of the transaction and adopt the other. Otherwise, the executors may receive the proceeds of the Hunt collateral without the slightest right or reason.

The executors chose to treat the whole transaction, according to the truth, as Mrs. Cotton's, and sold the Hunt collateral to the \$50,000 note, and kept the proceeds. The plaintiff was not ignorant of the question involved. He knew the proceeds were in dispute, and that the same went into the suspense account, but he kept the same, keeps them now, and appropriates them "as any other money of the estate."

No executor and no person in any capacity can accept a benefit and assert any claim contrary thereto.

Phillips v. Rogers, 12 Met. 405; *Hagood v. Houghton*, 22 Pick. 480; *Hyde v. Baldwin*, 17 Pick. 308-309; *Watson v. Watson*, 128 Mass. 153; *Smith v. Wells*, 184 Mass. 11; *Shurtleff v. Ferry*, 188 Mass. 259.

4. The facts all show conclusively that the

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renewals were not intended as extinguishments of the original debt, and that neither party expected or intended the stocks should be discharged of the pledge. The whole transaction was an ordinary one of the repeated renewals of a note upon the same terms as the first discount. The stocks were sold as of right by the bank, and dividends collected. The copies show collaterals were referred to in the new notes, and this was done in every renewal. Whether the new notes given operated as payment of the original debt or as renewals of the evidence thereof, and whether the security pledged for the payment of the debt was discharged, is to be determined by ascertaining the intention of the parties. If there was no express agreement, this intention is to be found from the circumstances attending the case.

Grimes v. Kimball, 3 Allen, 518; *Taft v. Boyd*, 13 Allen, 84; *Watkins v. Hill*, 8 Pick. 522; *Pomroy v. Rice*, 16 Pick. 22; *Green v. Russell*, 132 Mass. 536; *McConihe v. McClurg*, 13 Wis. 637.

The fact that the presumption of payment would deprive the party who takes the new note of a substantial benefit, has a strong tendency to show that it was not so intended.

Shaw, Ch. J., in *Curtis v. Hubbard*, 9 Met. 328.

If the new note is taken for a larger sum, it does not necessarily show that the prior debt is extinguished.

Hill v. Beebe, 13 N. Y. 556.

Nor with different names.

Pond v. Clark, 14 Conn. 384.

Taking a note for interest accrued on a mortgage debt does not remove that part of debt from the security of the mortgage.

Elliot v. Sleeper, 2 N. H. 525; *Parkhurst v. Cumming*, 56 Me. 155; *Feldman v. Beier*, 78 N. Y. 298; *Frink v. Branch*, 16 Conn. 260.

The fact that the note in this case was joined with the note of Frank B. in one note does not operate as extinguishment of the original debt. The purpose and intention of the parties still controls. The securities will be held to the extent for which they were originally pledged.

Port v. Robbins, 35 Iowa, 208; *Ellsworth v. Mitchell*, 81 Me. 247; *Goenen v. Schroeder*, 18 Minn. 66; *Pomroy v. Rice*, 16 Pick. 22; *Fowler v. Bush*, 21 Pick. 280; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65.

The consolidation was not made to extinguish either debt, but merely for convenience.

5. Neither does the change, as set forth in the notes, of the extent to which the collateral should be held, discharge the pledge. The change was not intentional, but accidental, arising from change in printed blank notes. Each debt can be definitely traced, and the amount of the debt to which each class of securities should be applied can be determined.

Although improperly and illegally held, collateral securities may be redeemed by "paying the sums for which they were legally holden."

Jarvis v. Rogers, 15 Mass. 389, 398, 417; *Story, Eq. Jur.* 12th ed. § 1094, and note.

6. In no event should the defendant be decreed to repay sums voluntarily paid by Frank B., executor. These payments were made in good faith by both parties, long assented to; and, if not properly made, the persons under the will should look to the executors to make

good moneys of the estate improvidently paid out.

Jennison v. Hapgood, 10 Pick. 77; *Moore v. Moore*, 127 Mass. 22; *Vez v. Emery*, 5 Ves. 141; *Giles v. Dyson*, 1 Stark. 82; *Shallcross v. Wright*, 12 Beav. 158; *Robinson v. Gee*, 1 Ves. 254.

The above covers all sums received by the bank excepting dividends.

If the court shall find that the loan was Frank B.'s, and that his mother was not interested therein so as to prevent her from setting up all claim to her collateral which a third party might, the defendant bank denies that the stock stood in the relation of a surety to the debt, or is discharged by extension of time given the principal debtor.

The stock was properly pledged to secure the debt of which the note was evidence. It cannot be delivered from the pledge except by payment, tender, or release.

Jones, Mort. 924-926.

It is not correct to apply to this transaction the rules concerning commercial paper, and to treat the property as a person.

A surety signs a definite contract, and is discharged if that contract is substantially changed.

These stocks were pledged for the payment of this debt to the bank, and should be governed by the law governing pledges.

In *Rowan v. Sharps Rifle Mfg. Co.* 38 Conn. 1, the contract was changed in its substance and character so as to destroy its identity.

In *Mitchell v. Roberts*, 17 Fed. Rep. 776, a tender had been made of payment of the debt.

W. Allen, J., delivered the opinion of the court:

This case was heard by a single justice upon replication, and reserved for the full court. After the evidence was printed, the defendant moved, before the justice who heard and reserved the case, that the reservation be discharged and the case reopened for the purpose of securing further testimony. The court, after hearing, discharged the reservation, and after hearing further evidence reserved the case upon the bill, answer, and replication, and evidence, including all the evidence taken at both hearings, subject to the objection of the plaintiff.

The question thus presented of the authority of a single justice to discharge a reservation and hear further evidence was rendered immaterial by the agreement at the argument before the full court, that, if the court should be of opinion that the additional evidence was such that it should be received by the full court, or that the reservation should be discharged and the case sent back for further hearing, the court might consider all the evidence reported as if included in the first reservation.

As we think that the reservation should be discharged for the purpose of receiving the evidence, we have considered the whole evidence reported as before us under the agreement, and have no occasion to consider whether the authority to discharge the reservation is exclusively in the full court.

On December 27, 1877, Mrs. Arria Cotton transferred certain stocks to the Atlas Bank as collateral security for the note of Frank B. Cotton to the bank for \$50,000. Mrs. Cotton

died March 17, 1880, and William C. Cotton, the plaintiff, and said Frank B. Cotton were her executors. The note was on four months' time, and when it became due it was renewed by discounting a new note on the same time; and the renewals were continued as each note became due, the interest being paid at each renewal, until September 27, 1881. The note of that date was not taken up at maturity, but was kept along until January 29, 1883, during which period payments were made upon it from dividends and sales of some of the stocks. At that time the bank held another overdue note of said Frank B., for \$19,000, and a new note was given by Frank B. to the bank for the amount due upon both notes.

The plaintiff, as the executor of Mrs. Cotton, claims that these transactions constitute payment of the debt for which her stock was pledged, and that if the debt was not extinguished, the conduct of the pledgee, the defendant bank, was such as to release the security.

Mrs. Cotton was not a party to the original debt, and the question whether it has been paid or discharged or satisfied by the giving and acceptance of a new note must depend upon the acts of the parties to it. This court has held that taking a negotiable note for a pre-existing account or note is *prima facie* a discharge of the old debt, and a substitution for it of the new note. It is a question of intention, and the intention to discharge the old note is presumed where a different intention is not shown by evidence or inferred from circumstances. When it appears that it will be for the benefit of the creditor that the old debt should be kept alive, the presumption does not arise, and the debt is not discharged. Accepting a negotiable note for a secured debt will not discharge the debt, because it will not be presumed that the creditor intended to give up his security (*Pomroy v. Rice*, 16 Pick. 22; *Appleton v. Parker*, 15 Gray, 173; *Dodge v. Emerson*, 131 Mass. 467; *Green v. Russell*, 132 Mass. 536), though the new note includes a new debt (*Taft v. Boyd*, 13 Allen, 84; *Hill v. Beebe*, 13 N. Y. 556; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65).

In the case at bar the evidence shows plainly that the parties to the original debt did not intend that anything that they did should be a payment or discharge of it. The debts and the notes were as distinct in their minds as they were in reality. It was not intended or expected that the debt should be paid when the first note should mature, but that the note should be renewed and the debt kept along, the bank at all times holding for it a note not overdue. This was, in fact, done, until the maker failed to renew the note, and allowed it to be dishonored. As soon as practicable after that, the bank procured the renewal of the note, in connection with the other dishonored note of the maker. The bank clearly intended to retain its hold upon its securities, and it took the new note, not in payment or satisfaction of the debt, but only in renewal of the overdue note. It is unnecessary to consider in detail the evidence of this; no other inference can be drawn from it.

The consideration of the other question requires a more particular reference to the evidence. The plaintiff contends that Mrs. Cotton, as the general owner of the pledged stock,

stood to the defendant bank in the relation of a surety upon the note; and that any conduct of the bank in regard to the note which would discharge a surety upon it would release the security pledged by her; and that the renewals of the note, which, while they did not discharge the debt, gave time to the debtor, the change in the terms of the memorandum of the pledge written on the renewed notes, and the mingling of the debt and security with another debt and other security when the "consolidated" note was given, operated to release the security.

Before considering these in detail, it is necessary to look at the relation of Mrs. Cotton to the debt, and the authority given by her in regard to the securities. Mrs. Cotton was a woman of large wealth (principally invested in business corporations in her neighborhood). Frank B. Cotton was her son and her general agent, acting under her direction, advising and representing her in many business matters. William P. Hunt was the president of the defendant bank, when the first note was given. He was also the president and treasurer of, and largely interested in, the South Boston Iron Company. Frank B. Cotton was interested in that company and in other concerns with Hunt, and had close personal and business relations with him. Mrs. Cotton had lent money to Hunt at different times, for which there was due to her about \$70,000, which was secured, and for which Hunt personally was considered amply responsible. Hunt wanted to borrow \$50,000, and Frank B. applied to his mother to lend stock as collateral for it at the bank, representing to her that Hunt wanted the money to use in his business,—to enlarge it and make it more prosperous. Other considerations were mentioned, as that the business had been very prosperous, that it was likely to become much more so by taking certain contracts and extending its business, and that Hunt might have an opportunity to secure an interest in it at a low rate for Mrs. Cotton, and the fact that Hunt already owed Mrs. Cotton \$70,000, secured by collateral, some of which was the stock of the South Boston Iron Company. These and other considerations were urged by the defendant as showing that Mrs. Cotton, and not Frank B., was the real debtor who borrowed the money of the bank on the note of Frank B. But we do not find it necessary to decide that question. In the view which we take of the evidence, the material fact in this point is that Mrs. Cotton furnished the stocks on the representation and expectation that they were to be used as security for money to be lent by the bank for Hunt to use in his business. She left the details of the transaction to be arranged by Frank B. He told her that he was to give his note to the bank, and it does not appear that she knew when it was to be payable. If it is to be inferred that she understood that it was to be a short-time note, to be discounted by the bank, it is also to be inferred that she understood that the loan was to be kept along by renewed discounts. Waiving the question which was the principal debtor as between her and Frank B., as between her and the bank, she lent the stocks to Frank B. to use as security for a loan for an indefinite time from the bank to him, upon his note in such form and manner as he saw fit. The right to limit the time of

payment of the debt by the first note discounted, and to extend it by renewal notes to be discounted, which was given, was not a mere authority or license which determined upon the death of Mrs. Cotton; it was a right so to use the stocks under which the arrangement with the bank was made, and the money was paid by it, and the liability of Frank B. upon his note was incurred. The fact that the stock was transferred directly from Mrs. Cotton to the bank, did not limit the authority of Frank B. in pledging the stock. He procured and delivered to the bank the assignment from Mrs. Cotton to it, and the bank had no other communication with her in regard to it.

The original note and the first renewal note, dated April 30, 1878, had indorsed upon them a list of the stocks which were referred to in the body of the note as deposited "as collateral security." A subsequent note contained the words, referring to the list of stocks in the note of April 30, 1878, "as collateral security for payment of this or any other direct or indirect liability of ours to said bank, due or to become due, and that may be hereafter contracted." There was no authority to pledge the stock for other liabilities of Frank B. It does not appear that at that time there was any other liability of Frank B. to the bank, and it does appear that there was no intention to pledge the stocks for any other debt than the \$50,000 for which it was already pledged. The change from the memorandum on the former notes seems to have been made inadvertently, by using a common form; no right was acquired against the plaintiff which did not exist before, and none has ever been claimed by the bank, or was intended by it. This cannot have the effect of releasing the security.

On the 29th day of January, 1883, the \$50,000 note had been about a year overdue, and there was then due upon it \$25,375.12, and some interest. The \$19,000 note of Frank B. to the bank was more than a year overdue, and there was due upon it \$18,300, and some interest. This note was secured by 100 shares of Manchester Mills. The whole amount of interest then due on both notes was \$895.66. The amount of interest then due upon each note was then computed, and can now be ascertained by computation, but it is not stated in the evidence. The bank had been endeavoring to procure a settlement of both of the overdue notes. At that time an arrangement was made; the whole amounts due upon both notes were added together, making \$44,570.78. The sum of \$2,942.08 was paid from the estate of Mrs. Cotton in two checks, drawn by Frank B. Cotton, executor, and a new note on four months time was given by Frank B. for \$42,500, being the balance due with the discount on the new note. This note was stated to be secured by certain stocks, which were in fact the same as those before pledged as security for both debts. Payments amounting to about \$10,000 have been made on the consolidated note from dividends and sales of the stocks pledged by Mrs. Cotton.

As has been before said, this transaction was not a payment of the \$50,000 debt, and we do not think that its effect was to discharge the security. It did not affect the title to the stock, or give to the bank any new right to it.

The bank held under the transfer to it from Mrs. Cotton, and not under the memorandum in the note. The writing in the note gave no right or title to the stock, and was not intended to. It was a statement in the note of a fact existing outside of it. The stock was in fact held as security for a debt represented in the note, and so far the statement was true. If the statement can be construed only as meaning that the stock was held as security for the full amount of the note, it was not true in fact; but how was Mrs. Cotton's estate prejudiced by the false statement? The recital did not alter the fact, or give any additional right in the stock to the bank, nor in any way affect the action of the bank in respect to it. The respective stocks stood pledged for the respective debts as they did before, and Mrs. Cotton's stock, at least, did not become pledged for anything more. In regard to giving time upon the \$50,000 debt, the effect upon that debt and its security by renewing the note as part of a larger note was the same as if it had been renewed alone. The right of action was suspended until the maturity of the new note; but, upon nonpayment of that, it revived as it was before, and payment of the original debt would release the security as fully as if the new note had not been given. The defendant at no time claimed to hold the stock pledged by Mrs. Cotton for anything but the debt for which it was pledged.

The two notes appear to have been consolidated at the request of the bank, and only for convenience, and without any intention of affecting the rights of Mrs. Cotton's estate in the stock; and nothing has occurred by which the estate has received any detriment in consequence. The amount of the debt can be ascertained, and the payments made properly applied, with as much certainty and by the same computations as if the new note had not been given. The right to redeem the stock was not impaired or hindered by the form in which the renewal of the note was made. The renewal was with the concurrence of the executors, was a waiver by the bank of its right to an immediate sale of the stock, and in that respect was apparently beneficial to the estate; and we do not think that the right of the bank was forfeited by it. The payments upon the consolidated note have all been from the estate of Mrs. Cotton, and must be regarded as applied to the debt secured by her stock.

Most of the payments that have been made upon the debt were from the avails of the pledged stock, but several payments were made by Frank B., as executor, from the funds of the estate. It does not appear that these payments were not for the benefit of the estate. If the value of the property pledged exceeded the amount of the debt, it might be clearly for the benefit of the estate to pay the debt and release the property. On the whole evidence we do not see any ground upon which the bill can be maintained.

Bill dismissed.

Winnifred DALAY

v.

Henry W. SAVAGE.

1. If a landlord lets premises abutting

upon a way, which are, from their condition or construction, **dangerous to persons lawfully using the way, he is liable to such persons for injuries** suffered thereupon, **although the premises are occupied by a tenant, unless the tenant has agreed with his landlord to put the premises in proper repair.**

2. That the **tenant may also be liable** is not a defense to the landlord.

3. The above doctrine applied in an action for damages for an **injury received by falling into a defective coal-hole, in the sidewalk** in front of the house to which the coal-hole was appurtenant, where the defendant had purchased the premises and had a right to the possession thereof, but had permitted the person in possession to continue therein as tenant at will, with the defect existing in the premises, without an agreement from such tenant to repair the premises.

Suffolk—Filed September 6, 1887.

ON plaintiff's exceptions. *Sustained.*

This was an action of tort brought in the superior court against Margaret Rice, executrix, and Henry W. Savage, for personal injuries suffered by falling into a coal-hole in the sidewalk in front of house No. 10 Wall Street, Boston, in said county, to which said coal-hole was appurtenant. Prior to the trial the plaintiff discontinued against defendant Rice, executrix.

It was admitted that Wall Street then was and for many years had been a public street of said city of Boston, and that said premises were conveyed to defendant Savage, November 8, 1883, by virtue of a power of sale contained in a mortgage of said premises for the purpose of foreclosing said mortgage. And that said premises were conveyed (subject to said mortgage) to Daniel Breslin, April 30, 1875, and that he occupied the same from that date till after this accident, and that he quitclaimed said premises to defendant Savage, November 9, 1883, and that said Savage was the owner of the premises at the time of the accident.

Breslin testified that he remained at a rent of \$41.67 per month; that Savage was to give him \$25; that Savage permitted him to remain and pay the rent because he, Savage, had not paid the \$25; that Savage, in lieu of paying him the \$25, permitted him to remain at \$41.67 per month. It appeared in evidence that Breslin remained in occupancy of said premises, under said oral agreement, from said November 8 till some months after the injuries complained of.

One of the plaintiff's witnesses testified that after assisting the plaintiff to her home, a few rods distant, he went back and examined the coal-hole, and that there was no chain on the cover, but a three-strand rope about three quarters of an inch thick: that the bed on which the cover lay had filled up with snow and dirt, and that it was liable to slip, the way it was fastened. He also testified, on cross-examina-

tion, that the bed-piece, or stone surrounding the coal-hole on which the plate or cover rested, was well worn, chipped off, and broken at the edges; and that it appeared to him this had been so a long time, so that, whether tied or untied from the inside, the cover, on being stepped on, would tip up. And it appeared in evidence that the bed had not changed in this respect during the tenancy.

The evidence tended to show that on the day immediately following the injury the coal-hole was repaired by someone other than the tenant by cutting away the broken edges of the bed-piece and setting the cover deeper in the stone. On the whole evidence the court ruled that the action could not be maintained, and ordered the jury to return a verdict for the defendant, and plaintiff excepted.

Mr. Patrick O'Laughlin, for plaintiff:

1. The law imposes a duty not to dig or maintain pits in the highway.

Fisher v. Cushing, 134 Mass. 375.

Constructing or maintaining a hole or pit in the sidewalk over which the public constantly travel, and leaving it in a dangerous and unsafe condition, exposed and without proper safeguards, is a public nuisance.

Murphy v. Brooks, 109 Mass. 202; *Shipley v. Fifty Associates*, 101 Mass. 253; *Dybert v. Schenck*, 23 Wend. 447.

The plaintiff, while properly on the sidewalk, having suffered special damage, becomes entitled to recover against him who owed a duty to the public to keep his premises in a reasonably safe condition.

Murphy v. Brooks, *Shipley v. Fifty Associates*, *supra*; *Kirby v. Boylston Market Assn.* 14 Gray, 251, 252; *Stetson v. Fazon*, 19 Pick. 155-159; *Croghan v. Schiele*, 1 Conn. L. ed. 29 (1 New Eng. Rep. 305), 53 Conn. 186.

The plaintiff has no right of action against the tenant unless the latter had a right to and control over the coal-hole, for the landlord owns and controls every part of the building not leased.

Milford v. Holbrook, 9 Allen, 22.

A mere verbal lease of a dwelling-house does not necessarily include a coal-hole in the sidewalk in front of the premises; and even if it were included, the tenant, as such, cannot be held responsible for a nuisance not created or maintained by him.

Readman v. Conway, 126 Mass. 376, 377.

There is no evidence in this case that the tenant, Breslin, had ever used the coal-hole or had any control over it, while a tenant of the defendant; indeed, the repairs made immediately after the injury to the plaintiff, as stated in the bill of exceptions, go far to negative any such presumption. That a coal-hole might have been used by the tenant, if he so desired, though not actually leased to him, cannot be urged by the landlord for the purpose of shifting his liability on the tenant.

Shipley v. Fifty Associates, and *Milford v. Holbrook*, *supra*.

2. While it is true that in the absence of an agreement the law presumes that the tenant shall make repairs on premises controlled by him, it is also true that the presumption is only *prima facie* and may be rebutted; hence evidence of acts or conduct of the landlord, in an action against him by a person injured by a

NOTE.—As to liability of landlord for injury to person or property by reason of condition of the leased premises, see *Joyce v. Martin* (R. I.) and note, *ante*, p. 706.

defect or trap on his premises, which tends to prove that the landlord, and not the tenant, was bound to repair and had control of the coal-hole, must be submitted to the jury as tending to negative the presumption that the tenant had control and was bound to repair.

Kirby v. Boylston Market Assn. 14 Gray, 251; *Shipley v. Fifty Associates*, 101 Mass. 254; *Readman v. Conway*, 126 Mass. 376; *Lowell v. Spaulding*, 4 Cush. 277; *Rich v. Basterfield*, 4 C. B. 788.

3. If a landlord lets his premises with a nuisance existing upon them, though not actually created by him, he is liable for continuing and upholding the nuisance.

King v. Peddy, 1 Ad. & El. 822; *Saltonstall v. Banker*, 8 Gray, 197; *Rich v. Basterfield*, 4 C. B. 900; *Leslie v. Pounds*, 4 Taunt. 649; *Staple v. Spring*, 10 Mass. 73, 74; *Oakham v. Holbrook*, 11 Cush. 399; *Hodges v. Hodges*, 5 Met. 211.

All the elements essential to the plaintiff's case and the defendant's liability for the injuries sustained are present in this case. It was improper, therefore, upon the evidence as detailed in the bill of exceptions, for the court below to rule as a matter of law that the defendant was not liable. The evidence that the nuisance existed before the tenancy began, and was continued thereafter up to the time of the injury to the plaintiff; that costly repairs were made by cutting away the broken edges of the bed-piece and setting the cover deeper in the stone, and that such repairs and alterations were not made by the tenant,—were facts which ought to have been submitted to the jury on the question of control of the coal-hole and liability to make repairs.

Larus v. Farren Hotel Co. 116 Mass. 68; *Ball v. Nye*, 99 Mass. 588; *Readman v. Conway*, 126 Mass. 377.

The defendant cannot urge that the nuisance originally was created by some person other than himself. His continuing it makes him liable.

Staple v. Spring, 10 Mass. 73.

That a landlord is liable, notwithstanding a lease or grant to a tenant, for a continuance of the nuisance, was decided as early as—

Roswell v. Prior, 12 Mod. 685; *McDonough v. Gilman*, 3 Allen, 287.

4. The case at bar is distinguished from *Lowell v. Spaulding*, *supra*, in that in the latter case there was no evidence that the nuisance existed at the time the premises were leased. Indeed, there was nothing to rebut the presumption that the tenants themselves created and maintained the defect complained of. As far as that case can be taken as an authority it is most favorable to the position of the plaintiff in this case, since the opinion clearly intimates that if the defendant created or maintained the nuisance he would be liable.

Lowell v. Short, 4 Cush. 277; *Lowell v. Boston & L. R. R. Corp.* 23 Pick. 24.

This case is also to be distinguished from *Mellen v. Morrill*, 126 Mass. 545; *Howland v. Vincent*, 10 Met. 371, and *Mistler v. O'Grady*, 132 Mass. 189. In those cases it was clearly shown that "there was no defect in the sidewalk itself." It was wholly outside of the traveled path; nor was there the slightest evidence that the landlord retained any control

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over the sidewalk by making repairs before or after the injury. In *Mellen v. Morrill* there was an implied invitation by the tenant to the person injured, who was his customer, to come upon the premises, impliedly warranting the safety of the place.

So, in *Leonard v. Storer*, 115 Mass. 86, not only was the tenant bound by his lease to make repairs "interior and exterior," but the roof itself was appropriate and proper for the purposes intended, and was in no sense a nuisance.

In *Stewart v. Putnam*, 127 Mass. 403, the court found that the tenant had absolute control of the premises, and that he appointed another to do certain work, which was conducted by this servant so negligently that a person was injured.

It is respectfully submitted that the court below should have allowed the case to go to the jury, because the evidence tended to show, (1) that the nuisance existed on the premises when they were let to the tenant; (2) that the letting to the tenant and the receiving of rent by the defendant, as landlord, was a continuance of the nuisance; (3) that the tenant had no control over the coal-hole, and neither created nor maintained the nuisance; and (4) that repairs were not made by the tenant, but by someone who felt obliged to them.

Mr. T. S. Dame, for defendant Savage:

1. The exceptions show that the judge ruled that the whole evidence did not make out a *prima facie* case, viz., warrant a verdict for plaintiff; and the only question before this court is whether that ruling was correct.

Lamb v. Old Colony R. R. Co. 1 Mass. L. ed. 4 (1 New Eng. Rep. 76), 140 Mass. 79.

2. This court cannot decide that question without having the pleading before it, and, if it could, there is nothing in the exceptions that shows any error in the ruling, and the burden of proof is on the party excepting to show error therein.

Fuller v. Ruby, 10 Gray, 285.

3. If the stone surrounding the coal-hole or cover needed repairs, so that the cover would not slip or turn, it was a part of the highway, and the city alone would be liable to plaintiff for damages resulting from want of repairs thereon, as no repairs could be made thereon lawfully without authority from the city or someone representing it; for the landlord was not bound, by any agreement with the city, to repair the stone or cover.

Pub. Stat. chap. 52, § 18; *Kirby v. Boylston Market Assn.* 14 Gray, 249.

4. If anyone beside said city would be liable to plaintiff for damages resulting from not repairing that part of the highway formed by the stone and cover, it would be the occupier of the premises alone, namely Breslin.

Lowell v. Spaulding, 4 Cush. 277; *Boston v. Worthington*, 10 Gray, 496; *Milford v. Holbrook*, 9 Allen, 17; *Cunningham v. Cambridge Savings Bank*, 188 Mass. 481.

Field, J., delivered the opinion of the court:

The defendant Savage received a conveyance of the premises on November 8, 1883, having purchased them at a sale under a power contained in a mortgage. Breslin, on April 20, 1875, had become the owner of the equity of redemp-

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tion, subject to this mortgage, and he occupied the premises from this date until after the accident, which is said to have occurred on December 17, 1883. On November 9, 1883, Breslin quitclaimed whatever title he had in the premises to Savage, for which Savage agreed to pay him \$25, and Breslin remained in occupation as the tenant at will of Savage, under an agreement to pay rent at the rate of \$41.67 a month.

There was evidence from which the jury might have found that the stone surrounding the cover of the coal-hole was permanently defective at the time Savage became owner; that it continued in this defective condition until after the accident; and was of such a character that "the cover, on being stepped on, would tip up," whether it was tied or not on the inside; and that the accident happened, not through the negligent manner in which Breslin used the premises, but through the defective condition of the stone surrounding the cover of the hole.

Savage, as landlord, was under no obligation to Breslin to keep the coal-hole in repair, and Breslin was under no obligation to Savage to repair it. It does not appear in the exceptions that Savage at any time knew that the coal-hole was in a defective and dangerous condition. It seems to be settled that if a landlord lets premises abutting upon a way, which are, from their condition or construction, dangerous to persons lawfully using the way, he is liable to such persons for injuries suffered therefrom, although the premises are occupied by a tenant, unless the tenant has agreed with his landlord to put the premises in proper repair. That the tenant may also be liable is not a defense to the landlord.

The case which perhaps most nearly resembles this is *Gandy v. Juffer*, 5 B. & S. 76; *S. C.*, on error, *Id.* 486. The reasons why the Court of Exchequer Chamber recommended that the plaintiff consent that the proceedings be stayed, do not appear in the report, but in 9 B. & S. 15, there is what purports to be the undelivered judgment of that court in the case. One question was, whether a landlord who has the power to determine a tenancy from year to year by giving notice, and who does not exercise it, is to be held as thereby reletting the premises. In the course of the argument in the Exchequer Chamber, *Earl, Ch. J.*, said of the landlord's liability: "If he lets the premises with a nuisance, all parties agree that he is responsible."

In the opinion published in 9 B. & S. 15, the grounds on which the Court of Exchequer Chamber differed from that of the Queen's Bench distinctly appear as follows: "We agree that, to bring the liability home to the owner, the premises being let, the nuisance must be one which was in its very essence and nature a nuisance at the time of letting, and not something which was capable of being thereafter rendered a nuisance by the tenants; and that it is a sound principle of law that the owner of property, receiving rent, should be liable for a nuisance existing upon his premises at the date of the demise; but that wherein we differ is that a landlord from year to year, having the power of giving the ordinary notice to quit, and not giving it, is thereby to be held as reletting the premises, and that such forbearing to give notice is equivalent to a reletting."

The reason of the rule that if a landlord lets

premises in a condition which is dangerous to the public, or with a nuisance upon them, he is liable to strangers for injuries suffered therefrom, is that by the letting he has authorized the continuance of the nuisance.

Pretty v. Bickmore, L. R. 8 C. P. 401, was decided on the ground that the tenant had covenanted to keep the premises in repair, and therefore the landlord could not be said to have given authority that the premises should be kept in a dangerous state. See *Leonard v. Storer*, 115 Mass. 86.

Gwinnett v. Eamer, L. R. 10 C. P. 658, follows *Pretty v. Bickmore*.

In *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. D. 311, it is expressly said that if the landlord lets premises in a ruinous condition, he is liable to strangers.

In *Saltonstall v. Banker*, 8 Gray, 195, 197, the decisions in *Rich v. Basterfield*, 4 C. B. 788, and in *Re v. Pedley*, 1 Ad. & El. 832, are approved, and it is said that if the nuisance existed at the time of the demise, the landlord is liable. See *Todd v. Flight*, 9 C. B. N. S. 377.

In *Jackson v. Arlington Mills*, 137 Mass. 277, the landlord was held liable for the acts of his tenants in polluting the water of a brook by discharging into it the sink water from the houses let, and the reason given was that the houses let were intended to be used by the tenants in the manner in which they were used, and that if the landlord did not retain the control of the water used by the tenants, he had, by the letting, authorized the use which the tenants made of the water. See also *Owings v. Jones*, 9 Md. 108; *Peoria v. Simpson*, 110 Ill. 294, 300; *Irvine v. Wood*, 51 N. Y. 224; *Durant v. Palmer*, 29 N. J. L. 544.

An attempt has been made to bring the present case within the rule that if the nuisance is created by a tenant or by a former owner who has let the premises to a tenant, a grantee is not liable for any injury that may result from the condition of the premises while the occupation of the tenant continues. If the defendant Savage had bought the premises subject to a lease to Breslin, who had continued in occupation under it, a different case would have been presented. But when the defendant Savage purchased the premises, and a deed was delivered to him by the mortgagee, pursuant to the power of sale contained in the mortgage, he became the owner, and Breslin had no longer the right of occupation. The defendant could then immediately have taken possession. After this, the defendant voluntarily let the premises to Breslin as a tenant at will, and at the time of the accident Breslin held possession by agreement with the defendant. It is strictly a case where the defendant let premises with a nuisance upon them, and took no agreement from the tenant to abate the nuisance or to repair the premises.

So far as appears, the plaintiff was lawfully traveling upon the highway; and if the coal-hole was in a permanently dangerous condition, and this condition existed when the defendant let the premises, the landlord is not excused from liability by the fact that the premises were in the occupation of a tenant at the time when the plaintiff was injured. It is not necessary to determine whether the owner or occupant is bound at all events to keep the covering of a

coal-hole in a public street safe, or is only bound to use reasonable care. There was evidence that the defect in the covering of the coal-hole had existed for a long time, and was open and visible, and such that the person whose duty it was to repair it ought to have known its condition.

In the opinion of a majority of the court the exceptions must be sustained.

Exceptions sustained.

Samuel D. WARREN *et al.*, Trustees,
v.
Daniel CAREY.

1. Declarations and admissions by the grantor of a trust deed, subsequent to the deed, are not made competent, as against the trustee, by the fact that such grantor is one of the *cestuis que trust*.
2. Evidence to prove a license, as a defense to an action for overflowing land, is not competent where license is not set up in the answer.
3. Evidence that a former owner of land, when in occupation thereof, told an adjoining owner that he might put a pipe in a natural stream, and that such former owner paid part of the expense of so doing, is not, as against a subsequent grantee, competent evidence of a grant or prescription to such adjoining owner to overflow said land by reason of such pipe.

(Middlesex—Filed September 22, 1887.)

ON defendant's exceptions. *Overruled.*
The case was tried in the Superior Court, and resulted in a verdict for plaintiff for \$25 damages. The exceptions are as follows:

"This was an action of tort for damages for the obstruction of an ancient watercourse, by which the water was caused to flow back upon the plaintiff's land. The writ, declaration, and answer are made a part hereof.

"The evidence showed that the plaintiffs held the land, which was alleged to be damaged by the obstruction of the watercourse, under a quitclaim deed of trust from one Henry M. Clarke, in trust for himself and others, and that they brought this action as such trustees; that said land lay west of and adjacent to land of the defendant, and that a ditch, with defined banks and bed, and of varying width, had for more than twenty years before the doing of the act complained of run across the land now owned by plaintiffs, in an easterly direction across land of defendant; that in 1879, while the title to said land of plaintiffs was in said Clarke, the defendant put a pipe through and under his land, substantially within the walls of the old ditch, which pipe took the water from the ditch on plaintiffs' land and emptied it into the ditch again, which was the old ditch, at the easterly side of defendant's land.

"The plaintiffs contended that this pipe carried the water less freely than in the open ditch in which the pipe was laid, and obstructed the free flow of the surface water from their land; but upon this point the evidence was conflicting.

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"The defendant's counsel asked a witness whether Henry M. Clarke (one of the plaintiffs' *cestuis que trust*, and the person who owned and lived upon the land in question at the time of the putting in of the pipe) ever told him that the pipe was an improvement on the old drain; and, upon the plaintiffs' objection, the court excluded the question. Defendant's counsel then asked the witness whether said Clarke had ever told him that he, Clarke, assented to the putting in of the pipe, and this question was also excluded. To both of these rulings the defendant alleged exceptions.

"The defendant then offered to show that, previous to his putting in the pipe in question, he went to see said Clarke and told him what he contemplated doing, and that he thought a pipe would improve the drainage, and asked Clarke to bear part of the expense; that Clarke told him to go ahead and put in the pipe and he would pay a fair part of the expense; that the defendant, relying upon the assent and promise of the said Clarke, put in the pipe, and subsequently said Clarke paid a part of the expense thereof. The court excluded this evidence, and the defendant alleged exceptions.

"The plaintiffs took the objection, among others, at the trial to all the above evidence and offers of evidence, that, even if otherwise competent, it was not open to the defendant under his answer.

"It appeared in evidence that said Clarke was on the ground, and knew of the putting in of the pipe, and made no complaint."

Messrs. H. N. Allin and G. L. Mayberry,
for defendant:

The admission by Clarke that he had assented to the putting in of the pipe was competent evidence for the defendant, and should have been admitted. An easement may be extinguished or modified by parol license.

Liggins v. Inge, 5 M. & P. 712; *Morse v. Copeland*, 2 Gray, 302; *Pope v. Devereux*, 5 Gray, 409; *Hyde v. Middlesex County*, 2 Gray, 287; *White v. Loring*, 24 Pick. 819; *Warshauer v. Randall*, 109 Mass. 588; *King v. Murphy*, 1 Mass. L. ed. 106 (1 New Eng. Rep. 484), 140 Mass. 254.

The conduct on the part of Clarke, which the defendant offered to show, was sufficient to estop him from maintaining an action for damages against the defendant for doing an act which he himself induced the defendant to do. Participation or acquiescence in the act done amounts to a waiver of damages.

Cornish v. Abington, 4 H. & N. 549; *Bigelow*, Estop. 4th ed. 688; *Griffin v. Lawrence*, 135 Mass. 365, and cases cited.

And what would estop Clarke would estop the plaintiff, who claimed under him and brought this suit for his benefit.

2 Herm. Estop. pp. 239, 349, 1196.

Matter of estoppel *in pais* need not be pleaded (*Bigelow*, Estop. 3d ed. 535), especially when the matter to which the estoppel relates is not specifically set forth in the plaintiff's declaration.

Adams v. Barnes, 17 Mass. 365; *Howard v. Mitchell*, 14 Mass. 241; *Foye v. Patch*, 132 Mass. 105.

Evidence of a surrender or modification of the easement by Clarke, before he conveyed to

plaintiff, was therefore admissible under the pleadings, as bearing upon the nature and extent of the plaintiff's title.

King v. Murphy, 1 Mass. L. ed. 106 (1 New Eng. Rep. 434), 140 Mass. 254; *Hastings v. Hastings*, 110 Mass. 280; *Walker v. Swasey*, 2 Allen, 812.

Messrs. Samuel D. Warren, Jr., and Louis D. Brandeis, for plaintiff:

I. Testimony that plaintiffs' grantor told a witness that the pipe was an improvement on the old drain was properly excluded.

a. It was a pure matter of opinion.

b. It was pure hearsay.

c. It was not a declaration against interest. Such a declarant must be dead.

Flagg v. Mason, 8 Gray, 556; *Currier v. Gale*, 14 Gray, 504.

d. It was not an admission, because—

1. Not relevant to the issue or in disparagement of title.

See *Osgood v. Coates*, 1 Allen, 77; *Simpson v. Dix*, 181 Mass. 179.

2. By one *cestui que trust*.

Such an admission cannot bind other *cestuis que trust* or the estate.

Taylor, Ev. 8th ed. § 757; *Pope v. Devereux*, 5 Gray, 409, 412.

II. Testimony that Clarke told the witness that he had assented to the putting in of the pipe was properly excluded. The question put was, like the one considered above, objectionable, being mere hearsay, and also for the reasons hereinafter stated, in connection with the offer of proof.

III. This offer of proof was properly rejected, because—

The facts contained in the offer of proof were immaterial and incompetent: (1) because the facts offered to be proved cannot destroy or affect the right in the defendant's land which pertained to the plaintiff's land; (2) because they cannot create an easement or incumbrance on the plaintiff's land in favor of defendant's land.

1. The right to the unobstructed flow of water in the ancient watercourse was either (a) a right in a natural watercourse, which is parcel of the land itself, or (b) an acquired easement annexed to the land;—consistently with the bill of exceptions, the former.

Johnson v. Jordan, 2 Met. 284, 289; *Cary v. Daniels*, 8 Met. 486; *Smith v. Miller*, 11 Gray, 145; *White v. Chapin*, 12 Allen, 516, 518. Comp. *Cary v. Daniels*, 5 Met. 236; *Crittenton v. Alger*, 11 Met. 281, 284; *Ashley v. Ashley*, 6 Cush. 70. But see Washb. Easem. 4th ed. p. 316, 431 *et seq.* See also *Soule v. Russell*, 18 Met. 436; *Elliot v. Fitchburg R. R. Co.* 10 Cush. 191.

(a) In the former case the facts offered to be proved cannot affect the plaintiffs, because their land, and what is part and parcel of it, can only be conveyed by grant, expressed, or presumed from twenty years' adverse possession; (b) while in the latter case an easement is an interest in the defendant's land which could only be released by deed or by abandonment. In the latter case the acts must be "of so decisive and conclusive a character as to indicate and prove an intent" to abandon the easement.

Dyer v. Sanford, 9 Met. 395, 402; *Pope v.*

Devereux, 5 Gray, 409; *Wood v. Edes*, 2 Allen, 578. Comp. *Warshaw v. Randall*, 109 Mass. 586; *Morse v. Copeland*, 2 Gray, 302; *Curtis v. Noonan*, 10 Allen, 406; *Winter v. Brockwell*, 8 East, 306; *Moore v. Rawson*, 3 B. & C. 323; *Davies v. Marshall*, 10 C. B. N. S. 697.

2. But the claim of defendant to maintain the obstruction and thus flow the plaintiffs' land is, in effect, an attempt to maintain a continuing nuisance which amounts to an incumbrance on the plaintiffs' land without a grant, express or implied. This cannot be done.

Stevens v. Stevens, 11 Met. 251; *Drake v. Wells*, 11 Allen, 141; *Craig v. Lewis*, 110 Mass. 377; *Hill v. Hill*, 118 Mass. 103. Comp. *Morse v. Copeland*, 2 Gray, 302.

a. The plaintiffs, as trustees of Clarke "and others," represent the estate, and not Clarke personally.

Pope v. Devereux, 5 Gray, 409.

And the deed of Clarke carried with it to them "the title to everything which is part of the realty or annexed to the freehold" (*Drake v. Wells*, 11 Allen, 141); and revoked all licenses affecting the estate (*Cook v. Stearns*, 11 Mass. 583, 588; *Drake v. Wells*, *supra*; *Hill v. Hill*, 118 Mass. 103; *Wallis v. Harrison*, 4 M. & W. 588).

b. Thus, it has been held that a parol or a written agreement made on good consideration to waive flowage damage caused by a dam on another's land, though it would bind the then owner of land flowed as a waiver of his own claim for damages (*Seymour v. Carter*, 2 Met. 520; *Smith v. Goulding*, 6 Cush. 154), cannot bind the land or the grantee of the original promisor (*Fitch v. Seymour*, 9 Met. 462; *Craig v. Lewis*, 110 Mass. 377; *Cobb v. Fisher*, 121 Mass. 169; *Snow v. Moses*, 53 Me. 546).

c. It may be taken, "as a general principle of law, that if one gives another a parol license to flow his land by a dam to be built on licensee's land, * * * such license is revocable."

Washb. Easem. 4th ed. p. 440. See Brown, Fr. 4th ed. § 27 a, *et seq.*; Gould, Waters, § 333; *Olmead v. Camp*, 38 Conn. 552, 552.

The facts which the defendant offered to prove were inadmissible under an answer of general denial merely.

They amounted at most to a license to do the very thing now complained of.

a. Before the Practice Act, as since, a defendant was required to plead a license specially.

Ruggles v. Leure, 24 Pick. 187.

Thus, in an action of trespass, the defendant cannot rely upon authority from a third person, without specially setting up such justification in his answer (*Snow v. Chatfield*, 11 Gray, 12; *Ward v. Bartlett*, 12 Allen, 419; *Mann v. Tuck*, 12 Allen, 420, note); nor on a license from the plaintiff himself (*Hollenbeck v. Rowley*, 8 Allen, 478; *Levi v. Brooks*, 121 Mass. 501, 506).

See *Hulet v. Stratton*, 5 Cush. 539; *Knapp v. Slocumb*, 9 Gray, 78; *Merrick v. Plumbley*, 90 Mass. 566; *Hildreth v. Lovell*, 11 Gray, 345.

b. The Massachusetts Practice Act abolished the general issue (Pub. Stat. chap. 167, § 15), and provided (Pub. Stat. chap. 167, § 20) that "the answer shall set forth in clear and precise terms each substantive fact intended to be relied upon in avoidance of the action."

The object of these provisions was to give the plaintiff "full notice of the specific grounds on which the defense is to be placed," and thus prevent surprise.

See *Ward v. Bartlett*, 12 Allen, 419.

c. Under present practice, therefore, many defenses which were admissible under the general issue at common law must now be specially set forth in the answer.

Cases *supra*, under (a); *Mulry v. Mohawk Valley Ins. Co.* 5 Gray, 541; *Granger v. Ilisley*, 2 Gray, 521; *Cushman v. Davis*, 8 Allen, 99; *Reed v. Scituate*, 7 Allen, 141; *Bullock v. Hayward*, 10 Allen, 460, 462.

W. Allen, J., delivered the opinion of the court:

It must be taken, from the terms of the exceptions, that the plaintiffs' land was injured by water set back upon it in consequence of the obstruction by the defendant, upon his land, of an ancient watercourse which flowed from the plaintiffs' land through the defendant's land. The declaration describes the watercourse as an ancient rivulet or stream, which had existed beyond the memory of man. The exceptions state that the action was for damages for the obstruction of an ancient watercourse, and that the evidence showed that "a ditch, with defined banks and bed, and of varying width, had, for more than twenty years, run across the land" of the parties.

No question is suggested in the exceptions as to the nature of the plaintiffs' right, and it must be taken that it was not a mere easement derived by grant from the owner of the defendant's land, but the right to have the water flow from his land in a natural watercourse. The obstruction complained of was the filling up of the ditch, or watercourse, except so much of it as was occupied by a pipe for conducting water. The obstruction was made when Clarke was the owner of the plaintiffs' land, and has been continued since. The plaintiffs' title is from Clarke in trust for himself and others. The declarations and admissions of Clarke, made after his deed to the plaintiffs, are not made competent by the fact that he is one of several *cestuis que trust*. *Pope v. Devereux*, 5 Gray, 409.

Besides, the acts of Clarke, which they were offered to prove, were not competent; and the remaining exception, which is to the rejection of evidence offered to prove such acts, cannot be sustained. So far as such acts tend to prove a license, whether by Clarke or by the plaintiffs, they are not competent, because a license is not set up in the answer. Pub. Stat. chap. 167, § 20; *Hollenbeck v. Rowley*, 8 Allen, 478; *Ward v. Bartlett*, 12 Allen, 419.

If the defense of a right by grant or prescription to flow the plaintiffs' land is open under an answer of general denial, the evidence offered was not competent to prove it. It is a right to an easement in the plaintiffs' land which can be shown only by grant or prescription. The evidence was not competent to prove either. *Cobb v. Ficker*, 121 Mass. 169; *Craig v. Lewis*, 110 Mass. 377; *Fitch v. Seymour*, 9 Met. 462; *Morse v. Copeland*, 2 Gray, 302; *Stevens v. Stevens*, 11 Met. 251.

Exceptions overruled.

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John H. BRADFORD *et al.*, Trustees,
v.

Rebecca M. BRINLEY *et al.*

By the first article of his will testator gave to his wife, during life, the use and income of all his property, except as otherwise provided in the subsequent articles thereof. The third article was substantially as follows: "Whereas, by the terms of my father's will, certain property * * * is bequeathed and devised to be held in trust or otherwise for the benefit of my mother, during her lifetime, and one half of the same or of the proceeds thereof may be disposed of by me, subject to her interest therein, * * * I do therefore order, direct, and appoint that, if my said wife is living at the time of my mother's death, she shall have the use * * * of that part of said property which is thus liable to be disposed of by me, or of the income thereof * * * until the eldest of my children who survives me attains his majority. When that event happens, if she is still living, my executors are directed to set apart out of the said property a fund for the benefit of my said child * * * to the amount or value of \$100,000. When my second child who survives me attains his or her majority, my said executors are directed to set apart for his or her benefit a similar fund of \$100,000; and so on in succession as each child attains his or her majority, until a fund of the amount or value of \$100,000 has been set apart for each of my children who attains majority. My said wife shall continue to have the use * * * of the remainder of the property, as the case may be, as each successive fund is set apart (and of the remainder after all the funds are set apart), during her lifetime as aforesaid." The testator's wife survived him and his mother, as did also his three children, who attained their majority. The testator before making his will had conveyed away a portion of the property referred to as having been devised by his father in trust for his mother, etc., and the fund arising from the portion of such property remaining did not amount to enough to pay each of testator's three children \$100,000. *Held*, that it was apparent that the testator did not rely alone on the property mentioned as devised by his father, for the satisfaction of the said legacies of \$100,000 each to his children; that said legacies were therefore **demonstrative and not specific**; and that, as article 1 of the will is in the nature of a residuary clause, and the gift to the testator's widow is subject to the provisions of the other articles, the said legacies to each of the children **must be paid in full**.

(Suffolk—Filed September 22, 1887.)

BILL in equity for the construction of a will and instructions to testamentary trustees,

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heard in the Supreme Court, before Holmes, J., and reserved for the full court.

The bill alleged that Samuel Dexter Bradford, late of Newport, R. I., died on January 12, 1873, leaving a will under which the plaintiffs are trustees.

By article 1 of said will, the testator, except as otherwise provided in the subsequent articles thereof, gave to his wife, Rebecca, one of the defendants, the use, benefit, and enjoyment, during life, of all property of every name and nature of which the testator should die seised, possessed, or entitled to, at law or in equity, or of which he could, by his father's will, or by any instrument, dispose of, or direct the use or other disposition of, by his last will or otherwise; and directed and appointed that said Rebecca receive and enjoy during her life the income of all property devised and bequeathed by his father's will for the benefit of himself, his family, or any other person, whereof he, by his father's will or any instrument, could dispose or direct the use, ownership, or other disposition of the income, not included in the foregoing gift to her of a life estate or interest therein; and, in case any subsequent gift or direction in the will should fail, he gave the use or income of all property in respect to which the gift or direction should so fail, to his said wife for life.

By article 2 and the codicil to his will he gave to his wife, in fee and absolutely, his dwelling-house, and all adjacent land at Newport, R. I., and all his personal property, and all debts, demands, and securities, and rights belonging to him, except those held in trust under the will of his father.

By article 3, the testator, in case his wife, said Rebecca, should be living at the death of his mother, gave to her the use and enjoyment of all property, including the homestead at West Roxbury, Mass., by his father's will given in trust or otherwise for the benefit of his mother for life, and which the testator has the disposal of, or the income only thereof, until the testator's oldest child should attain its majority, at which time his executors are required to set apart out of said property, for the benefit of such child, a fund of \$100,000. And when his second child should attain his or her majority, his executors are directed to set apart for his or her benefit a similar sum of \$100,000; and so on in succession as each child attains his or her majority, until a fund of the same amount has been set apart for each of his children, his wife to continue to enjoy, during life, the remainder of the property or its income, after such funds are successively set apart. Also providing that, at any time after his mother's death, his said wife may give to any one of his children, or its issue, absolutely and indefeasibly, any part of the capital mentioned in said article 3 or article 1 of the will, except such portion thereof as may have been set aside to constitute any fund mentioned in said article 3, or which it should be necessary to retain to constitute such fund; and that every division subsequently provided for in the will should be without reference to such gift.

Article 4 provides for the disposition of the remainder of the testator's estate after the death of his wife, which has not yet occurred, and gives all property named in the will, except

that given by article 2, to the executors of the will, in trust for the purposes thereof.

Article 5 gives specific directions as to the funds to be set apart under article 4.

Article 6 defines the words "issue" and "surviving issue" as used in the will.

The remaining articles and the codicil to the will are not material to the decision in the case.

Mrs. Julia E. Bradford, the mother of the testator, died August 15, 1866, and the three defendants, children of the testator, are all the children he ever had, and are all over twenty-one years of age. All property received and held by the plaintiffs as trustees under the testator's will, is personal property, and amounts only to the sum of \$389,101.48; and all property held by them under article 3 of the will amounts to the sum of \$125,000, and no more, and constitutes a part of the above-named sum of \$389,101.48. The real estate in West Roxbury, mentioned and referred to in article 3 of the will, was conveyed by the testator in fee to his mother, Julia Emma Bradford, long prior to the date of said will and codicil, and the real estate mentioned and referred in article 2 of the will, situate at Newport, R. I., was conveyed by the testator, long prior to the date of the will, to Arthur W. Austin, in trust for the creditors of said testator, and for other purposes.

The bill then sets forth that conflicting claims are made upon the plaintiffs respecting the legacies given to the several children of the testator under article 3 of the will, upon attaining the age of twenty-one years, and the death of the testator's mother; each of the defendants, Mary Josephine Kissel, Samuel Dexter Bradford, and Julia Emma Bradford, children of the testator, and Godfrey Kissel, husband of the said Mary Josephine, claiming and insisting that, notwithstanding the funds held by the plaintiffs as trustees under article 3 of the will amount to but \$125,000, they should each have forthwith set out for them separately, to be held under the provisions of the will, a fund of \$100,000, to be made up from said fund of \$125,000 under article 3 of the will, and so much as may be necessary from the remainder of the trust estate held by the plaintiffs, and in which the defendant, Rebecca M. Brinley, and her husband, Edward H. Brinley, claim that she has a life estate in, or the income of; while the mother, the said defendant Rebecca M. Brinley, and her husband, Edward H. Brinley, both claim and insist that, under said article 3, each of the defendants, children of the testator,—said Mary Josephine Kissel, Samuel Dexter Bradford, and Julia Emma Bradford,—should now have put and held in trust for them, for the purposes of the will, but one third of \$125,000, and that the said Rebecca M. shall be paid the income of, or have a life estate in, all trust property held under the will, except the said fund of \$125,000, so long as she lives; and other conflicting claims are made on them by said defendants.

The prayer of the bill was that the defendants might interplead and set forth their respective claims and interests in the premises, and that the same might be adjudicated; and that the plaintiffs might have the directions and instructions of the court therein, and in the performance of the trusts under the will.

The answer of the defendants Samuel D. Bradford, Mary J. Kissel and Godfrey Kissel, and Julia E. Bradford alleged the following facts, which were admitted to be true: That the sum of \$389,101.43 is derived solely from the moiety of the residuary estate of the testator's father, Samuel D. Bradford, which was devised under his will to trustees to pay half of such part over absolutely to the present testator when his brother, the plaintiff John H. Bradford, should attain the age of twenty-one, and to hold the other half of such part during the life of such testator, and pay over the income only of such half of such part to such testator during his life, and at his decease to pay over the principal of such half of such part remaining to such persons as the testator should by last will appoint, and, in default of such appointment, to his children, these defendants, share and share alike; and they allege that the first half of such part, which was so directed by the will of Samuel D. Bradford to be paid to the testator absolutely, has in fact been so paid and delivered over absolutely and free of trust to the testator during his lifetime, or to his widow, the defendant Rebecca M. Brinley, since his decease; and that such sum of \$389,101.43 referred to in the bill was derived solely from such latter half of the moiety of the residuary estate of said Samuel D. Bradford, which was left to the trustees to hold and pay the income only to the testator during his life. But they deny that all property held by the plaintiffs as trustees under article 3 of the will amounts to the sum of \$125,000, and no more; but claim that the whole fund of \$389,101.43, now in their hands, is subject to the trust declared by article 3, as well as to the other trusts of said will. They also admit that the West Roxbury real estate was conveyed by the testator in fee to his mother, Julia Emma Bradford, long prior to the date of said will; and of the other real estate, situate at Newport, they have no knowledge.

In order to a proper understanding of the circumstances under which the testator's will was made, the defendants further alleged that much the greater part of the estate absolutely owned by the testator, and all over which he had a power to devise, consisted of his interest under the will and codicil of his father, Samuel D. Bradford, of West Roxbury, who died on or about the month of December, 1865, leaving estate inventoried at \$1,595,334.51; which will and codicil was duly probated on January 13, 1866. Under the provisions of said will and codicil, after the payment of certain legacies, amounting in all to about \$118,000, and making a specific devise of the West Roxbury homestead to said testator's widow, Julia Emma Bradford, for life, with remainder to his sons, John H. Bradford and Samuel D. Bradford, Jr., the testator, — which remainder was afterwards conveyed to said Julia Emma Bradford, by said sons, — a fund of \$300,000 was given to the trustees of such will for the benefit of such testator's widow, Julia Emma Bradford, during her life: \$50,000 of which fund said widow was given power to devise, and the remaining \$250,000 was, upon her death, to be reincorporated in the residuary estate of such testator, and disposed of as before set forth. Said testator's widow, Julia Emma Bradford of West Rox-

bury, died in August, 1886, at the age of seventy-six, having in her will, which was duly probated, on September 18, 1886, made testamentary disposition, under her power, of the \$50,000 above referred to; whereupon the remaining \$250,000 of the fund, under said testator's will, became part of his residuary estate, to be disposed of as before set forth. And the defendants allege that half of this fund is the sum of \$125,000 referred to in the bill; and they admit that this sum composes all that has been received by the plaintiffs as trustees from that part of said testator's estate which was devised to said testator's widow, Julia Emma Bradford, of West Roxbury, for life, and is referred to in the first part of article 3 of the present testator's will; but they deny that said fund of \$125,000 comprises all the funds held by the plaintiffs as trustees under article 3 of the will of said S. D. Bradford, the younger, as alleged in the bill, but allege that the whole provisions of such article 3 of the will legally apply to the whole fund of \$389,101.43 now held by the plaintiffs as trustees under said will; and for a proper determination of this point they refer to the provisions of said will, and pray the judgment of the court.

The defendants further aver that the testator's estate, real and personal, of whatsoever nature, which he owned at the time of his decease, has been duly paid and delivered over to the defendant, Rebecca M. Brinley, in accordance with the second clause of his will; and that all the remainder of that portion of the estate of his father in which the testator had an absolute title, has also been duly paid over and delivered to such defendant, Rebecca M. Brinley, as before set forth; and that all the income of such other half of the moiety of the residuary estate of the testator's father as was devised to the testator for life, and disposed of by the testator under his testamentary power, has, from the time of his decease, been paid to such defendant Rebecca M. Brinley, according to the first clause of said will, amounting to large sums, to wit, the sum of \$156,278.89, since January 1, 1876, and other large sums prior to that date, the exact amounts of which are unknown to these defendants, as appears by the probate accounts of the executors, administrators, and trustees of the testator's father's estate; and that all the debts and pecuniary legacies of such testator are paid; and that ample funds, to wit, the sum of \$389,101.43, referred to in the bill, remain in the hands of the plaintiffs, as such trustees, to enable such trustees to set aside the three legacies of \$100,000 each, the income of which is due to the said defendants for life, and still leave a considerable balance, of which the income is to continue to be paid, under articles 1 and 3 of said will, to the defendant Rebecca M. Brinley.

And these defendants claim that, by the true intent and meaning of said will, all the estate, of whatever nature, of which the testator was absolutely possessed was to be paid and delivered over to the defendant Rebecca M. Brinley as her absolute property, which has been done as hereinbefore alleged, and that the income of all that half of the moiety of the estate coming to the testator under the will of his said father, which was to be held in trust for said testator during his lifetime, was, under clauses 1 and 3

of his said will, to be paid to his widow, the defendant, Rebecca M. Brinley, until his eldest child should attain the age of twenty-one, which has been done; and that thereupon a fund of \$100,000 was to be set apart for the benefit of such child, and the income thereof paid to such child during his or her natural life, and the principal, upon such child's decease, to his or her issue, or as such child might by will direct; and that similar funds were to be set apart for each such child upon his or her attaining majority, and the income of the rest and remainder, after each of such funds were successively set apart, and after all such funds were set apart, was to be paid to the defendant Rebecca M. Brinley for her life, as before; and that said legacies were all successively chargeable, primarily, upon the testator's share of that part of his said father's estate which was set apart for the benefit of his said mother, Julia Emma Bradford, now deceased; and that the testator's share of such fund only amounted to \$150,000 at the time of his decease and of the execution of the will, or to \$125,000, if his mother, Julia Emma Bradford, were to exercise her testamentary power of disposition, as said testator well knew. And therefore said defendants claim that, after such fund of \$125,000 was exhausted, each of their several legacies of \$100,000 became chargeable successively for their full amount, or for the balance due on each, upon the general estate of said testator remaining in the hands of the trustees under his will.

Articles 3, 4, and 5 of the will of Samuel D. Bradford are as follows:

"Art. 3. Whereas, by the terms of my father's will, certain property, real and personal, including his homestead at West Roxbury, Massachusetts, is bequeathed and devised to be held in trust, or otherwise, for the benefit of my mother during her lifetime, and one half of the same, or of the proceeds thereof, may be disposed of by me, subject to her interest therein or the trusts for her benefit, I do therefore order, direct, and appoint that, if my said wife is living at the time of my mother's death, she shall have the use, benefit, and enjoyment of that part of said property which is thus liable to be disposed of by me, or of the income thereof, if my power extends no further than to dispose of the income, till the eldest of my children who survives me attains his majority. When that event happens, if she is still living, my executors are directed to set apart out of the said property a fund for the benefit of said child, consisting of money or securities, or partly of money and partly of securities, to the amount or value of \$100,000. When my second child who survives me attains his or her majority my said executors are directed to set apart, for his or her benefit, a similar fund of \$100,000; and so on in succession as each child attains his or her majority, until a fund of the amount or value of \$100,000 has been set apart for each of my children who attains majority. My said wife shall continue to have the use, benefit, and enjoyment of the remainder of the property, or of the income of such remainder, as the case may be, as each successive fund is set apart (and of the remainder, after all the funds are set apart), during her lifetime, as aforesaid. And I order, direct, and appoint that at any time after my

mother's death my said wife may give to any of my children, or to any issue of such child, absolutely and indefeasibly, any part of the capital of the property mentioned in this or in the first article of this will, except such portion thereof as may have been set apart to constitute any of the funds mentioned in this article, or which it is necessary to retain in order to constitute all of said funds. And every division to be afterwards made, as hereinafter provided, shall be made without reference to such gift; the residue only being divided.

"Art. 4. Immediately after the death of my said wife, my surviving executors are directed to divide all the estate and property mentioned in any part of this will, except that mentioned in the second article thereof, into as many shares as I shall leave children me surviving who have also survived till their mother's death, or who have died and left issue surviving at that time. If my mother dies before my wife, any of the funds which have been set apart, as provided in the third article of this will, shall be accounted a part of the share to which the child, or the issue of the child, for whom it was set apart, would be entitled at my wife's death; but it shall not again be divided as part of the estate mentioned in this article. If, on the other hand, my wife dies before my mother, the division provided for in this article shall be made without reference to the property bequeathed and devised by my father for my mother's benefit, as stated in the foregoing third article; and after my mother's death that portion of said property which is subject to my disposition, as therein stated, shall be divided into as many shares as I shall leave children me surviving, who have also survived till their grandmother's death, or who have died and left issue surviving at that time. And in order to enable them the better to make the division or divisions herein provided for, and to discharge their powers and duties under this will, I hereby bequeath and devise to said executors, and the survivor or survivors of them, in trust for the purposes herein mentioned, all the property mentioned in this will, except in the second article thereof, subject to the life estates and interests of my said wife and mother, respectively.

"Art. 5. Every fund or share to be created or set apart as hereinbefore provided for shall be equal in value or amount, in executors' judgment, to every other fund or share to be created or set apart at the same time. Every fund or share created or set apart for the benefit of the issue of a deceased child shall be immediately paid, delivered, or transferred to such issue. Every fund or share created or set apart for the benefit of a child who is then living shall be held and managed by executors, during the lifetime of that child, in trust to invest and reinvest the same, and to pay over the clear income thereof, deducting expenses, to that child, as the same accrues, and not otherwise, the anticipation of any such income being hereby expressly prohibited. At his or her death, leaving surviving issue, such issue shall take absolutely the capital and unexpended income of such fund or share. But if such child leaves no surviving issue, he or she may dispose of the capital and unexpended income by a last will and testament, but not otherwise. In default

of any such disposition, such capital and unexpended income, or the part thereof not disposed of, shall be equally divided between my other children then surviving and the surviving issue of those who may be dead; such issue to take the share to which the parent would have been entitled if living."

Extracts from the will of Samuel D. Bradford of West Roxbury, probated Norfolk Co., Jan. 18, 1866:

"Item. After the decease of my wife, I give and bequeath my dwelling-house at West Roxbury, the garden, farm, and out-buildings, to my two sons, Samuel D. Bradford, Jr., and John Henry Bradford, to be held by them, their heirs and assigns forever.

"Item. I give and bequeath the sum of \$300,000 to the trustees hereinafter appointed, to be held by them in trust for the following uses, purposes, trusts, and limitations, and for no other, viz.: to pay over the income of the same as it may accrue to my dear wife, during her natural life; and at her decease to pay over to such person or persons as she shall by her last will and testament direct, \$50,000 of the principal of the said sum; and the residue of the said principal sum to pay into the residuary fund of my estate hereinafter provided for.

"Item. All the rest and residue of my property and estate, of whatsoever kind and where-soever situated, real, personal, and mixed, of which I shall die seised or possessed, or to which I shall be entitled at the time of my decease, or which may, by any means or cause whatsoever, be added to my estate or come to my heirs or legatees through me, in my right, I give and bequeath to the trustees hereinafter appointed, to be held by them in trust for the following uses, purposes, trusts, and limitations, and no other, viz.: to pay such sums as they shall deem fit and proper for the support and education of my second son, John Henry Bradford, during his legal infancy, and when said son shall attain the age of twenty-one years, then to divide the said property and estate mentioned in this item of my will into two equal parts or portions, in such way and manner as they shall deem just and equitable; one of such parts to be for the benefit of each of my sons, Samuel Dexter Bradford, Jr., and John Henry Bradford, and their heirs, and to be paid to them by the said trustees in the following manner, to wit: the part or portion of each of my said sons shall be divided into two equal parts; and one part or moiety be paid to him by the said trustees to be held by him, his heirs and assigns, forever; and the other part or moiety shall be held by the said trustees, and the income and interest thereof, as it may accrue, be paid over to him, or his wife or family, if he have any, as the said trustees shall deem proper and expedient, during his natural life, and, at his decease, the last-mentioned part or moiety to be paid over to such person or persons and under such limitations, regulations, and conditions as he shall by his last will and testament direct and appoint, if he shall leave such an instrument; and if he shall not leave a last will and testament, then to be paid to his children, if he leaves any, in equal proportions, share and share alike. In case either of my sons shall decease leaving no issue, and having made no testamentary disposition as aforesaid, 2 MASS.

then I direct the said trustees to transfer all the funds in their hands belonging to the deceased son to the surviving son, to be paid over to him, his wife, family, legatees, or heirs, in the same way and under the same conditions as are heretofore provided for in regard to his own share of my estate. In case both of my sons shall decease neither of them leaving any issue nor having made any testamentary disposition as aforesaid," etc.

Mr. Horatio G. Parker, for defendants Brinley:

Our position is that the gift in article 3 of the will is specific, not demonstrative.

Throughout the will there is no absolute gift of \$100,000; and no intention to make any absolute gift of \$100,000 is found.

Such gift and intention are necessary to constitute a demonstrative legacy.

Jarman defines a demonstrative legacy to be a legacy "where there is a separate and independent gift of a legacy, and then a particular fund or estate pointed out as that which is to be primarily liable."

3 Jarman. Wills, Randolph & T.'s ed. 523.

If there is an independent gift of money, followed by a direction to pay it out of certain moneys, the legacy is demonstrative.

Roberts v. Pocock, 4 Ves. 150; *Acton v. Acton*, 1 Mer. 178; *Walls v. Stewart*, 16 Pa. 275.

In *Creed v. Creed*, 11 Cl. & F. 491, Lord Cottingham says: "There are many cases in which, though a legacy be charged upon a particular fund, it does not fail by a failure of the fund; which are called demonstrative legacies. But these all proceed on the construction showing a general intent to have the legacies paid without reference to the fund."

2 Redf. Wills, 464, 465, § 12.

A gift of a part of a specific fund is specific. *Ford v. Fleming*, 1 Eq. Cas. Abr. 802, § 3; 2 P. Wms. 469; *Nelson v. Carter*, 5 Sim. 580; *Oliver v. Oliver*, L. R. 11 Eq. 506.

In the recent case of *Stevens v. Fisher*, 2 Mass. L. ed. 263 (3 New Eng. Rep. 808), 144 Mass. 127, *Mr. Justice Devens* says: "Where, even if a legacy is charged upon a particular fund, it appears by the will that it is not to fail by reason of any failure of the fund, or its inadequacy for the purpose, the legacy is held to be demonstrative. That a legacy which is thus charged should be demonstrative, there should appear a fixed separate intent to give the money or legacy independently of the fund."

Where the gift is of the fund itself, or the intention is clear to burden the fund in whole or in part with the payment of the legacy, the legacy is specific.

Malone v. Mooring, 40 Miss. 247; 2 Wms. Exrs. 1048, note 1; *Chaworth v. Beech*, 4 Ves. Jr. 555; *Luddam's Estate*, 18 Pa. 188; *Mullins v. Smith*, 1 Drewry & S. 204, 210; *Walls v. Stewart*, 16 Pa. 275, 284.

The provisions of article 3 of the will, relating to setting apart a fund of \$100,000 for the benefit of each surviving child and the surviving issue of each deceased child of the testator, and the gift in trust to the executors in article 4 of the will, constitute a trust, and only in the words declaring the trust can any gift be found in the will. Such a gift is not a demonstrative, but is a specific, legacy.

Spurway v. Glynn, 9 Ves. Jr. 488, cited in

Jarm. Wills, 2d Am. ed. p. 424, marg. 594; *Gittins v. Steele*, 1 Swanst. 24; *Dietrin v. Edwards*, 4 Hare, 273.

Specific legacies fail if the testator has not or never had the property specifically devised.

2 Redf. Wills, p. 460, § 4; *Walton v. Walton*, 7 Johns. Ch. 264.

If these legacies are declared to be demonstrative legacies, they can only be preferred to the amount of \$125,000. As to any deficiencies after exhausting the \$125,000, they must be satisfied *pro rata* with the general legacy to Mrs. Brinley.

Sellon v. Watts, 7 Jur. N. S. Dig. 134; *Same v. Same*, 9 W. R. 847; *Welby v. Rockcliffe*, 1 Russ. & M. 571; *Florence v. Sands*, 4 Redf. N. Y. Sur. 206.

It is a general rule that provisions in a will intended for the support of the wife, will receive the most favorable construction to accomplish the purpose intended.

Thurber v. Chambers, 66 N. Y. 42, 48; *Stimson v. Vroman*, 99 N. Y. 74, 79, 80.

Mr. F. J. Stimson, for defendants Samuel D. Bradford, Julia E. Bradford, Mary Josephine and Godfrey Kissel:

A demonstrative legacy is a pecuniary legacy payable out of or from, or charged on, or existing in, a specified estate, fund, securities, debts, or other property. It is like a combination of a general with a specific legacy. Like the latter, it takes precedence of other general legacies as to the property demonstrated; but it is not liable to ademption, like purely specific legacies, but becomes a general legacy as to any balance not satisfied from the property demonstrated.

O'Hara, Wills (bound with Wigram), pp. 330-336, 338; Lowndes, Legacies, chap. 3, p. 85; Preston, Legacies, pp. *55, 57; 2 Wms. Exrs. pp. *1159, 1160; 6th Am. ed. p. 1252, notes *f, g, h*; pp. *1162, 1166, 1168; 1 McLaren, Wills, p. 387, § 748, note i. See also cases *infra*.

That this law is familiar and universal, see the law dictionaries:

Wharton, Bouvier, subtitle *Demonstrative*; Sweet, subtitle *Legacy*.

That it is equally familiar in New York and Rhode Island, the State of the testator's domicile, see—

Bowen v. Dorrance, 12 R. I. 269; *Pearce v. Billings*, 10 R. I. 102; Rapalje & L. Dict. subtitle *Legacy*; *Giddings v. Seward*, 16 N. Y. 365; Abb. N. Y. Ann. Dig. 1884, p. 200, § 10; *Florence v. Sands*, 4 Redf. 210; *Doughty v. Stillwell*, 1 Bradf. 305; Livermore, Trustees' Hand book, § 36.

The directions in the third clause constitute, not specific, but demonstrative, legacies.

Atty-Gen. v. Parkin, 2 Amb. 566; *Attwater v. Attwater*, 18 Beav. 330; *Bessant v. Noble*, 2 Jur. N. S. 461; *Becan v. Atty-Gen.* 4 Gifford, 367; *Bowen v. Dorrance*, 12 R. I. 269; *Boys v. Williams*, 2 Russ. & M. 689; *Coleman v. Coleman*, 2 Ves. Jr. 639; *Colville v. Middleton*, 3 Beav. 570; *Constantine v. Constantine*, 6 Ves. 101; *Cunliffe v. Cunliffe*, 23 W. R. 724; *Ellis v. Walker*, Amb. 309; *Ford v. Fleming*, 2 P. Wms. 469; *Fowler v. Willoughby*, 2 Sim. & Stu. 354; *Giddings v. Seward*, *supra*; *Hodges v. Grant*, 15 W. R. 607; *Johnson v. Goes*, 128 Mass. 438; *Jones v. Southall*, 82 Beav. 43;

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Kirby v. Potter, 4 Ves. 748; *Le Grice v. Finch*, 8 Meriv. 50; *Mytton v. Mytton*, 44 L. J. Ch. N. S. 18; *Page v. Hurst*, 9 Jur. N. S. 906; *Pawlet's Case*, Sir T. Raym. 335; *Peterborough v. Mortlock*, 1 Bro. C. C. 565; *Phillips v. Gutteridge*, 32 L. J. Ch. 1; *Purss v. Snaplin*, 1 Atk. 414; *Reilly v. Stone*, 16 Ir. Ch. 297; *Roberts v. Pocock*, 4 Ves. 150; *Savile v. Blacket*, 1 P. Wms. 779; *Smith v. Fellows*, 131 Mass. 20; *Smith v. Fitzgerald*, 3 Ves. & B. 2; *Sparrow v. Josselyn*, 16 Beav. 135; *Vickers v. Pound*, 6 H. L. C. 885; *Warren v. Gregg*, 116 Mass. 304.

It is the fact, not the form of expression, that the courts regard in determining whether legacies are specific or demonstrative. Where a pecuniary legacy is coupled with a reference to, or a bequest of, a particular fund, that makes a demonstrative legacy: and it is immaterial whether the legacy is charged on the property or fund; whether the fund or property is named, described, or devised first, and then the legacy out of it, as in the case at bar; whether the legacy is first given, but "out of" or "from" a particular fund or property or its income or proceeds (see *Deane v. Test*, 9 Ves. Jr. 146); or whether the legacy be of so much money, or even such an amount of stock, "in" or "of" a fund.

See, in addition to cases cited, *Gillaume v. Adderley*, 15 Ves. 383; *Partridge v. Partridge*, Cas. t. Talb. 227.

Nor does the fact that the legacy in question is preceded or followed by a specific devise of the demonstrated property or fund, prevent its being not a specific, but a demonstrative, legacy. The established tests of a demonstrative legacy which have steadily maintained themselves and are material, are that, though charged upon or made payable out of a designated fund or property, or even though described as so many in such fund, the legacy is expressed as giving a sum of money.

Cases *supra*; *Anther v. Anther*, 13 Sim. 422; Lowndes, Legacies, 85; O'Hara, Wills, 332; 1 McLaren, 387; Preston, Legacies, *55; 2 Wms. Exrs. 1166. And see this distinction exactly shown by two cases, one on each side the line, in 4 Abb. N. Y. Dig. p. 215, § 96.

Thus, it will only be a specific legacy when the particular thing, debt, property, or a part of it, not a money amount, is bequeathed, as in *Foot v. Worthington*, 22 Pick. 302, 303; *Richardson v. Hall*, 124 Mass. 239; *Bradlee v. Andrews*, 137 Mass. 57; *Metcalfe v. First Parish in Farmington*, 123 Mass. 370; *Doughty v. Stillwell*, 1 Bradf. 306; or in cases where this rule is expressly controverted by the words of the will, or by other parts of the will, as in *Ellis v. Walker*, *supra*; *Nudd v. Powers*, 136 Mass. 273; *Boston Safe D. & T. Co. v. Plummer*, 1 Mass. 709 (2 New Eng. Rep. 813), 142 Mass. 268; *White v. Winchester*, 6 Pick. 56.

So, where a conversion of the specified property is permitted to, or required to, be made by the executors or trustees, in order to pay the legacies, they are demonstrative.

O'Hara, Wills, 332; 4 Abb. N. Y. Dig. 215, § 95.

And the last and most certain test of a demonstrative legacy is the very fact that the fund or property demonstrated was not, at the time of making the will, sufficient to pay it.

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Fontaine v. Tyler, 9 Price, 104; *Selwood v. Midway*, 8 Ves. 310.

That evidence of the condition of the testator's estate, at the time of making the will, is admissible to determine whether the legacy is demonstrative or specific, see *Fonnereau v. Poyntz*, 1 Bro. C. C. *472; *Wms. Exrs.* *1168; *Boys v. Williams*, 2 Russ. & M. 689; *Peterborough v. Mortlock*, 1 Bro. C. C. 565.

The context of the testator's will does not forbid, but rather supports, the legacies to his children as being demonstrative.

Mr. Edward L. Rand, for persons not known, and not in being:

The sole question to be determined in this case is, Are the legacies mentioned in art. 3 of the will to the three defendants, children of the testator, specific or demonstrative legacies? Whether a legacy is specific or demonstrative is purely a question of the testator's intent as expressed in his will: i. e., whether the testator intended to restrict the claim of the legatee to the whole or to a portion of certain funds. If this is so, the legacy is specific.

Dickin v. Edwards, 4 Hare, 273.

It is submitted that the language of the will in the case at bar shows "no intention that the money shall be paid to the legatees at all events;" but, on the contrary, the intention plainly appears that one particular fund, and that fund alone, is provided for the payment of these legacies. If this is true, the legacies are specific; and, on the failure of the fund appropriated to pay them, the deficiency cannot be paid out of the general estate.

2 Redf. Wills, § 49.

There is no general direction to pay legacies, anywhere in the provisions of the will.

It is submitted that the intention of the testator is clear on the face of the will to provide, in the first place, for his wife; in the second place, for his children. The cases on this subject of specific and demonstrative legacies are extremely numerous, and the decisions are not always easy to reconcile. It has been well said that, "in questions relating to the construction of wills, the mind is often perplexed and misled, rather than instructed, by a multiplicity of cases, especially when the question is as to the intention of the testator."

White v. Winchester, 6 Pick. 47.

Where a fixed fund is provided for the payment of legacies, the legacies are not demonstrative.

Bliss v. American Bible Soc. 2 Allen, 334; *Maybury v. Grady*, 67 Ala. 147; *S. C. Am. Prob. Rep.* 375.

It is submitted that in the case at bar the fund provided in art. 3 is absolutely fixed.

Williams v. Hughes, 24 Beav. 474.

Anything in the will showing that the testator had reference to a particular estate renders a legacy specific.

Measure v. Carleton, 30 Beav. 588.

Where a trust is created to raise and pay a sum of money, the only gift being in the direction to pay, the legacy is specific.

Dickin v. Edwards, 4 Hare, 273; *Spurway v. Glynn*, 9 Ves. Jr. 488; *Gittins v. Steele*, 1 Swanst. 24; *Welby v. Rockcliffe*, 1 Russ. & M. 571; 2 Perry, Tr. § 571 and cases cited.

There is no such general reference to pay—
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ment of legacies in the case at bar, as is contained in *Hodges v. Grant*, 4 Eq. 140.

The case at bar is analogous to the case of a devise of land charged with a pecuniary legacy. Here, unless the testator overrides his direction by other language or references in his will, the legacy is specific.

Walls v. Stewart, 16 Pa. 275, and cases cited; *Low v. Ashton*, 28 Beav. 379; 2 Perry, Tr. § 571, and cases cited.

It is therefore submitted that any or all of the legatees are not entitled to regard said fund as a demonstrative fund as far as it extends, and then receive the balance of their legacies out of the general fund given in trust for Mrs. Brinley, as held in *Sellon v. Watts*, 7 Jur. N. S. 1841. That the fund is insufficient to meet these legacies is the misfortune of the legatees, and the court cannot aid them.

Gittins v. Steele, 1 Swanst. 24.

If, then, the fund provided in art. 3 is insufficient to pay these legatees in full, they must await the ample provision made for them after the life estate of their mother has terminated.

Holmes, J., delivered the opinion of the court:

It may be conjectured with some plausibility that what the testator really had in mind in the third article of his will was the whole trust of one quarter of the residue under his father's will, as a fund which would be sufficient to give all the children their legacies, even on the view that the legacies to them were specific. But, in the opinion of the majority, the description of the fund is so definite as to exclude this construction, which could be reached only by a somewhat violent transposition of language which is plain as it stands.

The case between the widow and children, therefore, must depend upon the question whether the legacies to the children are specific or demonstrative.

We must assume that the testator remembered that before the date of the will he had conveyed away the West Roxbury homestead, mentioned in article 3; as the will does not necessarily imply the contrary. The homestead is only mentioned as part of the property left by the testator's father to be disposed of by the testator, subject to his mother's life interest, and serves to identify the fund referred to. But the testator only affects to dispose of the property which "is" liable to be disposed of by him, or of the income if his power "extends" no further than to dispose of the income,—using the present tense and words which are satisfied without attributing to him an attempt to devise the homestead which he no longer owned.

The fund in question therefore could not be more than \$150,000, or possibly \$175,000, because that was the largest sum which could come to him under the clauses of his father's will referred to. And, as he directed that his wife should receive the whole income of the fund until the time for setting apart the first \$100,000, and the income of what remained after each sum of \$100,000 was set apart, the testator could not have expected the fund to be increased by accumulations. It follows that he could not have expected the three funds, of

\$100,000 each, to be raised from property by no possibility amounting to more than \$175,000.

We may add a further consideration. The testator contemplates, in terms, the possibility that his power may extend no further than to dispose of the income of the specific property mentioned. This makes it still harder to suppose that he relied on this property alone. The reason for the testator's doubt points the same way. The property which he deals with in the third article did not come to him as a separate fund, but was left to him along with that which he disposed of in article 1, as part of the residue under his father's will. For, although his father's will created a separate fund of \$800,000, at least \$250,000 of it was to be paid into the residuary fund upon his father's widow's decease, and his own title was only under the residuary clause making the present testator and his brother residuary legatees, and giving one half of his half to the present testator outright, and the other half in trust for him or his family, etc. Hence the testator actually received his share of the \$800,000 as part of a larger fund, and the separation of a part of the residue from the rest, with reference to its remote origin, is purely imaginary.

The testator does not say that the sums for the other children after the first shall be raised from the property mentioned in article 3, but simply that they shall be set apart. And he then goes on to empower his wife to give his children any part of the capital mentioned in this or in the first article, "except such portion thereof" as may have been set apart, or may be needed to constitute the funds of \$100,000. "Thereof" refers grammatically to the capital mentioned in the first article as well as to that mentioned in the third; and on its face the clause imports that a portion of the capital mentioned in the first article may be needed to constitute the funds. In view of the arbitrary character of the separation between the capitals mentioned in the two articles, and the certainty that the fund mentioned in the third article would be insufficient, this interpretation seems not only grammatical but reasonable.

The whole difficulty is raised by the direction, when the first child reaches majority "to set apart out of the said property," i. e., out of the \$150,000, "a fund for the benefit of said child, consisting of money or securities, or partly of money and partly of securities, to the amount or value of \$100,000." It is argued that this legacy is specific, and that the direction to "set apart" "similar" funds for the other children must be taken to mean legacies of the same character, and is further shown to do so by the provision that the testator's wife shall continue to have the use, etc., of the remainder of the property.

Whether the legacy to the first child is specific or not, it cannot be allowed to cut down or to limit the legacies of like amounts to the other children, which are not made specific in terms. The testator shows by articles 4 and 5 that he means his children to have his property equally, while the result of holding all the legacies specific would be to give the first child \$100,000, if the fund was sufficient, the second not more than \$75,000, and the third nothing; and the facts leading to this result were known to the testator.

The gift of the use of the remainder of the property to the testator's wife, is made sensible by taking "the property" to include that mentioned in the first article, of which also she is given the use for life. When the specific property of \$150,000 is referred to earlier in the article, it is referred to as "the said property." In this connection, again, the arbitrary character of the separation of the property mentioned in article 3 should be kept in mind. There is enough to pay his legacy to the first child upon any construction of the will.

The result will be the same whether we suppose that the testator began by specifically disposing of the fund described, and then, for the sake of equality, gave general legacies to the other children of the same amount as the specific legacy to the eldest, or say that all the legacies are demonstrative. Many cases of weight, although not binding upon us as authority, go far towards deciding that the legacy to the first child, if it stood alone, even, should be regarded as demonstrative. It is unnecessary to consider how far they are reconcilable with *Bliss v. American Bible Soc.* 2 Allen, 384, and other Massachusetts cases. *Boys v. Williams*, 2 Russ. & M. 689; *Cunliffe v. Cunliffe*, 23 W. R. 724; *Sparrow v. Josselyn*, 16 Beav. 185; *Vickers v. Pound*, 6 H. L. C. 885; *Mytton v. Mytton*, 44 L. J. Ch. 18; *Bowen v. Dorrance*, 12 R. I. 269.

For these reasons, a majority of the court are of opinion that, as article 1 is in the nature of a residuary clause, and the gift to the testator's widow is subject to the provisions of the other articles, the legacies of \$100,000 to each of the children must be paid in full.

Decree accordingly.

Sylvester P. PIERCE

c.

EQUITABLE LIFE ASSURANCE SOCIETY of the United States.

1. The objection that an insurance company, having its legal existence in another State, ought not to be held to answer to a bill filed against it in this State, for an accounting as to a tontine life policy issued by it, when the books and papers required to be examined are properly kept in such other State,—*Held*, to have been waived by a general answer and the other facts of the case.
2. Under a tontine policy which contains no provision to the effect that the decision of the company as to the sum apportionable to it shall be conclusive, and by which the company agrees to equitably apportion its share of the profits to it,—the contention that the assured is bound by the apportionment made by the company's officers, unless it be shown that they did not act with discretion and in good faith, is untenable.
3. Under the New York decisions (which must govern the construction of a contract made between residents of that State, to be performed there),—*Held*, that

- the **tontine policy** in question did not create a trust; and hence that the bill for an account was not maintainable upon the ground that the assured was the beneficiary of a trust fund held by the defendant company.
4. Such bill, filed after the expiration of the tontine period, on a policy still in force, is, however, **maintainable under the statute giving jurisdiction in equity upon accounts** "where the nature of the account is such that it cannot be conveniently and properly adjusted in an action at law." Pub. Stat. chap. 152, § 2, cl. 10.
 5. Such bill is properly brought **against the insurance company alone**; it not being necessary that other members of the tontine class to which plaintiff belongs should be joined, or that the bill should be brought in their behalf.
 6. The **beneficiary of a tontine policy** issued by a stock company is **not bound by the action of the company's officers** in fixing the amount of profits, etc., apportionable to the policy, on the theory that such apportionment is, the declaration of a dividend to a stockholder.
 7. A suit for an account on such policy is not an inquiry concerning the relations of the foreign company and its stockholders, nor concerning the exercise of its corporate duties by the company,—jurisdiction as to which inquiry is confined to the courts of the company's domicile,—but is simply a **suit between a creditor and the company** on a contract, which suit **can be entertained by the courts of other States than that of the company's domicile.**

(Suffolk—Filed September 17, 1887.)

ON report. Bill in equity for an account. *Account decreed.*

This was a bill in equity alleging that the plaintiff holds a policy, issued to him by the defendant, under what is called the tontine savings-fund plan, on March 27, 1873; that the defendant agreed at the end of the tontine term of ten years, to wit, on March 18, 1883, in consideration that no dividend should be allowed or paid the plaintiff in the meantime, and by the terms of said policy, "that all surplus or profits derived from such policies on the tontine savings-fund assurance plan as shall cease to be in force before the completion of their respective tontine dividend periods shall be apportioned equitably among such policy holders as shall complete their tontine dividend periods; that upon the completion of the tontine dividend period on March 18, 1883, provided this policy shall not have been terminated previously by lapse or death, the legal holder or holders of this policy shall have the following option: (1) to withdraw in cash the policy's entire share of the assets (whether in the reserve fund proper or in the accumulated surplus); (2) to convert the same into a paid-up policy for an equivalent amount, provided always that if the amount of said paid-up policy

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shall exceed the original amount of the assurance, a certificate of good health from one of the society's medical examiners shall be required; or (3) to continue the assurance for the original amount, and apply the entire tontine dividend to the purchase of an annuity, to reduce the subsequent premiums falling due upon this policy; provided that if in any one year the amount derived from such annuity, together with dividends on this policy, shall exceed the amount of premiums due thereon, the excess shall be paid in cash to said Sylvester P. Pierce or assigns; that previous to the completion of its tontine dividend period this policy shall have no surrender value in cash or in a paid-up policy; that the parties are citizens of New York, the defendant having a usual place of business in Boston, and that the contract was issued to the plaintiff in New York. The bill further alleged that the policy is still in force, and that the defendant had refused to account with the plaintiff, and that plaintiff was unable to ascertain what accumulations of the tontine fund had been made, and what his share thereof was. The plaintiff prayed that the defendant be ordered to account.

At the hearing by the supreme court, before Holmes, J., the following facts were found: that the defendant is a stock company, with a capital of \$100,000, upon which it may pay dividends to stockholders, not exceeding 7 per cent; that, by the New York law, the policy issued to plaintiff did not create a trust, as alleged in the bill, under the evidence offered; but that the computations on which the amount of the plaintiff's claim was ascertained were of the most complicated and difficult nature, only to be understood by experts and mathematicians. The plaintiff contended that the account, taken in the manner which he says is his right, would be comparatively simple. The court ruled that, after a general appearance (which it appeared had been entered) and pleading to the merits, the defendant was too late to object to this court's taking jurisdiction on the ground merely that this was a New York contract, between New York parties, supposing the objection would have been valid if taken earlier; and, so far as that objection is concerned, if it (the court) had any discretion, it declined to dismiss the bill on that ground, and reported the case on the question whether the ruling was right. The court also reported the question as to its finding of New York law, and whether a bill in equity will lie in this case for an account, with the agreement of the parties that no objection shall be pressed on the form of the prayers in the bill. The following cases were put in evidence concerning the law of New York, and may be referred to:

Taylor v. Charter Oak L. Ins. Co. 9 Daly, 489; *Hencken v. United States L. Ins. Co.* 11 Daly, 282; *S. C.* 98 N. Y. 627; *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 84; *People v. Security L. Ins. & A. Co.* 78 N. Y. 114; *Bewley v. Equitable L. Assur. Soc.* 61 How. Pr. 344; *Cohen v. New York Mut. L. Ins. Co.* 60 N. Y. 610; *St. John v. American Mut. L. Ins. Co.* 13 N. Y. 81; *Uhlmann v. New York L. Ins. Co.* 18 Daly, 47; *S. C.* 21 N. Y. W. D. 5.

An appeal was taken from the decision of the court overruling the demurrer. The presiding judge reported the case on the two ques-

tions above stated for the consideration of the full court.

Messrs. John P. Treadwell and Edward P. Usher, for the plaintiff:

The plaintiff's case may rest either on ground of fiduciary relation, or on ground of complicated accounts, or on ground of specific performance. On one or all of these grounds the court clearly has jurisdiction.

The accounts are on one side, but a discovery is sought of facts which lie wholly in defendant's knowledge, and which are material to plaintiff's case; for the amount due him cannot be ascertained in any other way than by a disclosure of these facts by defendant. On defendant's own showing the accounts are complicated, and this by itself is sufficient to give equity jurisdiction, without any relation of trust between the parties.

Story, Eq. Jur. §§ 455-459; Pom. Eq. Jur. § 1421; *Kimberly v. Dick*, L. R. 13 Eq. 1; *Seymour v. Long Dock Co.* 20 N. J. Eq. 396.

Lord Romilly, *M. R.*, said: "It is quite settled, if the account is difficult and complicated, that it may be taken in equity, even though there is no relation of trustee and *cestui que trust* between the parties."

Watford, etc. R. Co. v. London, etc. R. Co. L. R. 8 Eq. 237.

Our statutes give jurisdiction in suits upon accounts "when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law."

Pub. Stat. chap. 151, § 2, cl. 10; *Bartlett v. Parks*, 1 Cush. 86; *Hallett v. Cumston*, 110 Mass. 32.

This statute has been liberally construed in favor of giving jurisdiction where it is reasonable to suppose the machinery of the equity court can handle the matter more effectively than would be the case in the courts of law, although the difficulties or complications are not such as to render it clearly beyond the operation of the legal methods. It would seem as if this case, which is claimed by defendant to be of great complexity and difficulty, is beyond all question within the purview of the statute.

After a general appearance and a pleading to the merits, it is too late to object to the jurisdiction on the ground that this was a New York contract between New York parties, whatever might have been the force of such objection if taken earlier. The defendant submitted to the jurisdiction.

Peabody v. Hamilton, 106 Mass. 217.

The statement in the policy that the surplus or profits should be apportioned "equitably" points directly to the equity courts as the arbiter between the company and the policy-holder on any dispute with regard to such apportionment. No power outside of the court sitting in equity can determine finally and conclusively the equitable rule of apportionment binding upon both the parties. If plaintiff has any satisfactory remedy, it is in equity.

It is improper to designate the claim of plaintiff as a claim for deferred dividends. It is a claim for a proportion of a fund made up, *inter alia*, of dividends, which, but for the terms of the policy, would have been paid from time to time to him and others holding similar policies, but is not a claim merely for the dividends that

became due on his policy, which were simply withheld under agreement.

None of the cases cited in the report at all affect this reasoning. Every case fails to reach and cover this, either because there was clearly no such fund involved, or it was a pure case of ordinary declaration of dividends out of profits. The late case of *Uhlmann v. New York L. Ins. Co.* 18 Daly, 47, rests on the erroneous assumption that the claim of plaintiff is for nothing more than dividends. It is a decision of an inferior court, and one of the judges, it is to be noticed, dissented. The case shows a singular confusion of ideas about the nature of dividends and the right to them.

See *Mass. Gen. Hospital v. State Mut. L. Ins. Co.* 4 Gray, 227.

Messrs. John Lowell and Robert M. Morse, Jr., for defendant:

The court may properly decline to take jurisdiction in equity of a suit brought by a citizen of New York against a New York corporation, upon a New York contract of life insurance, to compel the defendant to account and to pay to the plaintiff whatever may be found due.

The fact that the defendant has appeared and answered does not preclude it from raising this objection. It is not denied that the court has jurisdiction over the parties, but the defendant contends that the subject-matter of the suit is of such a nature that the court may properly send the plaintiff to the courts of New York for whatever relief he may be entitled to receive.

Objection to the jurisdiction of the court over the subject-matter of a suit may be taken at any stage of the proceedings.

In *Loomis v. Wadhams*, 8 Gray, 557, Thomas, J., said: "Any defect of service or of jurisdiction, so far as the person of the defendant was concerned, had been waived by his appearance and answer. If the want of jurisdiction had been of the subject-matter, it could not have been cured by the appearance of the defendant. The want of jurisdiction as to the person was cured by the defendant's voluntary submission. The distinction is a familiar and sound one."

See also, to same point, *Simonds v. Parker*, 1 Met. 508; *Richardson v. Welcome*, 6 Cush. 331; *Elder v. Dwight Mfg. Co.* 4 Gray, 201; *Riley v. Lovell*, 117 Mass. 76; *Cheshire v. Adams & C. R. Co.* 119 Mass. 356; *Smith v. New York Mut. L. Ins. Co.* 14 Allen, 386; Story, Conf. L. § 543; *Williston v. Michigan S. & N. I. R. R. Co.* 13 Allen, 400; *Wheelock v. Lee*, 74 N. Y. 495; *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 179; *Howell v. Chicago & N. W. R. R. Co.* 51 Barb. 378; *Reiner v. Salisbury*, L. R. 2 Ch. Div. 378; *Matthaei v. Galitzin*, L. R. 18 Eq. 840; *Cumberland C. & I. Co. v. Hoffman S. C. Co.* 80 Barb. 159; *Merrick v. Van Santvoord*, 84 N. Y. 222; *Eaton v. Aspinwall*, 19 N. Y. 119; *Buffalo & A. R. R. Co. v. Cary*, 26 N. Y. 75; *Ogdenburgh & L. C. R. R. Co. v. Vermont & C. R. R. Co.* 16 Abb. Pr. N. S. 250.

This bill can be maintained, if at all, only (1) for the enforcement of a trust; (2) for the specific performance of a contract; (3) for an account.

The discovery sought is incidental to the relief.

By the New York law, which governs the

construction of the contract in suit, the policy issued to the plaintiff did not create a trust.

In *Bewley v. Equitable L. Assur. Soc.* 61 How. Pr. 344, the plaintiff, a policy holder, brought suit against the company and its directors, alleging that the directors had misapplied and misappropriated the funds and property held by them in trust, and claiming that the plaintiff and the other policy holders were the real *cestuis que trust* and owners thereof. The plaintiff demanded an account, appointment of a receiver, and an injunction. The defendants demurred. The court sustained the demurrer. *Larremore, J.*, after citing *St. John v. American Mut. L. Ins. Co.* 18 N. Y. 88; *People v. Security L. Ins. & A. Co.* 78 N. Y. 114; *Taylor v. Charter Oak L. Ins. Co.* 59 How. Pr. 468, and other cases, said: "In view of the authorities above cited, it is apparent that no trust was created or now exists between the plaintiffs and the defendant corporation or its directors."

In *St. John v. American Mut. L. Ins. Co.* *supra*, the court said: "An insurance upon the life of an individual is a contract by which the insurer, for a certain sum of money or premium proportioned to the age, health, profession, or other circumstances of the person whose life is insured, engages that if such person shall die within the period limited in the policy, the insurer shall pay the sum specified in the policy, according to the terms thereof, to the person in whose favor such policy is granted. I am not aware of any principle of law that distinguishes contracts of insurance upon lives from other ordinary contracts, or that takes them out of the operation of the same legal rules which apply to and govern such contracts."

See also, to same point, *Taylor v. Charter Oak L. Ins. Co.* 9 Daly, 489; *People v. Security L. Ins. & A. Co.* 67 N. Y. 114; *Cohen v. New York Mut. L. Ins. Co.* 50 N. Y. 610; *Cole v. Knickerbocker L. Ins. Co.* 23 Hun, 255; *Bogardus v. New York L. Ins. Co.* 1 N. Y. L. ed. 402 (2 Cent. Rep. 150), 101 N. Y. 839.

It is submitted that, neither at law nor in equity, will the court undertake to revise an apportionment which the defendant company, in the exercise of its discretion and in good faith, has already made as being the fair and equitable proportion of the profits due to the plaintiff.

1. The word "apportion" is a word of well-settled legal signification, and has been construed by the courts of the State of New York. In *Haight v. Day*, 1 Johns. Ch. 19, the commissioners, to open subscriptions for the Catskill Bank, were "to apportion" the excess among the several subscribers as they should judge discreet and proper. The bill charged that the commissioners arbitrarily apportioned it among themselves, their relations, favorites, etc. *Chancellor Kent* said: "The commissioners were to 'apportion the excess among the several subscribers as they should judge discreet and proper.' The bill charges a gross inequality in the apportionment among the subscribers, and that the distribution was principally confined to the commissioners themselves, their relations, and favorites. * * * Where a statute gives to commissioners a discretion in a particular case, and for a special purpose, I doubt exceedingly whether a mistake of judgment, in that case, can be corrected. The supreme court seemed to think it could not, in the case of *Lawton v.* 2 Mass.

Highway Comrs. 2 Cai. 182. In the case of a special power granted to an individual by will, to be exercised according to discretion, the court of chancery has repeatedly refused to interfere, and to judge of the motive, where there was great inequality in the distribution of property under the trust. *Civil v. Rich*, 1 Ch. 809; *Maddison v. Andrew*, 1 Ves. 58. This is a stronger case than that of a private trust created by the act of the party, or of a public trust created for general purposes; and the courts would certainly interfere, in this case, with much greater reserve and caution. Here the Legislature selected the trustees by name for a special purpose, and for no other, and confided to them to act, in the given case, as they should judge discreet and proper; and, after the act was performed, they were to become *functi officio*. * * * These words, 'as they should judge discreet and proper,' gave an undefined discretion, and would be utterly senseless, upon the construction that the apportionment was intended to be, to each subscriber, in a ratio to the amount of his subscription. That would have been a plain mathematical rule, without the exercise of any discretion; and if that had been the meaning of the law, it would, undoubtedly, have said so. The word 'apportion' must mean, here, to assign to each subscriber, or give him, such portion as the commissioners should deem meet."

See *Clarke v. Brooklyn Bank*, 1 Edw. Ch. 868.

In *Walker v. Devereaux*, 4 Paige, 258, *Chancellor Walworth* said that *Haight v. Day*, 1 Johns. Ch. 19, had been acted on as law ever since that time; and in *Le Roy v. New York*, 4 Johns. Ch. 856, it was held, on the same authority, that the court would not interfere with the discretion of assessors in whom was vested discretion to impose an assessment.

In *Fisher v. The Charter Oak L. Ins. Co.* 20 Jones & S. 179, *Sedgwick, Ch. J.*, said: "For the amount of the apportionment can be fixed only through the exercise, in fact, of a discretion by the officers of the company, in view of present circumstances and future contingencies. A court or jury could not exercise that discretion, even if the agreement did not, as it does, contemplate that the officers should exercise it in trust for the whole body of the holders of policies."

2. The main difference between this policy and an ordinary life insurance policy is that under it no dividends are to be allowed or paid unless the person insured survives the completion of the tontine dividend period. Then he shall receive a dividend out of the surplus or profits as provided in the fourth clause of the agreement and conditions, which surplus or profits "shall be apportioned equitably among such policies as shall complete their tontine dividend periods."

But this apportionment is to be made by the company, and is not subject to the revision of the court; it is merely the declaration of a dividend.

It is well settled that the court will not interfere with the declaration of a dividend even by a domestic corporation.

Karnes v. Rochester & G. V. R. R. 4 Abb. N. S. 107; *Williams v. Western Union Tel. Co.* 98 N. Y. 162; *State v. Bank of Louisiana*, 6 La.

745; *Verplanck v. Mercantile Ins. Co.* 1 Edw. 84; *Luling v. Atlantic Mut. Ins. Co.* 45 Barb. 510; *Ely v. Sprague*, 1 Clarke, 351; *Pratt v. Pratt*, 83 Conn. 446; *Scott v. Eagle Fire Co.* 7 Paige, 198.

3. A shareholder, even still less a policy holder, has no right to a share in the profits until they are declared.

Williston v. Michigan S. & N. I. R. R. Co. 13 Allen, 400; *Minot v. Paine*, 99 Mass. 101; *Goodwin v. Hardy*, 57 Me. 148; *Jones v. Terre Haute & R. R. Co.* 57 N. Y. 196; *Hyatt v. Allen*, 56 N. Y. 558; *Granger v. Bassett*, 98 Mass. 462; *Phelps v. Farmers & M. Bank*, 26 Conn. 269; *Brundage v. Brundage*, 1 Thomp. & C. 82.

The agreement by which surplus, when it arises, is to be apportioned, is the law voluntarily acknowledged by the parties in interest, and, until and except as thus apportioned, there is no power in the court to divide and distribute such surplus.

The same principle is involved as in those cases where it is held that where the price is to be fixed by a third party, or a particular method is to be used for ascertaining it, no action will lie until the price is so ascertained.

Delaware & H. C. Co. v. Pennsylvania Coal Co. 50 N. Y. 250; *Scott v. Avery*, 5 H. L. Cas. 811; *United States v. Robeson*, 9 Pet. 319 (80 U. S. bk. 8 L. ed. 142); *Perkins v. United States Electric Light Co.* 15 Reporter, 680; *Milnes v. Gery*, 14 Ves. 400; *Scott v. Liverpool*, 3 De G. & J. 334; *Hood v. Hartshorn*, 100 Mass. 117.

The plaintiff cannot obtain the relief which he seeks, under Pub. Stat. chap. 151, § 2, cl. 10, relating to bills for an account; for in the cases where this statute is held to apply the account is not given as relief; the plaintiff is merely allowed to bring a suit in equity, which at law would be an action of contract. The plaintiff acquires no new rights on coming into equity; the court simply allows him to prove his legal right in equity because of the difficulty of proving it to the satisfaction of a jury at law. If he has no right to an account at law, he will not obtain an account in equity under this statute. The reference to accounts in this statute is, in general, to mutual accounts, where the balance of one account over another is sought to be ascertained and recovered. This has always been the rule in the equity practice of the English courts, and it has been followed by the courts of this Commonwealth.

Phillips v. Phillips, 9 Hare, 471; *Frietas v. Dos Santos*, 1 Young & J. 574; *Hemings v. Pugh*, 4 Giff. Ch. 456; *Krue v. Loring*, 120 Mass. 507.

In *Marvin v. Brooks*, 94 N. Y. 71, the court said: "The best-considered review of the authorities puts the equitable jurisdiction (referring to accounts) upon three grounds: 'the complicated character of the accounts; the need of a discovery; and the existence of a fiduciary or trust relation. 1 Story, Eq. Jur. § 459, and note 5. The necessity for resort to equity for the first two reasons is now very slight, if it can be said to exist at all, since a court of law can send to a referee a long account, too complicated for the handling of a jury, and furnishes, by an examination of the adverse party before trial, and the production and deposit of books and papers, almost as

complete a means of discovery as could be furnished by a court of equity."

And see the following cases where jurisdiction in equity was refused, although there were complicated accounts:

Ward v. Peck, 114 Mass. 121; *Badger v. McNamara*, 123 Mass. 117; *Walker v. Brooks*, 125 Mass. 241; *Padwick v. Stanley*, 9 Hare, 627; *Dinwiddie v. Bailey*, 6 Ves. 136; *Mozon v. Bright*, L. R. 4 Ch. App. 292; *Foley v. Hill*, 3 H. L. C. 28.

There are two cases in this Commonwealth where bills for account were allowed to be filed because of complication, although the accounts were not mutual:

Bartlett v. Parks, 1 Cush. 82; *Hallett v. Cumston*, 110 Mass. 32.

But a partnership was defendant in both of these cases; and in *Badger v. McNamara*, 123 Mass. 117, Gray, Ch. J., said: "The case wholly differs from those between partners, or in which, though the parties may not be technically partners, the account between them is to be settled upon the same principles as if they were, and requires the investigation of mutual charges and credits, as in *Bartlett v. Parks*, and *Hallett v. Cumston*, *supra*."

The bill, falling in relief, cannot be supported as a bill for discovery; for all the discovery asked for by the plaintiff can be obtained by interrogatories filed in the proper action at law.

Ahrend v. Odiorne, 118 Mass. 261; *Emery v. Bidwell*, 1 Mass. L. ed. 75 (1 New. Eng. Rep. 231), 140 Mass. 271.

In an action at law on the policy, the plaintiff may recover the amount for which the defendant is liable, and in that action he is entitled to discovery, upon interrogatories, as to all points material to the support of his case.

Devens, J., delivered the opinion of the court:

The policy in regard to which the plaintiff seeks that the defendant shall render an account, complaining that the defendant has not apportioned to him the share of reserve and profits to which he is entitled, was made in New York; the plaintiff is, and was at the time of bringing this bill, a resident of that State, in which the defendant has its legal existence. Had the defendant, instead of appearing generally, objected originally that, even if an account should be taken, it ought not to be held to answer here to the plaintiff, in view of these facts, and the great inconvenience involved in taking such an account at a distance from the State in which its voluminous books and papers are properly kept, such objection would have been worthy of serious consideration. Even if a party was entitled to an account, he might under such circumstances be compelled to seek it where it could most appropriately, as well as most conveniently, be rendered. Any objection to the exercise of the jurisdiction of the court, founded upon these facts, must be deemed to have been waived, in the opinion of the majority of the court, by the general answer of the defendant, and the other facts appearing in the case.

The principal characteristics of the policy of life insurance, on which the controversy arises, are these: It was one for the sum of \$10,000,

payable on the decease of the plaintiff to his executors, and was for the term of his life. It was known as a tontine policy, on the savings insurance plan, and was to continue as such for the term of ten years if the plaintiff should live so long. If the holder of the policy died during the tontine period, his estate would not receive any benefit from the dividends which ordinarily are made on life insurance policies annually, or at stated periods, which dividends consist of the surplus of premiums after deducting the cost of insurance and the computed reserve. These being thus held by the company for the benefit of the other policy holders, and forfeited by him, his estate would receive only the amount of his policy. If the holder of the policy also should fail, during this tontine term, to keep up his policy by payment of the premiums, it would be forfeited. Policies of this character are kept in classes of ten, fifteen, or twenty years, according to their tontine periods; and while the funds of each class are not kept separate, distinct accounts are kept with each class so as to show the amount to which it is entitled, and by this means the amount due upon each policy at the expiration of its tontine term. At the expiration of ten years, if such be the term, or at the completion of the tontine dividend period, it is provided "that all the surplus or profits derived from such policies, on the tontine savings assurance plan, as shall cease to be in force before the completion of their respective tontine dividend periods, shall be apportioned equitably among such policies as shall complete their tontine dividend periods." The holder of the policy then has the option "to withdraw in cash the policy's entire share of the assets, whether in the reserve fund proper or in the accumulated surplus," or to use his share in various modes provided by the policy for the procurement of additional insurance or by the purchase of an annuity for the payment of the premiums that may thereafter become due on his policy. The "reserve fund proper" and "accumulated surplus" are made up of the dividends which have been withheld on the premiums of the class during ten years, the dividends, thus withheld, of those who have died within the ten years, being forfeited for the benefit of the class to which their policy belonged; and also all payments made by, and dividends withheld from, those who have forfeited their policies by nonpayment of premiums.

It is the contention of the defendant that the plaintiff is bound by the apportionment made by its officers in the discharge of their duties, unless it shall be shown at least that they did not act in the exercise of an honest discretion and in good faith. We find no words in the policy indicating that the decision of the defendant is to be conclusive, and the words by which the defendant agrees "equitably" to apportion to the plaintiff's policy its share of the profits bind the defendant to make the apportionment, and imply that in any proper proceeding it may be inquired whether it has properly fulfilled this part of its contract.

That the bill brought by the plaintiff cannot be maintained, on the ground that he is the beneficiary of a trust fund held by the defendant, which is one of the grounds upon which the account is often ordered, and upon which

theory the bill is based, is, we think, reasonably clear. By the New York law, which must govern the construction of a contract made between New York parties, to be performed in that State, it has been found as a fact by the judge who presided that the policy issued to the plaintiff did not create a trust. This finding is fully sustained by the evidence from the decisions of the tribunals of that State. *Taylor v. Charter Oak L. Ins. Co.* 9 Daly, 489; *Hencken v. United States L. Ins. Co.* 11 Daly, 283; *S. C.* 98 N. Y. 627; *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 84; *People v. Security L. & A. Ins. Co.* 78 N. Y. 114; *Bewley v. Equitable L. Assur. Soc.* 61 How. Pr. 844; *Cohen v. New York Mut. L. Ins. Co.* 50 N. Y. 610; *St. John v. American Mut. L. Ins. Co.* 18 N. Y. 31; *Uhlman v. New York L. Ins. Co.* 2 N. Y. W. D. 5.

While the prayers in the plaintiff's bill have been made upon the theory that there was a trust fund held by the defendant for the benefit of the plaintiff, among others, as a holder of a ten-years' tontine policy, no objection is pressed by reason of the form of the bill. We proceed to consider, therefore, whether, upon any other ground than that strictly of trust, the bill may be maintained for an account. Our statute gives jurisdiction in equity upon accounts "where the nature of the account is such that it cannot be conveniently and properly adjusted in an action at law." Pub. Stat. chap. 152, § 2, cl. 10.

Even if the amounts kept back from the plaintiff and those of his class of policy holders, by the retention of those dividends which would otherwise have been received, or of those sums accruing from the forfeiture of policies either in the whole or in part, do not constitute a trust fund, or place the defendant in a strictly fiduciary capacity, the defendant was bound to keep accurate accounts of them, and of all interest and profit thereon, if any. All the facts were entirely within its own knowledge, and it is only thus that it could be determined what equitably should be apportioned to the plaintiff. It is said that the plaintiff has a sufficient remedy at common law; that he could bring his action at law; and that upon proper interrogatories addressed to the defendant, all the information necessary for the proper adjustment of the account could be obtained. But, even if an action at law could be maintained where an account is complicated, so that a full examination and settlement of previous accounts, transactions, or methods of business is necessary; and where the whole matter is entirely within the knowledge of the defendant,—it cannot so conveniently or accurately be investigated at common law as in equity. Even if a trial by jury be claimed and allowed, the court might, in a suit in equity, so mould the issues and direct the course of the trial as to avoid many of the difficulties attending a trial at common law. *Hallett v. Cumston*, 110 Mass. 32.

It was thus held in the case cited that one who was not a partner, but was entitled to share in the net profits of a business, might maintain a bill for an account against a partnership, which necessarily involves an examination of its transactions and its whole course and methods of conducting business.

In *Massachusetts Gen. Hosp. v. State Mut.*

L. Assur. Co. 4 Gray, 227, it was said that the plaintiff might properly maintain a bill for an account of the net profit arising from the insurance of lives, made by it, one third of which the defendant was by law bound to pay the plaintiff.

That the accounts are singularly complicated, and that the method by which the value of the shares of the plaintiff which he has obtained by full payment of his premiums and completion of his tontine period is ascertained, is one of much complexity and difficulty in its application, appears from the evidence reported. A court of equity is the appropriate tribunal for dealing with such an account, and the defendant is fairly bound to produce an account, from the data in its possession, which shall show that it has complied with its promise, equitably to apportion to plaintiff his share in the accumulations made through the operation of the tontine provisions in his policy.

Nor do we perceive that it is necessary to join any more of this class of policy holders in the bill, or that the bill should be brought on their behalf. It appears by the answer of the defendant, and also by the evidence, that all the policy holders of the class to which the plaintiff belonged, have been settled with, and received the amount apportioned to them by the defendant corporation. But even if it did not, the plaintiff made his individual contract with the defendant; and if others have similar contracts, depending on similar states of facts, they in no way affect him; he has no demand upon anyone other than the defendant, and nothing that he will receive from the defendant will in any way affect the claims of others.

It is contended that the apportionment of the reserve or accumulated profits to be made at the conclusion of the tontine dividend period is but the declaration of a dividend, and that the court will not interfere with the declaration of a dividend, even by a domestic corporation, it being a question solely for its directors, or other proper officers, whether any shall be made; if so, of how much; and that until this is made, no stockholder has any rights in any profits that have been made, or assets that might be divided. Conceding this to be the general law, the amount to be apportioned, or which the plaintiff is entitled to have apportioned, is not a dividend in the limited sense in which the word is used in its application to dividends to stockholders. Between stockholders and the corporation of which they are members, no relation of debtor or creditor ordinarily exists, nor does any arise until a dividend has been declared. The affairs of the corporation are managed by them, or those whom they elect as officers, and by this administration of affairs they are bound. The plaintiff is not a member of the corporation, but its creditor, who has contracted with it. At the end of a fixed period, having complied with the contract on his own behalf, and made the payments required, he is entitled to have apportioned to him his share of a certain computed fund. The defendant has no right to withhold it as a corporation may withhold a dividend from a stockholder. This share, or its equivalent in value, is plaintiff's own property, and not that of the defendant corporation.

Nor is it important that the sum to be com-

puted as belonging to the class, and from which the apportionment to the plaintiff's policy is to be made, is constituted partially of dividends which, but for the tontine contract, would have been previously paid upon the policy. It may be that the amount of the dividends annually, or at other stated intervals, distributed to policy holders, could absolutely be determined by the officers of the corporation. If this is so, the plaintiff would still have a right to an account, and to ascertain whether the dividends reserved under his contract were proportionally the same as those declared on other life insurance policies, having relation to their different circumstances; or at least to ascertain what were the amounts reserved as dividends to be passed to the credit of the fund when it should be computed, if it had no actual existence.

In our view of the case, if the defendant was a domestic corporation there would be a right on the part of the plaintiff to have an account taken, and to ascertain thereby whether a fair apportionment had been made. If the defendant had kept no account, if it had no means of furnishing it, or showing whether it had dealt justly or unjustly with the plaintiff, it should be answerable for the injury which it had occasioned by its neglect to do what the contract implies it would do. The defendant is, however, a foreign corporation, and it is urged that this court ought not to take jurisdiction of the case if it were possible so to do, and that, practically, it is impossible for it to effect justice between the parties.

That it is a matter of grave inconvenience to the defendant to be held to account here may be conceded. That if the objection had been promptly taken that the plaintiff was a resident of New York, as well as the defendant, it would have received serious consideration, we have heretofore suggested (*Smith v. New York Mut. L. Ins. Co.* 14 Allen, 336); but we find no inconvenience that is insuperable. The defendant has an established place of business in this Commonwealth, and an agent to receive service of lawful process. It may be presumed that it anticipates that the profits of the business will compensate for the inconvenience of being held to answer, and, in a proper case, to account in a State other than that to which it owes its corporate existence. It is true that we cannot bring the officers, or the books, or the assets of this corporation within our jurisdiction, but the corporation is itself lawfully before us. We shall not assume that it will neglect any order that we may pass, nor indicate how such order may be enforced; or, if it cannot be enforced, how such proceeding may be had that the plaintiff may be indemnified for the violation of the contract made with him.

It is a further objection that the case requires us to exercise a jurisdiction over the corporation in its corporate functions, in the matter of its internal economy, and in the relations existing between it and its policy holders.

The statute under which this corporation is subjected to the service of process does not, it is true, necessarily bring the subject-matter of the suit, or the remedy sought, within the jurisdiction of this court; nor do the rights and liabilities of parties under local laws, of necessity, follow them into other jurisdictions. *Smith v. New York Mut. L. Ins. Co. supra.*

Did the inquiry before us concern the relation between the defendant corporation and its stockholders, we could not undertake to pass upon or determine it. *New Haven H. S. Nail Co. v. Linden Spring Co.* 1 Mass. L. ed. 602 (2 New Eng. Rep. 580), 142 Mass. 349.

Such an inquiry is to be determined by the local tribunal. Were the case such that we were called upon to pass any order directing or controlling the corporation in the exercise of its corporate duties, we have no such jurisdiction as would enable us to do it. The subject-matter would not be within our province. But in the case at bar the plaintiff is a creditor, and not a member of the corporation. He has a contract with it which he claims the corporation has not fairly performed. There is no question of its internal economy involved, as when the relation between its members and the corporation are concerned. If it has adopted any method of conducting its business, inconsistent with the due performance of its contract, such a method of administration will not deprive the plaintiff of any rights. It can no more refuse to account than could an individual to whom plaintiff entrusted his moneys on any similar contract. In dealing with the plaintiff, the corporation dealt with an outside party, and only the relation which it bears to such party claiming to be its creditor is here involved.

The question whether, if the defendant is to account, on what principles it shall do so, or whether, if the case is submitted to an auditor or master, it shall be so submitted by an order which shall direct him how the account shall be taken, have not been discussed and are not considered. It may be that further evidence may be required before they can be disposed of than has yet been taken.

Decree for account.

Darius WELLINGTON

v.

John V. APTHORP, Admr. with the Will Annexed of Mary Chism, Deceased.

1. It is, in law, competent for a **valid oral contract** to be made, to **leave a certain sum of money by will to a particular person** in consideration of services thereafter to be rendered by the promisee to the promisor, provided such services are in fact thereafter rendered and accepted in pursuance of such contract, although the promisee did not bind himself in advance to render them. The performance of the consideration renders the contract binding, and gives a right of action upon it.
2. **W, who was the brother-in-law of C, an unmarried woman, was in the habit of advising her about her business affairs; his services were valuable; before the sale by her of certain real estate which she had bought by his advice, she told him that if a profit of \$10,000 was made he should have one half or part of it; the transaction resulted in a profit of that amount to C, but nothing was paid to W. Afterwards C told W**

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that if he would go on and act as her adviser, she would make a will giving his wife \$5,000; and, in the event of his wife's dying before him, she would, by a new will or codicil, bequeath him \$5,000. W assented to this, and C made a will leaving \$5,000 to W's wife. Thereafter C made other profitable transactions by W's advice. Subsequently, W's wife being fatally ill, C told him that she (C) desired to visit the West some months later, and **that if he would accompany her, and would continue to serve her in the management of her property, she would make a will leaving him \$5,000, and would pay the expenses of such journey.** W assented, and C destroyed her former will and made a new one containing a legacy of \$5,000 to W. W's wife died, and thereafter he accompanied C on her visit to the West, and continued to manage her business matters. Thereafter C made a will revoking all former wills, and containing no legacy to W, and died; whereupon W sued her estate for \$5,000 and the expenses incurred by him on the said journey. *Held*, that there was not enough in the facts to repel the ordinary presumption that **C's promise was a contract**, which when made was intended and understood by both parties to be binding upon her; **and that W was entitled to recover the sums sued for.**

(Suffolk—Filed September 24, 1887.)

ON report, upon plaintiff's exceptions. *Exceptions sustained.*

The case was tried in the Superior Court before Bacon, J., and reported by him to this court, with the following report:

This is an action of contract against the defendant, as administrator with the will annexed of the estate of Mary Chism, deceased, upon an agreement, as the plaintiff claims, made by her with the plaintiff on or about May 23, 1878, to bequeath to him by her last will the sum of \$5,000, and pay his expenses of a journey to California and Nevada in accompanying her there in the fall of 1878; and also upon account annexed for services in managing her property, in accompanying her to California and Nevada, and for cash paid as expenses on said visit.

The case was sent to an auditor, whose report is hereto annexed, and is made a part of this report.

Trial by jury was waived, and, upon the trial before me, the plaintiff put said auditor's report in evidence, and rested. The defendant thereupon called the plaintiff, who testified that he was married again in November, 1879; that he did not inform said Mary Chism, beforehand, of his intended marriage; that there was no occasion for his doing so; that he did inform her thereof, by a messenger, on the day of the marriage; and that she was not present at the ceremony; nor was anyone else, except the necessary parties.

Said auditor's report, and the foregoing testimony of the plaintiff, were all the evidence in the case.

Upon this evidence, I found for the plaintiff in the sum of \$473.24, with interest from the date of the writ, for the expenses of his journey to California and Nevada paid by him, as alleged in the declaration; to which finding the defendant excepted. But I found that the facts stated in the auditor's report did not sufficiently show that a binding agreement was entered into by said Mary Chism with the plaintiff, to make a will in his favor; and that the agreement declared upon, whereby she was to bequeath to him by her last will the sum of \$5,000, was not proved, as alleged: and upon these issues I found for the defendant. I also found for the defendant upon the items of the account annexed for services rendered in the management of said Mary Chism's property, and in accompanying her on a visit to California and Nevada. To which findings the plaintiff excepted, and I report the case for the determination of the Supreme Judicial Court.

Auditor's Report.

Pursuant to a rule of court in the above-entitled action, I have met and heard the parties, examined their vouchers and evidence, and report thereof:

1. The defendant is administrator with the will annexed of Mary Chism, deceased. Prior to 1853, Mary Chism, with two sisters, Charlotte and Octavia, kept a boarding-house in Boston. The plaintiff had boarded with them, and in 1853 he married Charlotte Chism. After their marriage, the plaintiff and his wife continued to board with Mary Chism during the greater part of the time until the death of said Charlotte.

2. About 1862 the two sisters, Mary and Octavia, had acquired by inheritance and their savings about \$4,000, which sum, by advice of the plaintiff, was withdrawn from savings banks and invested in United States bonds.

3. Octavia Chism died in August, 1863, and her share in said bonds came into the possession of Mary Chism. In July, 1866, by advice of the plaintiff, Mary Chism invested the proceeds of said United States bonds in the equity of real estate on Rowe, afterwards Chauncy Street.

4. While Mary Chism was owner of the equity of the Chauncy Street estate, and when there was a prospect of making a profit upon it of about \$10,000, she told the plaintiff if such profit was made by him he should have one half or a part of it.

5. In April, 1868, the equity of the Chauncy Street estate was sold at a profit of \$10,000; this sale was negotiated and advised by the plaintiff. Shortly after this sale had been made, Mary Chism told the plaintiff if he would go on and act as her agent and adviser respecting her investments, she would make a will, giving the plaintiff's wife a legacy of \$5,000; and, in the event of the plaintiff's wife dying before the plaintiff, she would then by a new will or codicil bequeath the legacy of \$5,000 to the plaintiff. The plaintiff assented to said arrangement, and a day or two after this conversation Mary Chism executed a will containing a legacy of \$5,000 to Charlotte, wife of the plaintiff.

6. After the execution of said will, and while it was unrevoked, in June, 1868, Mary Chism

purchased an equity in real estate, on Washington Street, and sold it at a profit in January, 1869. In January, 1869, the plaintiff intended to purchase on his own account the equity of an estate on Bedford Street, and applied to Mary Chism to borrow \$3,000 to be used in such investment; she expressed the wish to join in the transaction, and the plaintiff assented. They agreed that she should advance all the money, and, after receiving 7 per cent interest thereon, the profits should be equally divided. She did furnish the money, the title was taken and mortgage given in her name. After paying her the 7 per cent interest, the profits of this investment were between \$4,000 and \$5,000, and were equally divided. The estate was sold, part in 1873, and the balance in 1874. In 1876, she purchased the equity of an estate on Mt. Vernon Street, which she retained at her death. All the above-mentioned purchases and sales of real estate were negotiated and advised by the plaintiff, and made solely upon his judgment.

7. In June, 1878, the plaintiff's wife, Charlotte, died. A few weeks before her death, and when it was apparent she was fatally ill, Mary Chism, with the knowledge of said Charlotte, told the plaintiff that she desired to visit California and a brother who resided in Nevada, and that if the plaintiff would accompany her there in the fall of that year, she, in consideration of his so accompanying her, and of the services he had rendered and might thereafter render her respecting the management of her property, would make a will giving him \$5,000, and pay his expenses of the journey. The plaintiff assented thereto; and therefore, in May or June, 1878, Mary Chism destroyed the will before mentioned and executed a new one, wherein she gave the plaintiff a legacy of \$5,000. At this time Mary Chism's property was about \$23,000, and it had been acquired largely by the advice and management of the plaintiff; and I find that the plaintiff's advice was valuable and his management judicious, and was given and rendered whenever requested or required, and he has received no compensation therefor, except as stated in ¶ 6, respecting the Bedford Street property.

8. In the fall of 1878 and the winter following the plaintiff accompanied Mary Chism to Nevada and California, and then and thereafter in all respects complied with and fulfilled the aforesaid agreement. And I find that the items of cash paid by him for expenses of the journey, alleged in items 3 to 50, both inclusive, of the account annexed to the declaration, and amounting to \$473.24, were incurred by him, and are reasonable, and should be allowed.

9. Mary Chism died October 18, 1883, without issue and unmarried, leaving a will revoking all former wills, dated December 20, 1866, which was admitted to probate November 12, 1883, and contains no legacy to the plaintiff.

Whether or not, upon the facts stated in this report, the plaintiff is entitled to recover any greater sum than said \$473.24, is reserved for the ruling of the court.

Mr. J. S. Patton, for plaintiff:

An auditor's report is not only *prima facie* evidence of the facts stated in it, upon which the jury may, if those facts show that the plaintiff is entitled to recover, find a verdict for

the plaintiff, but is so far conclusive that the jury is bound so to find, unless the report is rebutted or overbalanced by other evidence.

Allen v. Hawks, 11 Pick. 361; *Bradford v. Stevens*, 10 Gray, 879.

In jury-waived trials the court is equally bound thereby in making its findings of fact.

Pub. Stat. chap. 167, § 69.

There was no evidence in this case rebutting, contradicting, or modifying the auditor's report. The facts stated in it are therefore to be taken as proved or admitted as true, and were so treated by the justice who heard the case.

The auditor found in express terms that Mary Chism's proposition and the plaintiff's assent thereto was an "agreement." There was an explicit offer by Mary Chism, accepted by the plaintiff, which thereupon became a binding promise on her part.

Hubbard v. Coolidge, 1 Met. 84.

There was a good and sufficient consideration for the promise at the time it was made. The services theretofore rendered her by the plaintiff had been rendered at her request, and upon her promise to compensate him for them, and formed with his assent a sufficient consideration for the new promise.

Lamphegh v. Brathwait, 1 Smith, Lead. Cas. 7th ed. 222.

The plaintiff's acceptance of her offer made a complete contract, in which his promise to accompany her on her visit formed a sufficient consideration for her promise.

Boston & M. R. R. v. Bartlett, 3 Cush. 225; *Backus v. Spaulding*, 116 Mass. 418; *Hubon v. Park*, 116 Mass. 541.

Even if the parties did not enter into a mutual agreement at the time, her promise to compensate him in the manner proposed by her became, upon his performing the acts and services in consideration of which the promise was made, and her acceptance of the same, a binding agreement on her part to make a will giving the plaintiff \$5,000, and pay his expenses of the journey.

Gouard v. Waters, 98 Mass. 596; *Marie v. Garrison*, 83 N. Y. 14; *Storm v. United States*, 94 U. S. 83 (24 L. ed. 42).

If Mary Chism did agree for a sufficient consideration to make a will giving the plaintiff \$5,000, the court was bound to construe and interpret that agreement; *i. e.*, determine its legal effect as a matter of law, and could not find its meaning and effect as a matter of fact.

Pratt v. Langdon, 12 Allen, 544; *Short v. Woodward*, 13 Gray, 86; *Globe Works v. Wright*, 106 Mass. 216.

The true construction and interpretation of Mary Chism's agreement to make a will giving the plaintiff \$5,000, is that she was to make and leave a will which would give him that sum at her death. Every contract is to be construed according to the true intent of the parties to it, which intent is to be ascertained from the language used, in the light of the circumstances under which the contract was made.

Gray v. Clark, 11 Vt. 583.

Where there is any ambiguity in the language of a contract, such construction and interpretation should be given to it as to make it operative and effectual, on the ground that the parties intended that result, rather than that

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it should be inoperative, frivolous, or meaningless.

Story, Cont. 5th ed. §§ 781, 784; *Thrall v. Newell*, 19 Vt. 202; *Patrick v. Grant*, 14 Me. 233; *Archibald v. Thomas*, 3 Cow. 284; *Lilly v. Ewer*, 1 Doug. 72; *Atwood v. Cobb*, 16 Pick. 227; *White v. Snell*, 5 Pick. 425.

If there is any doubt as to the meaning of the words, "would make a will giving \$5,000" to the plaintiff, they should be construed most strongly in favor of the plaintiff, who has been misled by and spent his time upon the strength of them.

Barney v. Newcomb, 9 Cush. 46.

A promise, upon a sufficient consideration, to bequeath a legacy to the promisee, is valid.

Canada v. Canada, 6 Cush. 15; *Ridley v. Ridley*, 34 Beav. 478; *Jenkins v. Stetson*, 9 Allen, 128.

Such a promise, though not in writing, is not within the Statute of Frauds.

Peters v. Westborough, 19 Pick. 364; *Doyle v. Dixon*, 97 Mass. 208; *Bell v. Hewitt*, 24 Ind. 280; *King v. Hanna*, 9 B. Mon. 369.

Messrs. Archibald M. Howe and Thomas J. Homer, for respondent:

The plaintiff's claim rests upon Mary Chism's alleged promise, which was not in any sense a contract, but merely a representation of future intention concerning a state of facts not actually in existence at the time she spoke; and, there being no evidence of fraud on Mary Chism's part, her representative, the defendant in this case, is not estopped to deny the liability of her estate.

Maunsell v. White, 4 H. L. Cas. 1089; *Jorden v. Money*, 5 H. L. Cas. 214; *Maddison v. Alderson*, L. R. 8 App. Cas. 467, overruling *Loffus v. Mau*, 3 Giff. 603; *Langdon v. Doud*, 10 Allen, 436.

The plaintiff had an option to perform or not to perform any and all the services he rendered or was to render Mary Chism; his undertaking was voluntary and was uncertain in its character. Mary Chism could have dismissed him or have paid him any sum she pleased, or nothing, without leaving him any remedy therefor either at law or in equity.

His undertaking was such that it could not form a good consideration which would support Mary Chism's promise.

See *Maddison v. Alderson*, *supra*; *Taylor v. Brewer*, 1 Maule & S., 290; *Roberts v. Smith*, 4 Hurlst. & N. 320.

The representations of Mary Chism did not lead the plaintiff to alter his position; he continued to act as he had done, and as he did not abandon any rights he cannot now hold the estate of Mary Chism under the doctrine of estoppel by representation.

Jorden v. Money, 5 H. L. Cas. 185; *Insurance Co. v. Mowry*, 96 U. S. 544 (24 L. ed. 674).

The facts and circumstances of this case show that the services performed and to be performed by the plaintiff were not such that the law would imply a promise to pay the reasonable value of benefits received therefrom.

There is evidence tending to show that all the transactions alleged to have taken place were family affairs, concerning which the plaintiff, as a brother-in-law, acted gratuitously for the good of all concerned. Therefore the judge

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below was right in finding the evidence insufficient to constitute a binding agreement.

Guild v. Guild, 15 Pick. 180; *Spring v. Hulett*, 104 Mass. 591; *James v. Cummings*, 132 Mass. 78.

Even upon the supposition that there was a contract, it was not proved to be a contract to make a will which should not be revoked. And, in view of the facts, it is fair to presume that she did not do more than promise to make a will which she might revoke, thereby protecting herself from any failures on the part of the plaintiff to perform his undertakings. Any other presumption would lead to the supposition that the plaintiff, who was acting as her adviser, and who got her promise while his wife, her sister, was lying fatally ill, did not properly protect Mary Chism's interests; and such a supposition might impute to him undue influence or fraud.

Woodbury v. Woodbury, 1 Mass. L. ed. 396 (2 New Eng. Rep. 90), 141 Mass. 329; *Cuthbertson's App.* 97 Pa. 163; *Bridgeman v. Green*, Wilmet, 58, 61.

The judge below erred in finding that the plaintiff is entitled to \$478.24, with interest from the date of the writ, for the expenses of his journey to California.

If there was not enough evidence to sustain a binding agreement, then the whole claim of the plaintiff failed, and the journey, which the plaintiff took at his own option, he should pay for, and not Mary Chism's estate.

Allen, J., delivered the opinion of the court:

It is not contended on behalf of the defendant that a contract, founded on a sufficient consideration, to make a certain provision by will for a particular person, is invalid in law. The contrary is well settled. *Jenkins v. Stetson*, 9 Allen, 128, 132; *Parker v. Coburn*, 10 Allen, 88; *Canada v. Canada*, 6 Cush. 15; *Parsell v. Stryker*, 41 N. Y. 480; *Thompson v. Stevens*, 71 Pa. 161; *Updike v. Ten Broeck*, 32 N. J. L. 105; *Caviness v. Rushton*, 101 Ind. 502.

Nor is it contended that a contract to leave a certain amount of money by will to a particular person, though oral, is open to objection under the Statute of Frauds. It is not a contract for the sale of lands or of goods; and it may be performed within a year. *Peters v. Westborough*, 19 Pick. 364; *Fenton v. Emblers*, 3 Burr. 1278; *Ridley v. Ridley*, 34 Beav. 478; *Kent v. Kent*, 62 N. Y. 560; *Bell v. Hewitt*, 24 Ind. 280; *Wallace v. Long*, 2 Ind. L. ed. 50 (3 West. Rep. 870), 105 Ind. 522.

Such a contract differs essentially from a contract to devise all one's property, real and personal, which comes within the Statute of Frauds. *Gould v. Mansfield*, 103 Mass. 408.

The obligation of such a contract is not impaired, though the consideration is to arise wholly or in part in the future, and though the person to whom the promise is made is under no mutual, binding obligation on his part.

In *Train v. Gold*, 5 Pick. 380, 385, it was said by Justice Wilde: "Thus, if A promises to B to pay him a sum of money if he will do a particular act, and B does the act, the promise thereupon becomes binding, although B, at the time of the promise, does not engage to do the act." This doctrine was quoted with approval in *Gardner v. Webber*, 17 Pick. 407, 418, 630

and in *Bornstein v. Lans*, 104 Mass. 214, 216, and it is also affirmed in *Goward v. Waters*, 98 Mass. 596.

In *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 580, it was held that "where one promises to pay another a certain sum of money for doing a particular thing which is to be done before the money is paid, and the promisee does the thing upon the faith of the promise, the promise, which was before but a mere revocable offer, thereby becomes a completed contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of the offer of a reward." See also *Paige v. Parker*, 8 Gray, 211, 218; *Hubbard v. Coolidge*, 1 Met. 81; *Todd v. Weber*, 95 N. Y. 181, 192; *Miller v. McKenzie*, Id. 575, 579.

It is therefore, in law, competent for a valid oral contract to be made to leave a certain sum of money by will to a particular person in consideration of services thereafter to be rendered by the promisee to the promisor, provided such services are in fact thereafter rendered and accepted in pursuance of such contract, although the promisee did not bind himself in advance to render them. The performance of the consideration renders the contract binding, and gives a right of action upon it.

The objection mostly relied on by the defendant in the present case is that the auditor's report does not conclusively show such a contract, upon such a consideration. The auditor does not, in terms, as he might properly have done, make any specific finding upon the question whether there was such a contract; but he states the facts in detail upon which he considered that question to rest, and leaves the determination of it to the court. The detailed facts stated by the auditor are not controverted, and the evidence upon which they were found is not before us. These facts are therefore to be taken as they stand, with no further explanation than is afforded by the circumstances. Looking at them in this manner, it is to be determined whether, on the whole, there is enough clearly and decisively to show that there was a contract, so that the judge who heard the case could not properly find the contrary; in other words, whether it appears there was a promise by the defendant's testator sufficiently definite to be enforced, and made with the understanding and intention that she would be legally bound thereby. A promise made with an understood intention that it is not to be legally binding, but only expressive of a present intention, is not a contract. *Thornton v. Thornton*, 1 Cush. 89; *Chitty, Cont.* 11th Am. ed. 12, 13.

Ordinarily, when there is a distinct promise, for a sufficient consideration, to do a particular thing, such promise is to be considered as a contract unless there is something in the subject of the promise, or in the circumstances, to repel that assumption. But each must be examined in the light of its own circumstances.

In the present case, it appears that the plaintiff was the brother-in-law of the defendant's testator, who was an unmarried woman; that he was early in the habit of advising with her about her business affairs, and not at the outset, if ever, in the expectation of being paid directly for his services. Nevertheless, there soon came to be a recognition on her part that the

plaintiff's services were valuable in a money sense, and an intention in some form to pay him for them. By his advice, in 1866, she bought real estate on Chauncy Street, and sold it again in 1868 at a profit of \$10,000, the sale being advised and negotiated by him. Prior to the sale, she told him that if such profit should be made, he should have one half or a part of it. In fact, nothing was paid to him at this time, but it appears that she already contemplated putting the relation between them on a business basis; and shortly afterwards she told him that if he would go on and act as her agent and adviser respecting her investments, she would make a will giving his wife \$5,000; and in the event of his wife's dying before him, she would then, by a new will or codicil, bequeath the legacy of \$5,000 to him. He assented to this, and she made her will accordingly, bequeathing \$5,000 to his wife. All this savored of a business arrangement. The sum mentioned was not greater than she had talked of paying to him, as a part of the profits on the sale of the Chauncy Street real estate; indeed, not so great, for that was to be payable in 1868, while the bequest would not be payable till after her death.

In 1868 another purchase was made of real estate, which was sold at a profit in 1869. In 1869 he admitted her to share in a purchase of real estate on Bedford Street, which he had intended to make on his own account; the whole of the money was furnished by her, and in 1873 and 1874 the estate was sold at a profit of between \$4,000 and \$5,000, over and above the allowance to her of 7 per cent interest on the purchase money, and this profit was equally divided between them.

In 1876 a purchase was made of real estate on Mt. Vernon Street. All of these purchases and sales were negotiated and advised by the plaintiff, and were made solely upon his judgment.

Such were the relations of the parties up to 1878. She had paid him nothing for his services; but her will, bequeathing \$5,000 to his wife, had stood during all this time, according to the understanding between them in 1868. Nothing had been said or done to vary the effect of her promise to bequeath the legacy of \$5,000 to him in the event of his wife's dying before him.

In 1878 a new arrangement was made. The plaintiff's wife was fatally ill, and died in June of that year. A few weeks before her death, and when it had become apparent that she was fatally ill, the defendant's testator told the plaintiff that she desired to visit California and a brother who resided in Nevada, and, if he would accompany her there in the fall of that year, she, in consideration of his so accompanying her, and of the services he had rendered and might thereafter render her respecting the management of her property, would make a will giving him \$5,000, and pay the expenses of the journey. The plaintiff assented thereto; and in May or June of that year she destroyed the will then existing, and executed a new one, wherein she gave to him a legacy of \$5,000. According to the terms of what she had proposed in 1868, she was, by a new will or codicil, to bequeath to him the legacy of \$5,000, in the event which was now

at hand, if he would go on and act as her agent and adviser respecting her investments. This he had done up to that time. She now proposed to him that she would make a will giving him \$5,000 in consideration of his accompanying her to California and Nevada, and of the services he had rendered and might thereafter render to her. There was no stipulation binding him to render such services for any particular length of time in the future. The most that could fairly be implied is that he should render them as requested, and as long as he should be able to do so. Her proposition appears to have been intended as in the nature of business. The relations between the parties in the past had not been merely those of kindness and voluntary aid. The services which he had already rendered were substantial and of a business character. They did not consist merely of advice, but he appears to have taken, to a large extent, the responsible charge of her business matters, and to have conducted them successfully. In addition to continuing such services, he was now asked to accompany her to California, which he did, in the fall of 1878 and the winter following,—a trip of several months. She proceeded at once to act upon his acceptance of her proposition, and made a new will accordingly. This new will remained unrevoked for two and a half years. In view of all these circumstances it seems to us that, upon a just construction of the auditor's report, there is not enough to repel the ordinary assumption that the promise of the defendant's testator was a contract which, when made, was intended and understood by both parties to be binding upon her.

The present case materially differs in its facts from *Maddison v. Alderson*, L. R. 8 App. Cas. 467; S. C. 5 Exch. Div. 298, and 7 Q. B. Div. 174. In that case doubt was expressed whether there was a contract; but the question was not finally determined. It depended, in part, upon a review of the testimony of witnesses, which is not fully reported. The terms of the alleged promise and consideration differed from those in the case before us in certain respects which might be found to be material. But the decision in that case turned finally upon the question whether, assuming a contract, it had been shown that there had been a part performance sufficient to take it out of the Statute of Frauds; and it was held in the negative.

Upon the auditor's report in the present case, we must now assume that the whole consideration stipulated for was performed by the plaintiff, and that it was sufficient. It is expressly found that his advice was valuable and his management judicious, being given and rendered whenever requested or required; that he has received no compensation therefor, except as stated respecting the division of the profits arising on the sale of the Bedford Street real estate; that in the fall of 1878 and the winter following he accompanied her to Nevada and California, "and then and thereafter in all respects complied with and fulfilled the aforesaid agreement."

It is also suggested in behalf of the defendant that, even assuming a contract, it was not proved to be a contract to make a will which should not be revoked. But looking at the language used in the light of the circumstances

existing and preceding, so narrow a construction of the contract is not permissible. The substance of it was that she would bequeath to him the sum mentioned. An instrument effectual as a will was clearly contemplated; otherwise, the promise was but illusory.

The result is, in the opinion of a majority of the court, that the plaintiff is entitled to judgment for the sum of \$5,000 and interest, in addition to the amount found at the trial.

Exceptions sustained.

Michael C. BRASLIN

SOMERVILLE HORSE R. R. CO.

Where the terms of a lease by a street railroad company, of a part of its track, to another company, to be operated by the lessee, appeared to be sufficient effectually to bind the lessee to indemnify the lessor against loss, but did not state that the lessor should be exonerated from responsibility; and the making of the lease was ratified by the Legislature by a statute which did not contain any express provision as to the liability of the lessor or its exemption therefrom,—*Held*, that the lessee was not substituted for the lessor in any such sense as to relieve the latter from liability; and that therefore an action of tort for personal injuries received on the leased track operated by the lessee company, was maintainable against the lessor company.

(Middlesex—Filed September 24, 1887.)

ON report. *New trial granted.*

Action of tort for personal injuries brought in the Superior Court and there tried before Blodgett, J., who ruled, upon the evidence, that the action could not be maintained, and directed a verdict for the defendant, and thereupon reported the case to this court.

Messrs. George A. Bruce and M. F. Farrell, for plaintiff:

The claim of defendant is that its charter liability has been avoided by the lease of its track to the Middlesex Railroad Company, and the approval thereof by the Legislature.

Unless the power granting the charter has consented that the defendant should be relieved from the liabilities imposed upon it, it must be liable in this action.

Nelson v. Vermont & Canada R. R. Co., 28 Vt. 717; *Chicago, St. P. etc. R. R. Co. v. McCarthy*, 20 Ill. 385; *Ohio & M. R. R. Co. v. Dunbar*, 20 Ill. 623; *Chicago & R. I. R. R. Co. v. Whipple*, 22 Ill. 105; *Washington, A. & G. R. R. Co. v. Brown*, 21 U. S. 17 Wall. 445 (21 L. ed. 675); *Langley v. Boston & M. R. R.* 10 Gray, 103; *Ingersoll v. Stockbridge & P. R. R. Co.* 8 Allen, 438; *Davis v. Providence & W. R. R.* 121 Mass. 134.

The language of the leases shows that it was not the intention of the Legislature, in ratifying them, to relieve the defendant corporation from its charter liability.

Messrs. Samuel Hoar and W. H. Martin, for defendant:

No question can arise as to the power of the

defendant to relieve itself, by its contracts and leases, of all liability for injuries such as the one here complained of, the Legislature having confirmed the agreements and leases under which the Union Railway Company operated the road at the time of the injury. The only question is, What is the legal effect of those contracts and leases?

By these instruments the Union Railway Company acquired complete and exclusive control of the road on Elm Street, and the exclusive right to run cars over the same, and to transport passengers thereon, for the unexpired term of the charter of the defendant, the defendant retaining no rights in or to the same, except merely its covenants with the lessee. It is a lease, not only of the road, but of the entire franchise of the defendant in so far as it covers the street in question. "With this franchise went the liability of the defendant to compensate all its passengers injured by the negligence of its servants or agents. This liability does not grow out of the statute provision to that effect in its charter alone, but is one which rests on all carriers of passengers."

Quested v. Newburyport Horse R. R., 127 Mass. 205.

It is a well-settled principle in this court that the party having the exclusive direction and control of the servants running the train at the time of the accident is the one responsible for the negligence of those servants, irrespective of the ownership of the cars, the engines, or the road, unless the Legislature, by the charters of the companies, or public acts, have decreed otherwise.

Fletcher v. Boston & M. R. R. 1 Allen, 14; *Schopman v. Boston & W. R. R. Corp.*, 9 Cosh. 24; *Ballou v. Farnum*, 9 Allen, 47.

In this case, not only by its exclusive control of the operation of the road, has the Union Railway Company assumed all liability for the acts of its servants, but, by the express terms of the lease under which it operates the road, it makes itself "subject to all the liabilities of the" defendant, and has "assumed all liabilities imposed on" the defendant, "by its charter, save those incident to its organization and continuance;" and agrees to defend all suits brought against the defendant for the acts of the servants of the Union Railway Company. And this express assumption of responsibility by the Union Railway Company, the Legislature has sanctioned and approved.

The covenant in the lease, that the lessee, at its own expense, would defend all suits brought against the defendant, and pay all judgments recorded against it, was evidently inserted because the defendant, at the date of the lease, January 5, 1876, and at the date of the assignment of the same to the Union Railway Company, February 1, 1876, had no authority to make the lease.

Pub. Stat. chap. 113, § 56.

It was intended to protect the defendant until the leases should be ratified and confirmed by the Legislature, which Act of confirmation was passed and approved March 22, 1876, and to cover all intervening suits against the defendant.

There is, then, nothing in this case to take it out of the ordinary rule of *respondent superior*, as laid down in *Ballou v. Farnum*, *supra*.

3 MASS.

The person whose negligence is alleged to have caused the injury in this case was a servant of the Union Railway Company, over whom the defendant had no control, and to whom the defendant was an entire stranger; the defendant, therefore, cannot be held responsible for his acts.

C. Allen, J., delivered the opinion of the court:

This is an action of tort against the Somerville Horse Railroad Company, to recover for personal injuries. The question presented by the report is whether the plaintiff's right of action, if any, is against the defendant, or exclusively against the Union Railway Company, another street railway company, which was operating the defendant's road under the assignment of a lease. The presiding justice in the superior court ruled that the plaintiff could not maintain his action against the present defendant; and reported the case for the determination of this court, upon facts which were not in dispute. Those facts, so far as material, are as follows:

The Middlesex Railroad Company was incorporated, by Stat. 1854, chap. 434, with power to construct a street railway; and by § 5 was made liable "for any loss or injury that any person may sustain by reason of any carelessness, neglect, or misconduct of its agents and servants, in the management, construction or use of said tracks, roads, or bridges." The Somerville Horse Railroad Company, the defendant in this action, was incorporated by Stat. 1857, chap. 250, to receive a transfer of the franchise and property of the Middlesex Railroad Company in the town of Somerville; and, upon such transfer being made, the Somerville Horse Railroad Company was to stand in the place of the Middlesex Railroad Company, so far as the road in Somerville was concerned; and the duties, liabilities, and burdens imposed on the Middlesex Railroad Company were transferred from said company and imposed upon the Somerville Horse Railroad Company. This transfer appears to have been carried into effect, and the defendant was in possession accordingly.

In April, 1871, a tripartite agreement was entered into between these two companies and the Union Railway Company, whereby, among other things, the Somerville Horse Railroad Company agreed to lay a new street railway track on Milk and Elm streets, in Somerville, and, on the completion thereof, to lease the same to the Middlesex Railroad Company; and on January 5, 1876, in order to carry into effect the above agreement, a lease thereof was executed accordingly, for and during the unexpired term of the lessor's charter, "upon the like terms and conditions, and with all the rights and privileges contained in a certain written instrument, bearing date the 1st day of June, 1869, and duly executed by the said Middlesex Railroad Company and the said Union Railway Company." This lease did not include the whole of the railroad of the lessor, and no mention was made therein of the lessor's franchise.

Referring, now, to the instrument of June 1, 1869, in order to ascertain the terms and conditions of the above lease, it appears that it was

a lease from the Middlesex Railroad Company to the Union Railway Company of a certain piece of street railroad in Somerville theretofore built by the Somerville Horse Railroad Company and by it leased to the Middlesex Railroad Company; and the lease of June 1, 1869, was made "subject, however, to all the conditions, restrictions, duties, and liabilities imposed upon the said Somerville Horse Railroad Company by its charter and its contracts and agreements." The lessee was to pay a certain rent and all taxes; and it agreed to "assume and perform all duties imposed upon the Somerville Horse Railroad Company, by its charter, save those incident to its organization and continuance," and, further, to "keep said railroad in good repair during said term, and to run and operate the same in such proper and careful manner as the public safety and convenience may require; and that it, the party of the second part (*i. e.* the lessee), at its own cost, will defend any and all suits of any kind brought against said Somerville Horse Railroad Company and the party of the first part severally, on account of injuries to person or property, and any loss of property happening, or which may arise out of the operation and use of said railroad during said term, and any acts and neglects of said party of the second part and any persons in its employ, and will pay and discharge all judgments recorded against them or either of them in such suits." The lessee further agreed to deliver to the lessor, at the expiration of the term, the said property; and there were provisions for re-entry for breach of covenant.

The lease of January 5, 1876, from the Somerville Horse Railroad Company to the Middlesex Railroad Company, was assigned by the lessee to the Union Railway Company, on February 1, 1876, subject to all the liabilities, duties, and conditions contained in said lease; and the assignee covenanted to do and perform all the duties and services, and assume all the risks and liabilities, and perform all the covenants and agreements, imposed by said lease upon the lessee named therein.

At the time when the plaintiff received the injuries complained of, the railroad, at the place of the accident, was used and operated by the Union Railway Company under the above-mentioned lease and assignment, which, by Stat. 1876, chap. 53, were ratified, confirmed, and declared valid; and all acts and proceedings theretofore done under and in accordance therewith were declared valid and legal.

The question presented for determination is whether, by means of the above-mentioned instruments and statutes, the Somerville Horse Railroad Company is exonerated from responsibility to a person injured upon that part of its railroad which it leased to the Middlesex Railroad Company on January 5, 1876. There is perhaps no reason to doubt that the Union Railway Company would be responsible; but we are to determine whether the Somerville Company is also responsible.

The general rule is familiar, that neither a steam nor a street railway corporation can make a valid transfer—either by way of absolute deed, mortgage, or lease—of its franchise, or of its railroad and the bulk of its property; or relieve itself of the burden imposed upon it by

law or by its charter, without the consent of the State. *Commonwealth v. Smith*, 10 Allen, 448; *Richardson v. Sibley*, 11 Allen, 65; *Worcester Cent. Nat. Bank v. Worcester Horse R. R. Co.*, 13 Allen, 105; *Middlesex R. R. Co. v. Boston & C. R. R. Co.* 115 Mass. 847; *Davis v. Old Colony R. R. Co.* 131 Mass. 271; *Washington, A. & G. R. R. Co. v. Brown*, 84 U. S. 17 Wall. 445, 450 (21 L. ed. 675); *Bower v. B. & S. W. R. Co.* 42 Iowa, 546.

In *Quested v. Newburyport & A. Horse R. R. Co.* 127 Mass. 204, a street railway company had leased its railroad and franchise, under legislative authority to do so, it being expressly provided by statute, however, that such lease should not exempt said company from any duties or liabilities to which it would otherwise be subject. There is no similar express provision in any statute affecting the present case; but, on the other hand, we find nothing indicating an intent that the defendant, by means of a lease, should be able to escape from its liabilities and responsibilities to the public.

The provisions of the lease, including those which are incorporated by reference, define the duties and obligations of the contracting parties as between themselves, and appear to be sufficient effectually to bind the lessee to indemnify the lessor against loss. But it is nowhere stated that the lessor should be exonerated from responsibility, nor was it possible for the parties to make a contract which should have that effect. The sanction of the Legisla-

ture was given to the contract as made by the parties, but added nothing by way of exemption from the primary responsibility of the lessor. The lease did not purport to transfer the lessor's franchise, or the whole of its property. The lessor was not going out of business entirely, but only leased a portion of its road, with provisions for restoration of the leased property at the end of the term, and for re-entry. It was under a positive duty and obligation to the public, and the consent of the Legislature to the making of the lease did not imply a discharge from the duty and obligation. Indeed there is a certain implication that the parties did not contemplate any such discharge, arising from the stipulation for indemnity "during said term,"—that is, during the whole term of the lease. Where a corporation seeks to escape from the burdens imposed upon it by the Legislature, clear evidence of a legislative assent to such exoneration should be found. We do not overlook the decisions in *Mahoney v. Atlantic & St. L. R. R. Co.* 63 Me. 68, and in *Murch v. Concord R. R. Corp.* 29 N. H. 1, 35, which certainly are rather to the effect that the lessees alone are responsible, under circumstances not much unlike those in the present case. But we do not find that the lessees were substituted for the defendants in any such sense as to relieve the latter from liability; and the result is that there must be a new trial.

New trial granted.

VERMONT.

SUPREME COURT.

Israel ROBINSON

v.

MISSISQUOI R. R. CO., W. C. Smith, *et al.*

1. In construing a deed, every word and every clause, so far as possible, should be given some force and meaning; and where it is doubtful what the construction should be, resort may be had to the circumstances; thus, where the language in the granting part and in the *habendum* was appropriate to convey a fee, and, to the following clause in the description: "being a strip of land 4 rods in width across my land, and being the same land now occupied by the St. Albans & Richford Plank Road Co. for their road," was added the clause, "for the use of a plank road."—*Held*, that the last clause was a limitation upon the grant, and that only an easement was conveyed.
2. The lien which an owner has for land damages on land taken by a railroad for its use is not barred by the Statute of Limitations, if at all, until fifteen years have elapsed, if such owner has clearly evinced an intention to hold the title until the damages are paid.
3. When the finding of the master is equivocal as to the allowance of interest, the orator will not be allowed more than he claimed by his bill.
4. Nor in such case should he be allowed to amend his bill in this respect.

(Franklin—Filed September 7, 1887.)

BILL in chancery. Heard on bill, answer, replication, and a special master's report, September Term, 1886, Franklin County, Taft, Chancellor. Bill *pro forma* dismissed. *Reversed*.

The suit was brought to recover land damages for land taken by the defendant railroad, and in default of payment for a foreclosure. The prayer of the bill was that the defendants be ordered to pay the damages, and in default of payment that they be perpetually enjoined from operating their railroad over and across the orator's farm. On February 26, 1858, the orator was the owner of a farm in Swanton, containing about 190 acres, and on which day he conveyed by deed a strip of land through said farm to the St. Albans & Richford Plank Road Co., a corporation duly chartered, of which deed the following is a copy:

"Know all men by these presents that I, Israel Robinson, of Swanton, in the County of Franklin and State of Vermont, for the consideration of forty dollars paid to my satisfaction by the St. Albans & Richford Plank Road Co., a corporation created by the Legislature of the State of Vermont, have sold and quitclaimed and do hereby freely release, quitclaim, and transfer unto the St. Albans & Richford Plank Road Co., their successors and assigns forever,

1 vt.

all my right, title, and interest in and to the following land in Swanton, described as follows, viz.: being a strip of land 4 rods in width across my land, and being the same land now occupied by the St. Albans & Richford Plank Road Co., for their road for the use of a plank road. To have and to hold said premises with all the privileges and appurtenances thereto belonging to the said St. Albans & Richford Plank Road Co., their successors and assigns forever. In witness whereof I hereto set my hand and seal this 26th day of Feb. 1858." (Signed, sealed, etc.)

(As to the punctuation of the deed, see the opinion of the court.)

The master found that on or about said February 26, the said road company constructed a plank road "through said farm, and took for the purposes of said road a strip of land 4 rods wide," etc.; that said company occupied said strip of land for a plank road until about July 1, 1870, when said plank road company conveyed all of its interest in the said strip of land to the defendant the Missisquoi R. R. Co.; that said railroad company took possession of said strip of land at once, and constructed thereon its railroad, and operated the same over and upon said strip of land until November, 1877; that the Missisquoi R. R. Co. in November, 1870, was mortgaged to W. C. Smith, B. P. Cheney, and William Stevens, trustees; that said trustees, under an order of the court of chancery, went into possession of said railroad and said strip of land, claiming title under said mortgage; that said trustees, or some of them, have been in possession ever since some time in November, 1877, operating said railroad upon said strip of land. The orator objected to the construction of the railroad, and claimed damages by reason thereof. On August 29, 1876, S. P. Carpenter and E. A. Smith, a committee on land damages, duly appointed by said railroad company, and authorized to act for said railroad company in respect to said damages, agreed with said Robinson upon the damages sustained by him on account of the construction of the railroad over said strip of land; and the damages were agreed on at \$300; but the trustees were not parties to the agreement, and it did not appear that they knew of the same until they came into possession. The committee gave the orator the following writing:

St. Albans, Aug. 29, 1876.

John W. Newton, Treas.:

Dear Sir,—We have this day agreed with Israel Robinson, of Swanton, to allow him \$300 for damages by reason of the location of our road upon the line of the plank road through his farm, which sum you are hereby authorized to pay.

Silas P. Carpenter,

E. A. Smith,

Committee on Land Damages.

The master found as to interest:

"And the parties before me agreed that the actual damages to said farm and to said Robinson, by reason of constructing said railroad over said strip of land, was \$300; and that, if said trustees were required to pay said damages or the agreed damages, they should pay interest from the time that said railroad company would be legally bound to pay interest.

"If the orator is entitled to interest from the

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time said Missisquoi R. R. Co. took the exclusive possession of said strip of land and commenced operating their said railroad over said land, then I find said interest to September 20, 1886, to be \$270, making the interest and damages at that date \$570. If the orator is entitled to interest on the damages only from the time the damages were agreed upon as aforesaid, then I find said interest to September 20, 1886, to be \$181.50, making the interest and damages at that date \$481.50."

The master also found that the farm was damaged by the construction of the railroad.

Messrs. M. Buck & Son, for orator:

If the defendant trustees are not bound by the agreement made by the committee on land damages, on the ground that they are not parties to it, then they can derive no benefit from it.

Adams v. R. R. Cos. 57 Vt. 240; *Kittell v. Missisquoi R. R. Co.* 56 Vt. 96.

The trustees took possession of the railroad and operated it over the orator's land, subject to his lien for his actual damages caused by the original taking. The words "for the use of a plank road," used in the deed, limit the interest granted to the use of the land for a particular purpose. General terms will yield to the specific.

Wheelock v. Moulton, 15 Vt. 519.

When printed blanks are used, phrases written in have the preference.

2 Pars. Cont. 29.

The deed only conveyed an easement.

2 Washb. Real Prop. § 59.

But the finding of the master that the farm was damaged brings the case within the decision of *Brainard v. Missisquoi R. R. Co.* 48 Vt. 107. It was a taking of land within the purview of the Constitution.

Winn v. Rutland, 52 Vt. 494; *Cooley*, Const. Lim. 546, 589.

The orator is entitled to interest from the time the defendants took possession. The orator's lien continues fifteen years. The Statute of Limitations is not a bar.

Kittell v. Missisquoi R. R. Co. 56 Vt. 96.

Messrs. Noble & Smith, for defendants:

The principal question is, What estate did the orator's deed in 1858 pass to the plank road company? It conveyed a fee. The first clause of the granting part, "their successors and assigns forever, all my right," etc., is absolute.

In the *habendum* is the clause, "said company, their successors," etc. The two concur in describing an absolute estate. The words, "their successors and assigns forever," carry the fee as much as do the words "heirs," etc., in a deed to an individual. The words, "for the use of a plank road," are words of description and not of limitation. They made the description complete. If the language is ambiguous, it should be construed most strongly against the grantor.

Adams v. Warner, 23 Vt. 411.

This is a deed poll. The language is that of the grantor alone; hence special force should be given to this rule. The rule includes all exceptions and conditions.

Mills v. Cutlin, 22 Vt. 98.

Effect should be given to all the phrases and language of the deed.

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Cushman v. Northwestern Ins. Co. 34 Me. 487; 2 Pars. Cont. § 5.

The office of the *habendum* is to determine what estate is granted.

1 Jones, Mort. § 87.

The words, "for the use of a plank road," in connection with the words preceding, simply define the extent of land taken. The trustees stand as innocent grantees. The plank road company had legal capacity to take the title in fee.

Page v. Heineberg, 40 Vt. 81.

The Statute of Limitations is a complete defense.

Rev. Laws, § 3371; 1 Redf. R. R. pp. 336, 351.

If the case is subject to the rule laid down in *Kittell v. Missisquoi R. R. Co.* 56 Vt. 96, and in *Adams v. R. R. Cos.* 57 Vt. 240, then we claim to come within the exception stated in the latter case, viz.: "Unless the owner has done that which in law precludes him from asking its enforcement," Rev. Laws, § 951, does not apply. This suit is brought for \$300 and interest, and not for the "recovery of lands."

Again, the award in this case was made in 1876. The orator's suit was brought to the April Term, 1885. The railroad company constructed its railroad over the land in July, 1870. "Equity aids the vigilant; not those who slumber over their rights."

In some cases courts of equity deny relief on the ground of acquiescence, though a less period of time than that prescribed by the Statute of Limitations has run.

Pom. Eq. Jur. §§ 7, 9.

The orator accepted the order in settlement of his claim; and this extinguished his lien, if he ever had one.

ROSS, J., delivered the opinion of the court:

1. The first contention is whether the deed from the orator, of February 28, 1858, to the St. Albans & Richford Plank Road Co. conveys the fee, or an easement in the premises described. The language used in the granting part of the deed, and in the *habendum* is appropriate, and that commonly used to convey the fee. The first part of the description of the premises, "being a strip of land 4 rods in width across my land, and being the same land now occupied by the St. Albans & Richford Plank Road Co. for their road," is appropriate to an absolute grant. But the remaining clause, "for the use of a plank road," unless properly descriptive of the premises, is such language as would naturally be used to limit or qualify the grant,—to change it from a fee to an easement. The description of the premises granted is complete without this clause. This clause, in the original deed, is separated from the former part of the description by a mark of some kind, designed evidently either for a comma or a dash. This clause can have no force as descriptive of the premises conveyed, and no force at all unless as qualifying and limiting the grant. It is an important rule of construction, applicable to all written instruments, that every word and every clause shall, so far as possible, be given some force and meaning; and that if, in case of construing the whole instru-

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ment one way, meaning is given to every word and clause, while construing it another way, some portion of the language used is rendered meaningless, the construction which gives force and meaning to all the language used is, as a rule, to prevail. This is upon the presumption that the party making the instrument did not use any language except what was necessary to make it speak the intention of the parties thereto. Again, when it is doubtful what the construction should be, resort to the circumstances surrounding the transaction may be had to enable the reader to understand and apply the language used. The language of the deed indicates that the grantee was already in the occupation of the premises granted. The only possible use to which the grantee could put the premises was for its plank road; hence it would desire to purchase the right to so use it only. It was also natural that the grantor should desire to limit the grant, it being a strip of land 4 rods wide through his entire farm. The consideration of the deed, \$40, is quite inadequate for an absolute grant of 8 acres, so situated as to sever the orator's farm. Under these circumstances we should naturally expect to find an easement rather than a fee granted. When language is found in the instrument making the grant, fitted to create the grant naturally to be desired by both parties, although not in the usual form of such a grant, it should be given its evidently intended force and effect. *Keeler v. Wood*, 30 Vt. 243.

In making the conveyance a common printed blank deed was used. It was easier to write the limiting clause in the blank space left to be filled with the description of premises, and at the close of such description, than to erase and insert it in the *habendum*. We think this clause was intended as a limitation upon the grant, reducing it from the grant of the fee to a grant of an easement for the use of a plank road,—all that the grantee cared to acquire, and all that the grantor would be likely to desire to part with.

2. If the St. Albans & Richford Plank Road Co. only took an easement in the premises, it is not contended, under the recent decisions,—*Kendall v. R. R. Cos.* 55 Vt. 438; *Kittell v. Missisquoi R. R. Co.* 56 Vt. 96; *Adams v. R. R. Cos.* 57 Vt. 240,—on the facts found by the master, that the orator is not entitled to recover, unless he is barred by the Statute of Limitations, which is insisted upon. This suit was brought to the April Term of the Court of Chancery of Franklin County, 1885. The railroad company entered upon the land in 1870, but acknowledged its obligation to pay the orator's damages by an order on the treasurer therefor, August 29, 1876. The trustees under the mortgage took possession in November, 1877. If this were an action at law to collect the damages thus agreed upon, it would be barred by the Statute of Limitations. While it is a suit in equity for the collection of those damages, it is also more than that, as it seeks to recover the premises if the damages are not paid within the time limited for that purpose. The result of the recent decisions of this court in this class of actions, as I understand them, though it has not been so expressly stated, is that where, from all the facts and circumstan-

ces, it is evident the landowner intends to hold the title of the land taken until his damages are paid, the law will treat him—as it does any owner of real estate who by contract allows another to take possession of the premises contracted to be sold, and to make improvements or payments, who is not to have a conveyance of the title until the entire or specified portion of the purchase money is paid—as holding the title as security for the payment of the damages ascertained, or to be ascertained, or the contract price. While, strictly speaking, the relation of mortgagor and mortgagee does not exist between parties so related to real estate, yet in equity they are treated very much as though that relation did exist between them. The time stipulated for payment or other performance is rarely in equity considered the essence of such contracts; if the purchaser by contract is ready and willing to perform, though after the time stipulated, he is allowed in equity to do so, and the contractor is decreed to convey upon such tendered performance. This is the rule in equity, unless the case is exceptional; and the contractor will be placed at a disadvantage by the allowance of a subsequent performance. The contractor, until the time for performance has expired, holds the title to the premises in trust for the purchaser by contract, and also as security for performance by the contract purchaser. Where the purchaser in possession has not fulfilled, the contractor may maintain ejectment for the recovery of the premises contracted to be sold. But if the purchaser in possession has partly performed, though not in time, he may in equity be allowed to perform and receive conveyance, and have the suit in ejectment perpetually enjoined. Inasmuch as the purchaser in possession may almost always, if not always, thus force the contractor into equity, the contractor may first bring his suit in equity and have the rights of the purchaser in possession in the premises foreclosed, if he refuses or fails to perform in such extended time as the court of equity may allow. The relation of a landowner whose land is taken by a railroad company for the use of its railroad, with or without the exercise of the power of eminent domain, who either consents that the railroad company may take possession, or forbids it, if he clearly evinces an intention and purpose to hold the title until his damages are paid,—while, from the nature of the possession and the interests involved, he may not maintain ejectment,—is, in equity, that of the owner of real estate who has contracted to sell it on certain conditions being performed or payments made, and has allowed the purchaser to take possession. He may, like such owner, enforce the performance by a time limited in equity, or recover possession of the premises contracted to be sold. I think all the recent cases on this subject fall within this familiar principle in equity. By the suit in equity the landowner says, in substance: "I still hold the title of the premises taken; I never intended the railroad company should have it until it paid me my damages. It has not paid the damages, either because it never agreed to, or agreed to and has not performed its agreement; I ask that it shall pay, or surrender to me, the possession of the premises." It is thus seen that the suit in equity is really for the recovery of the posses-

sion of land, and is not barred by the Statute of Limitations, if at all in equity, until fifteen years have elapsed. While the Statute of Limitations is not strictly applicable to suits in equity, courts of equity recognize the time limited by such statutes as the time when a party should be at rest from the embarrassments and perplexities of litigation. No such facts exist, nor such time has elapsed, as would lead a court of equity to refuse the orator relief in this case.

8. The only further contention is in regard to the time when the interest is to commence. The finding of the master as to the agreement in regard to the damages is equivocal as to the time when the sum found is to commence to draw interest. It is that the orator is entitled to interest on the sum found as damages from the time the railroad company would be legally bound to pay it. If there had been no agreement in regard to the damages, that would be from the time it took possession. But it is found that by the agreement with the railroad company interest would commence on the \$300 August 29, 1876. This is all the orator has claimed by his bill. He must be held to the demands of the bill; nor should he be allowed to amend it, in this respect, on the equivocal finding of the master on this subject.

The decree of the Court of Chancery is reversed, and the cause remanded, with a mandate to enter a decree that, unless the defendants pay to the clerk \$481.50, with interest since September 20, 1886, and costs of suit, for the orator, by a time to be limited by the Court of Chancery, the defendants shall be perpetually enjoined from using the premises described in the bill; and upon such payment, if made, the orator is to deliver to said clerk a deed of said premises for the use of a railroad, to the defendants, before receiving the money.

STATE of Vermont

v.

Village of ST. JOHNSBURY.

1. All **fin**es imposed under the liquor law, for its violation, are payable to the State; and when such fines are paid by a justice of the peace to the treasurer of a village, they are recoverable in an action of general assumpsit in the name of the State against the village, although the prosecutions resulting in the payment of the fines were wholly conducted by the village authorities and at its expense.
2. The State is not estopped by the conduct of its officers in not objecting to such payments, although the State's attorney and State auditor knew of them,—as it did not appear that the village had been in any way influenced by what the State, through its officers, did or omitted to do.
3. The village can not be allowed anything for disbursements in respect to legal services and expenses, or for taxable costs; for it was the duty of the State's attorney to attend to the prosecutions; and one cannot be made a

debtor, whether he will or not, for gratuitous services.

4. The State is also entitled to recover \$100, less \$13.22 paid out of it for court and clerk fees, which sum was paid by a respondent, who appealed to the county court, and whose recognizance was taken to the village, when it ought to have been to the State, and whose bonds were forfeited.

(Caledonia—Filed September 9, 1887.)

GENERAL ASSUMPSIT. Heard upon an agreed case, June Term, 1886, Caledonia County, Ross, J., presiding. Judge Ross declined to hear the case upon its merits, as he was a taxpayer in the defendant village, and a *pro forma* judgment was rendered for the defendant. *Reversed.*

It was conceded that the State was entitled to an appeal.

Agreed statement: The action is general assumpsit. The State claims to recover the amount of certain fines and costs which were paid to the village treasurer at various times between the 1st day of August, 1881, and March, 1885. All these fines and costs accrued in prosecutions for the illegal sale of intoxicating liquor and for being found intoxicated. All these prosecutions were instituted upon complaint of the police of the defendant village as complaining officers, and were wholly conducted by the village authorities and at the village's expense. Neither the State's attorney nor any other State, county, or town officer ever had any connection with or control over any of the prosecutions. The fines and costs were paid by the respective convicted respondents to the justices of the peace before whom such prosecutions had been had, and were by such justices paid into the village treasury. The village treasurer in good faith claimed that the fines and costs belonged to the village treasury, and said justices acquiesced in the claim, and paid the money over, from time to time, as it was received by them. The State's attorney for Caledonia County, and State auditor, knew of the payments as they were made; and neither they nor any other State officer ever objected to said justices to the payments until the time of the demand. Neither the village treasurer nor any other village officer ever promised to pay the money or any part thereof to the State or any officer thereof. The village has never in any way recognized the right of the State to any of said money, nor in any way agreed to hold it for the State or to pay it or any part thereof to the State. The claim of the village has all the time been, and now is, in good faith, that the money belonged to it. The payments were made to the village treasurer voluntarily by said justices, with the knowledge of the State authorities aforesaid and without objection on their part. The fines so paid amount to \$397.35, and said costs to \$12.09. All the costs were paid out before the demand by the village treasurer to the various justices, witnesses, and prosecuting officers, who would have received them from the State had the funds been paid into the State treasury. Before the demand, one fourth of one of said fines, to wit, \$12.50, had been paid by the vil-

lage treasurer to the complainant in that prosecution, as is provided by law.

In a prosecution, begun and prosecuted as aforesaid, against one Monty, the respondent appealed to the county court and gave bonds to the said village as required by law, which were forfeited in the county court and chancered to \$100. This \$100 the village received and held as it did said fines. Out of it the village, before demand, paid, for costs and court and clerk fees and attorney fees in said prosecution, the sum of \$26.85. The court and clerk fees alone amounted to \$13.22 in said case. Before the making of said demand, the village had paid out of said funds the sum of \$98, aside from said \$26.85, for legal services and expenses necessarily incurred in conducting said prosecutions and securing said convictions, and the further sum of \$21.63 for taxable costs in other liquor cases of the same character, begun and prosecuted in the same way during the same period; in which cases convictions had not been secured. And of this last-named sum \$13.32 accrued in cases where the bonds of the respondents were forfeited and paid, and the State received the money collected on the bonds to amount exceeding said \$13.32.

Before the demand, all the balance of said money had been paid out and expended by the village treasurer upon the orders of the trustees of the village for general purposes of the village.

On the 7th day of March, 1885, the State's attorney for Caledonia County demanded payment of fines and costs to the State treasurer. No other demand was ever made therefor by any person or authority.

Mr. Alex. Dunnett, State's Attorney, for the State.

Messrs. Ide & Stafford, for defendant:

The fines in question belonged to the defendant.

Rev. Laws, §§ 1744, 1746.

The penalty for "selling," etc., is "he shall forfeit to the State," etc. This is not a specific disposition of the fines, such as is found in other places, where it is declared that certain fines shall be paid "into the State treasury." Assumpsit for money had and received cannot be maintained. There is no privity between the parties.

The defendant does not hold this money "to the use of the plaintiff." It never has so held it. On the contrary, it received and has always retained it under a distinct adverse claim of a right to take and appropriate it. No case can be found in the books where the action has been maintained by A against B for money of A's received by B from C, under a claim of right made in good faith by B and acquiesced in by C. Thus: A pays a sum of money into a banker's for a specific purpose; the banker's clerk, by mistake, pays the money to B, who has no right to it. Held, that A cannot maintain an action against B to recover it back.

Rogers v. Kelly, 2 Camp. 128; *Centre Turnpike Co. v. Smith*, 12 Vt. 212; *Williams v. Everett*, 14 East, 582; 3 Price, 58; *Stephens v. Badcock*, 3 Barn. & Ad. 354; *Coles v. Wright*, 4 Taunt. 197; *Stewart v. Fry*, 7 Taunt. 889; *Howell v. Batt*, 5 Barn. & Ad. 504; *Yates v.*

Bell, 3 Barn. & Ald. 648; *Adams v. Nickerson*, 1 Allen, 427.

The plaintiff is estopped. The State's attorney and State auditor knew what was being done,—that the defendant was maintaining a police force, employed counsel, summoned witnesses, etc., in prosecuting these cases.

Bigelow, Estop. 246; *People v. Jansen*, 7 Johns. 332; *United States v. Behan*, 110 U. S. 388 (Bk. 28, L. ed. 168); 10 Mass. 155; *Commonwealth v. Andre*, 8 Pick. 224; 5 Wall. 772 (72 U. S. bk. 18, L. ed. 556); *Rogers v. Burlington*, 3 Wall. 664 (70 U. S. bk. 18, L. ed. 79); 13 Wall. 297 (80 U. S. bk. 20, L. ed. 579).

The case cannot be distinguished in principle from that of a voluntary payment.

Brayt. 222; 1 Chitty, Pl. 355; *Dacey, Parties*, 14; *Rob. Dig.* 526; 2 Smith, *Lead. Cas.* *402; *Sowles v. Soule*, 3 New Eng. Rep. 591 *et seq.*

Interest is recoverable only since the demand. *Rob. Dig.* 399; *Mass. Dig.* 3091; 3 Pick. 261.

Rowell, J., delivered the opinion of the court:

This case is defended on several grounds. The first is that the fines and costs in question belong to the village and not to the State.

By the liquor law as first passed in 1852, fines for illegal sales were to be paid to the treasury of the town where the offense was committed (Stat. 1852, No. 24, § 5); but if the grand jury prosecuted, the fine and costs went to the treasury of the State (Id. § 24). In like manner the penalty for being drunk was first made payable to the treasury of the town where the offense was committed (Stat. 1855, No. 2, § 2).

But in the General Statutes the law was changed, and in both those cases the fines and costs were made payable to the treasury of the State (Gen. Stat. chap. 94, §§ 9, 10); and the law has been so ever since. In the Revised Laws, it is true, the phraseology is a little changed—"shall forfeit * * * to the State," instead of "to the treasurer of the State," or "to the treasury of the State," as in the General Statutes. But this makes no difference, for the present phraseology constitutes just as effective a disposition of these fines and costs to the treasury of the State as the old phraseology did. And the last Legislature must have thought so, for in an Act amendatory of § 1744 of the Revised Laws, whereby it is provided to what treasury fines and costs shall go that are not otherwise disposed of by law, it took pains to declare that the Act shall not be construed to divert from the State treasury any fines or costs arising from prosecutions under the liquor law. It is clear, therefore, that the fines and costs in question belong to the State, and not to the village.

It is also said that these were voluntary payments, and therefore not recoverable. But the very idea of a voluntary payment implies a right, on the part of the person paying, to exercise volition in respect of paying or not paying. But here the justices had no such right. It was their duty, under the law, to pay to the county clerk what was due to the State, and they had no right to choose to pay to the village.

As to the claim that the State is estopped from recovering the money, it is sufficient to say that it does not appear that the conduct of the village has been in any way influenced by what the State, through its officers, did or omitted to do. It might also be said that the State has neither concealed nor misrepresented any material fact, and that the village was ignorant of no such fact.

But it is said that assumpsit for money had and received will not lie, for that there is no privity between the State and the village, as the latter received from third persons and has retained the money in good faith, under an adverse claim of right and ownership. But in order to maintain this action there need be no privity between the parties, nor any promise to pay, other than what arises and is implied from the fact that the defendant has money in his hands belonging to the plaintiff that he has no right conscientiously to retain. In such case the equitable principle on which the action is founded implies the promise. When the fact is found that the defendant has the plaintiff's money, if he can show neither legal nor equitable ground for keeping it, the law creates the privity and the promise. *Brand v. Williams*, 29 Minn. 238; *Knapp v. Hobbs*, 50 N. H. 476; *Eagle Bank v. Smith*, 5 Conn. 75; *Mason v. Waite*, 17 Mass. 560; *Hall v. Marston*, Id. 575; *Vaughan v. Matthews*, 13 Q. B. N. S. 190, note; *Walker v. Conant*, 8 West. Rep. 181.

Lord Mansfield says in *Moses v. Macferlan*, 2 Burr. 1005, that "if the defendant be under an obligation, from the ties of natural justice, to refund, the law implies the debt and gives this action, founded in the equity of the plaintiff's case, as if it were upon a contract," or, as the Roman law puts it, "*quasi ex contractu*." Though, as to its merits, this case has always been doubted and rarely followed (*Corey v. Gale*, 13 Vt. 644; *Philips v. Hunter*, 2 H. Bl. 414), it does not seem to have been criticised on this point; and in *Cary v. Curtis*, 3 How. 236 (44 U. S. bk. 11, L. ed. 586), the Supreme Court of the United States adopts its language as one of the principles on which the action for money had and received is maintainable. *Howard v. Wood*, 2 Show. 23; *S. C.* 1 Freem. 473, 478, was *indebitatus assumpsit* for the fees and profits of the office of stewardships of a court leet and court baron, brought by a grantee of the reversion of the office for ninety-nine years, against a stranger who took the fees and profits thereof to himself. It was objected that the action would lie only when there is *quasi* a contract or an agreement between the parties; as, when another pays money to J. S. to my use, then J. S. agrees by construction of law when he receives the money to pay it to me; but when a man receives money as due to himself, it will be hard to make this an agreement by construction whether he will or not; that the declaration ought to be according to the fact; that it was laid that the defendant received the fees *ad usum et commodum quærentis*, whereas in truth he receives them to his own use. But the court adjudged that the action would lie, but said had it been an original case it should have adjudged otherwise, but that there were many such judgments, some passing *sub silentio* and others on debate, especially in the Exchequer.

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The same objection was made in *Arris v. Stukely*, 2 Mod. 260, which was *indebitatus assumpsit* for the fees of the office of comptroller of the customs at the port of Exeter, which the defendant had received to his own use, against the will of the plaintiff, on pretence of title to the office; but the court gave judgment for the plaintiff.

Indeed, assumpsit for money had and received is now the usual mode for trying the title to an office to which fees are annexed. *Mayor of London v. Gorey*, 1 Freem. 433; *Powell v. Milburn*, 3 Wils. 355; *Boyle v. Dodsworth*, 6 T. R. 681; *Green v. Hewitt*, Peake, 182; *Hall v. Mayor, etc. of Swansea*, 5 Q. B. N. S. 526.

In *Hitchin v. Campbell*, 2 W. Bl. 830, the court said that this action had been much extended as a very useful and general remedy; that while the action was in its infancy the courts endeavored to find technical arguments to support it; as by a notion of privity, etc., but that that was too narrow ground to support the action to the extent to which it had been admitted.

In *O'Conley v. Natchez*, 1 Smedes & M. 31; *S. C.* 40 Am. Dec. 87, it is held that assumpsit for money had and received lies where intruders or trespassers collect under an adverse claim that which belongs to the plaintiff.

It is said by Heath, J., in *Lightly v. Clouston*, 1 Taunt. 112, that Holt, Ch. J., held it clear law that if one goes and receives my rents from my tenants under pretence of title, I may bring my action against him for money had and received. The same notion is favored by many authorities. *Bac. Abr. Assumpsit (A): Arris v. Stukely*, 2 Mod. 260; *Mayor of London v. Gorey*, 1 Freem. 433; *Husser v. Wallis*, 1 Salk. 28. But some of the authorities are the other way. *Cunningham v. Lawrence*, reported in Gwyllim's notes to *Bac. Abr. Assumpsit (A); Marshall v. Hopkins*, 15 East, 309; *Codman v. Jenkins*, 14 Mass. 96; *Redfield, J., in Centre Turnpike Co. v. Smith*, 13 Vt. 212.

In *Bank of Metropolis v. First Nat. Bank*, 19 Fed. Rep. 301, assumpsit for money had and received was maintained upon the ground that the law implies a promise whenever the defendant has in his hands money of the plaintiff's that he is not entitled to retain, as against the plaintiff; and *Judge Wallace* says that it has long been well settled that want of privity is no objection to maintaining the action.

In *Pierce v. Crafts*, 12 Johns. 90, it is said not to be true that the action for money had and received can be grounded only on privity of contract, but that if a man receives my money without authority, I may recover it of him in this form of action, although there is no privity of contract between us. See 1 Cranch, App. 440, where the cases are collated.

In the case before us, the justices could impart to the village no right to retain the money, and the village took it, knowing all the fact, and chargeable with knowledge of the law that it belonged to the State, and its payment to the village in the circumstances constituted no recognition, by the State, of the claim of the village, not even *pro hac vice*. These and other features distinguish this case from many

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of those relied upon by the defendant. Thus, in *Rogers v. Kelly*, 2 Camp. 123, the banker's clerk, by mistake, paid plaintiff's money to the defendant, for a valuable consideration, the defendant not knowing that it was plaintiff's money; and although, in giving judgment for the defendant the case is put on the ground of want of privity, yet it comes better within the principle laid down in *Mason v. Waite*, 17 Mass. 560, and adopted in *Lime Rock Bank v. Plimpton*, 17 Pick. 159, and *Thacher v. Pray*, 118 Mass. 201, that it would be mischievous to require those who receive money in the way of business or the payment of debts to look into the authority of those from whom they receive it.

In *Centre Turnpike Co. v. Smith*, 12 Vt. 212, defendant had never promised, and had no money in his hands belonging to the plaintiff, and the plaintiff was regarded as having foregone a legal right under a misapprehension of the law. So in *Williams v. Everett*, 14 East, 582, defendant had neither promised plaintiff, nor had any money in his hands belonging to him. In *Coles v. Wright*, 4 Taunt. 198, the defendant was a mere bearer of the money, and had paid it over to the trader lying in prison before he became a bankrupt, and it was sought to charge him by relation; but he had judgment. In *Stewart v. Fry*, 7 Taunt. 839, there was nothing to restrain the right of the acceptors who made the remittance to recall the money as they did, nor of the defendants to make any new appropriation of it that they thought fit, nor any promise to hold it for plaintiff's use. In *Howell v. Batt*, 5 Barn. & Ad. 504, the defendant was servant to another, and no sum of money had been expressly given to him by his master for the plaintiff, nor did it appear but that his master might have countermanded payment to the plaintiff, and the defendant had agreed to hold no money to the use of the plaintiff, but held it to the use of his master. *Yates v. Bell*, 3 Barn. & Ald. 643, is simply to the effect that when a party to whom a bill is remitted repudiates the trust with which it is clothed, it gives no right of action to the party to whose account the bill is directed to be applied. In *Adams v. Nickerson*, 1 Allen, 427, the defendant did not know that the debtor abroad had instructed his agent here to have him pay plaintiff's claim out of money in his hands, and he had repaid the balance of it to the agent, as he agreed to do when he received it.

As to the amount the State is entitled to recover: The village received \$397.85 in fines, and \$12.09 costs, and paid out the costs to those entitled, and \$12.50—one fourth of one of the fines—to the complainant in that case; and the State does not seek to recover these costs, and only \$384.85 of the fines—it being the amount thereof less the \$12.50—with interest thereon from March 7, 1885, the time of demand.

Although Monty's recognizance was taken to the village when it ought to have been taken to the State, and might for that reason have been unenforceable; yet, being taken in the business of the State, the money paid upon it belonged to the State, and not to the village, which was unauthoritatively assuming to control the business and make it its own. The State seeks to recover this \$100 also; less the \$18.22

paid out of it for court and clerk fees in that suit, with interest thereon from time of demand.

The village can be allowed nothing for disbursements in respect of legal services and expenses, as in no view can it charge the State with expenses that no one in the circumstances was then authorized by law to impose upon the State in such cases, it being the official duty of the State's attorney to attend to them.

Nor can the village be allowed anything for disbursements in respect of the taxable costs in the cases in which no convictions were had, notwithstanding the State realized something from them by way of forfeited recognizances; for, if one undertakes my business, claiming it to be his own, and therein makes expenditures, I am not liable to him therefor, although he has vantage me thereby. This is so even when one undertakes my business for me and on my behalf without my request, express or implied, and benefits me; for his services are gratuitous. One cannot thrust himself upon me and make me his debtor whether I will or not.

Hence the State is entitled to recover the said sums of \$384.25 and \$86.78, making in all the sum of \$471.03, with interest thereon from March 7, 1885; and the judgment is reversed, and judgment for plaintiff accordingly.

CONNECTICUT & PASSUMPSIC RIVERS R. R. CO.

v.

Town of ST. JOHNSBURY.

Prior to the Act of 1886, No. 20, the selectmen or the county court had no authority to establish a highway at grade across a railroad track; but while this case was pending on appeal in the county court, having been remanded from the supreme court, said Act was passed, which authorized the laying of a highway at grade. *Held*, as the Act gave no original jurisdiction, and as the jurisdiction of the county court was merely appellate, that it had, in this case, no power to establish such highway; and that proceedings must be commenced *de novo*.

(Caledonia—Filed September 8, 1887.)

PROCEEDINGS for the laying of highway across a railroad at grade. Hearing on the mandate from the Supreme Court, December Term, 1886, Caledonia County, Powers, J., presiding. *Reversed*.

The court held that it could in this case lay out and establish a highway across the petitioner's railroad tracks at grade; and referred the cause to commissioners to report whether the highway should be laid out and established; and, if so, whether the same should be laid over, under, or across said railroad. Exceptions by the petitioner. The mandate from the supreme court was: "Adjudged that county court had no jurisdiction to establish a highway across the railroad of the petitioner at grade with the track. Judgment reversed, and cause remanded for proceedings subject to said limitation."

This case originally came into the county

court on the petition of said railroad company complaining of the action of the selectmen in laying a highway across the railroad track.

Act No. 20 of the Session Laws of 1886 was approved November 24, 1886.

Messrs. Ide & Stafford, for defendant:

The case would not have been remanded unless further action by the county court was proper. If the plaintiff's contention is correct, the supreme court would have quashed the proceedings.

Wires v. Farr, 24 Vt. 645; *Bank of Newbury v. Richards*, 35 Vt. 281.

The supreme court will render final judgment in highway cases, unless the case is to be proceeded with in the court below.

French v. Barre, 58 Vt. 587; *Platt v. Milton*, 58 Vt. 608; *Brock v. Barnet*, 57 Vt. 172; *Hogaboom v. Highgate*, 55 Vt. 412; *Penniman v. St. Johnsbury*, 54 Vt. 306.

When final judgment has not been rendered in this court, it was the plain intent that further proceedings were necessary in the county court.

Winooski Lumber, etc. Co. v. Colchester, 57 Vt. 541; *Gray v. Middleton*, 56 Vt. 58; *Sharon v. Stafford*, 56 Vt. 421; 52 Vt. 412.

The judgment of the court below will not be disturbed unless manifest injustice has been done.

French v. Barre, *supra*; *Chase v. Rutland*, 47 Vt. 393; *Londonderry v. Peru*, 45 Vt. 424.

The ruling of the county court was correct. No formal pleadings are necessary.

Crawford v. Rutland, 52 Vt. 412.

These proceedings are to be administered in a practical manner, and for the best interest of the public.

Ferguson v. Sheffield, 52 Vt. 77.

After the first trial, the power of the court was enlarged by Act No. 20, Acts 1886. It must decide on the facts and the law as they were when the decision was made. When the court is called upon to establish a highway, it must act according to the terms of the statute in force at the time of its action.

Drown v. Sutton, Gen. Term, 1883, Caledonia County; *Danforth v. Smith*, 23 Vt. 253; *Cooley*, Const. Lim. 371; *Heppburn v. Curtis*, 7 Watts, 800.

A case must be determined on the law as it stands when the judgment is rendered.

16 Serg. & R. 169; *Watson v. Mercer*, 8 Pet. 88 (83 U. S. bk. 8, L. ed. 876); *Mather v. Chapman*, 6 Conn. 54; *Cooley*, Const. Lim. 381.

So, if a case is appealed, and the law is changed, the appellate court must decide according to the law in force when the decision is rendered.

State v. Norwood, 12 Md. 195; *Cooley*, Const. Lim. 381, 389, 500; *Freeborn v. Smith*, 2 Wall. 161 (69 U. S. bk. 17, L. ed. 922); *Baltimore & S. R. Co. v. Nesbit*, 10 How. 395 (51 U. S. bk. 13, L. ed. 469); 7 Pet. 234 (32 U. S. bk. 8, L. ed. 669).

Messrs. Edwards, Dickerman, & Young, for plaintiff:

It is a principle of universal jurisprudence that laws must be prospective, and cannot have a retrospective effect.

Kent, J., in *Dash v. Van Kleeck*, 7 Johns. 477; *Bates v. Kimball*, 2 Chip. 77.

Prior to the enactment of the statute in November, 1886, this court held in this case (58

Vt. 234) that neither the selectmen nor the county court had authority to lay a highway across the plaintiff's track at grade. The Legislature has no power to set aside a judgment of this court; or by special statute to grant one an appeal, who had allowed his time for taking an appeal to expire.

Bates v. Kimball, *supra*.

Law is a rule of civil conduct prescribed.

1 Bl. Com. 44.

The very essence of a new law is that it is a rule for future cases.

Story, J., 2 Gall. 136.

A statute cannot affect a suit commenced before the statute was passed; otherwise vested rights could be taken away, and an innocent party endamaged in payment of costs.

Ogden v. Blackledge, 2 Cranch, 272 (6 U. S. bk. 2, L. ed. 276); *Calder v. Bull*, 3 Dall. 306 (8 U. S. bk. 1, L. ed. 648).

It would manifestly be unjust to thus defeat a suit already commenced upon a right already vested.

Beadleston v. Sprague, 6 Johns. 101.

In *Couch v. Jeffries*, 4 Burr. 2463, a *qui tam* suit for a penalty, Lord Mansfield said: "It can never be the true construction of this Act to take away this vested right and punish the innocent pursuer of it with costs." The case ought to be decided precisely as if the Act of 1886 had not been passed.

Dash v. Van Kleeck, *supra*; *Kent v. Wallingford*, 42 Vt. 651.

It was held by this court in *Stanford v. Barry*, 1 Aik. 314, that the Legislature had not the constitutional power to pass an Act authorizing the probate court to renew a commission for the allowance of claims upon the estate of a deceased person, after the expiration of the time limited by the general law for such renewal. It was also held in *Hill v. Sunderland*, 3 Vt. 507, that the section of the statute of 1826, allowing an appeal from the decision of road commissioners, made before the passing of the statute, was unconstitutional as to damages and costs. The plaintiff's rights were preserved to him by Rev. Laws, § 28.

See *Harris v. Townshend*, 56 Vt. 716; *State v. Leicester*, 33 Vt. 653; *State v. Williston*, 31 Vt. 153.

In laying out highways the county court is an appellate tribunal.

French v. Holt, 63 Vt. 364; 24 Vt. 176. See 14 Vt. 279; *Briggs v. Hubbard*, 19 Vt. 86.

Taft, J., delivered the opinion of the court: The selectmen of the defendant town laid out a highway across the petitioner's track at grade; the petitioner took an appeal to the county court; commissioners were appointed, who reported in favor of laying out the highway at grade with the track; and the highway was so established. The petitioner brought the cause to this court, and it was held that neither the selectmen nor the county court could establish a highway across a railroad track at grade with the track, and remanded the case for proceedings subject to said limitation. *Central Vt. R. Co. v. Royaltown*, and this case, 2 New Eng. Rep. 475, 58 Vt. 234. Subsequently to such ruling, the Legislature enacted a law authorizing the laying of highways across railroad tracks at grade. Act No.

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20, Sess. Laws 1886. Under this statute the county court held that in this case a highway may be established at grade with the track; and this holding is the question now before us for revision.

Was it error or not? In highway cases of this character the jurisdiction of the county court is appellate only. The question of whether a highway should or should not be laid out must first be acted upon by the selectmen of the town; and in no case can the county court acquire jurisdiction until such action is had. At the time the selectmen acted and established the highway at grade, they had no jurisdiction in the matter and could not legally act therein, i. e., in laying out the highway at grade. The selectmen having, at the time the highway was laid out, no jurisdiction or power to so establish it, it follows that the county court acquired none by the appeal. The Act of 1886, referred to, gives it no original jurisdiction. If a road is to be established at grade, proceedings must be begun *de novo*. The action of the county court was erroneous.

Judgment reversed and cause remanded, to be proceeded with as directed by the mandate from the General Term, 1886.

A. B. FARNUM

v.

John EWELL.

1. An action to recover for damages to the plaintiff's carriage shop, to the machinery therein, and for interruption to his business, is not a possessory action in respect to the damages to the business; and one of two parties, whether partners or not, who have a joint interest in the business, cannot, in his own name, recover full damages for such interruption; and where the evidence tended to show a joint interest, the court erred in neglecting to submit the question, with proper instructions, to the jury.
2. The charge to the jury (*q. v.*) was construed to mean that the owner of the shop could recover full damages for injury to the business, in which his son had a half interest, and was therefore erroneous.

(Caledonia—Filed September 7, 1887.)

ACTION on the case for negligence.

Trial by jury, December Term, 1886, Caledonia County, Powers, J., presiding. Verdict and judgment for the plaintiff. *Reversed.*

The plaintiff had title to a carriage shop on the southerly side of a road leading through Peacham; and the defendant, for six years prior to this suit, and for a longer period, had been in the actual occupation and use and control of a sawmill just below the plaintiff's said shop, and the flume supplying the same with water, under a contract of purchase from the heirs, and in his own right. Plan of shop used in evidence may be referred to.

The water used to run the shop and sawmill was divided above said road, and a part of 1 Vt.

same was carried in a penstock to the plaintiff's shop, and the rest run in a plank flume to defendant's mill.

The plaintiff's evidence tended to prove that this flume was elevated upon a cob-house framework of logs about 6 feet high, where it passed the northwest corner of the plaintiff's shop; that this flume passed down by the side of the shop to defendant's sawmill, but at a distance of several feet after passing said northwest corner; that the defendant's flume at said northwest corner was some 18 to 24 inches from his shop, that for some time prior to the suit said flume had been out of repair and leaky; that the defendant knew of the condition of the flume, but had not repaired it; that the water gushed out of it at this northwest corner, splattered the plaintiff's buildings on the outside, and formed ice under the same; by all of which the building was greatly rotted and thrown out of level or line; and that the machinery that was in said shop was also thrown out of level, the waterwheel in the basement frozen up and stopped; and that the business which the plaintiff and his son, Scott Farnum, had for more than six years prior to suit, carried on in said shop, as hereafter stated, had been greatly interrupted, hindered, and delayed.

The plaintiff sought to recover all damage done to his shop, the expenses of putting it in level and machinery in line, and also for loss in consequence of the interruption to the business done in the shop. The plaintiff introduced evidence as to all said damages.

The defendant's testimony tended to show that this sawmill and flume, at the time of suit, and for some time prior, belonged to the estate of his father, Isaac Ewell, deceased; that he had no deed of two thirds of said mill and flume, but he had agreed with the other two heirs to buy their share of same; that the flume was just as good as it was when his father died, or as it had been for many years; that it did not leak much, etc.

The defendant introduced evidence to show that the part of plaintiff's shop wet from defendant's flume was over plaintiff's line, and upon that of the Ewell heirs, as aforesaid; that plaintiff, in the dry weather, would stop up the opening to this flume where the water was divided, so that all the water would run to his shop; that in consequence of this the timber in flume would dry up, and that then the flume would for some time leak badly, and timber rot faster than it otherwise would have done.

The plaintiff introduced his son, Scott Farnum, who, on cross-examination, testified in substance as follows: That he and his father for ten years last past had carried on business in said shop of carriage making and repairing, planing lumber, etc.; that there had been, since Scott was seventeen or eighteen years old, a sign on north end of shop which read, "A. B. Farnum & Son;" that all the business was done in that name; that all orders were given and taken in that name, etc.; that if there was any loss, bad debts, etc., he had no partnership in it; that the credit was given to them both; that when he was twenty-one, some five or six years ago, his father told him he might have half of what they made, provided he would stay at home, and he did stay at home; that they kept no separate account of work, but all was

charged upon a common book; that either settled all accounts as he pleased; that one had as much control of the business as the other, and had common access to shop; that he paid no rent on shop, and that he helped pay repairs that had been made.

The plaintiff was the sole owner of the machinery which was claimed to have been injured.

There was no other proof to vary or alter the above evidence of said Scott Farnum.

The defendant's counsel, in his argument, claimed to jury that plaintiff could not in this action, in his sole name, recover all the damages occasioned by the interruption to business (if any), because this business belonged to the partnership of Farnum & Son, and not to plaintiff alone; but the court, on objection made by plaintiff's counsel, stopped the counsel, and said there was no evidence to show any partnership between plaintiff and his son; that he should instruct the jury so, and that counsel must not argue that point any further; and counsel did not do so. To this ruling and refusal the defendant excepted.

The court, in its charge, told the jury there was no proof of partnership between plaintiff and his son; that plaintiff could in this action recover for all loss to his business in consequence of the negligence of defendant as aforesaid.

Messrs. Bates & May and J. P. Lamson, for defendant:

The plaintiff declared for, and claimed damages for, loss of business. He could not recover for the son's loss caused by an interruption of the business.

"Partnership is a question of law, dependent on the facts; but when there is any doubt as to the facts, it becomes a question for the jury to decide."

Prof. Jur. §§ 274, 316.

There may be a legal partnership, even though a partner is guaranteed against loss.

Pars. Partn. p. 42.

This is the rule in this State.

Chapman v. Devereux, 32 Vt. 616; *Brigham v. Dana*, 29 Vt. 1. As to the damages, see *Wood, Mayne, Dam.* § 624.

Messrs. Nichols & Dunnett, for plaintiff:

To form a partnership there must be a share in the profits and loss of the business, and the terms, when used in reference to this subject, denote the ultimate profit of the operation.

Bowman v. Bailey, 10 Vt. 170; *Kellogg v. Griswold*, 12 Vt. 291; *Morgan v. Stearns*, 41 Vt. 398.

Sharing in the profit and loss is not decisive between the parties, as it may have been a mere arrangement with a view to compensation for services rendered in the employment.

Farrand v. Gleason, 56 Vt. 688; *Bailey v. Clark*, 6 Pick. 372; *Chase v. Barrett*, 4 Paige, 148.

This case falls within the line of cases where the share received is in compensation for services, and is not a strict partnership.

Bowman v. Bailey, *supra*; *Ambler v. Bradley*, 6 Vt. 119; *Tobias v. Blin*, 21 Vt. 544; *Mason v. Potter*, 26 Vt. 722; *Hawkins v. McIntyre*, 45 Vt. 496; *Baxter v. Rodman*, 8 Pick. 435; *Hesketh v. Blanchard*, 4 East, 144; *Muzzey v. Whitney*, 10 Johns. 226; *Vanderburgh v. Hull*, 20 394

Wend. 70; *Burekle v. Eckart*, 1 Denio, 337; *Bradley v. White*, 10 Met. 303.

The action is a possessory action, and not a merely personal action, like a suit for a chattel and if the plaintiffs were tenants in common, one of them could recover the full damage.

Hibbard v. Foster, 24 Vt. 542; *Bigelow v. Rising*, 42 Vt. 678; *Shaw v. Cummings*, 7 Pick. 76.

Rowell, J., delivered the opinion of the court:

It is immaterial to inquire whether the plaintiff and his son were partners in the business carried on in the shop; for the testimony tended to show that the son had a half interest as owner in what was made in the business; and if he had, the plaintiff could not, in his name alone, recover full damages for injury to that business, as such injury would damage the joint interest of both, and this suit, in respect of these damages, is not a possessory action, so that the plaintiff can recover the whole damages.

Plaintiff claims that his son had no interest in the business, but that the arrangement whereby he was to have half that was made in it amounted to no more than affording a standard by which to measure the amount of compensation he was otherwise to receive for his services, and gave him no interest in the business itself, nor in what was made in it. But it was for the jury to say how that was on the testimony, and it should have been submitted to it with proper instructions.

The chief justice thinks that in the charge the plaintiff was limited to recovery for loss to his interest in the business only, and was not permitted to recover for damage to the son's interest therein, agreeing that, if not so limited, there was error. But the rest of the court does not think the exceptions fairly susceptible of that construction, and that plaintiff was allowed to recover full damages in this behalf.

It is not necessary to consider the exception to what plaintiff was permitted to say defendant did when he asked him to fix the sum, as it is not likely that that testimony will be called out on another trial.

Reversed and remanded.

W. C. SMITH

o.

O. A. BURTON and E. A. Sowles.

1. A subscription contract, plain and complete in itself, to pay money in aid of a contemplated manufacturing business, cannot be enlarged, varied, or contradicted, by a letter which was simply one of the preliminary negotiations to the subscription.
2. A subscription contract contained several conditions, and the only one relating to the subscribers had been fulfilled, but some of the other conditions relating to other parties had not been fulfilled. Held, that the subscriptions were enforceable.
3. The plaintiff signed a subscription paper, agreeing to pay the defendants,

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B and S, \$500 to aid a contemplated business, of which M was the proprietor, and in which they were interested by reason of loans to M. The plaintiff also furnished labor and supplies to M, and B told him to charge the same to B and S. Although B and S were not partners, their attitude to the business was apparently a joint relationship; the subscription ran to them jointly, and S assented that the plaintiff might pay it with said supplies. *Held*, that the plaintiff was entitled, on the facts reported, to a judgment against both for the balance, above his subscription.

(Franklin—Filed September 8, 1887.)

BOOK account. Heard on an auditor's report, September Term, 1886, Franklin County, Royce, Ch. J., presiding. Judgment, *pro forma* and without hearing, for the plaintiff, to recover the larger sum found due by the auditor, which was \$628.55. *Reversed*.

The auditor found that if the subscription was applied on the account, there was due plaintiff only \$18.05.

The master found, in part:

On January 10, 1881, a subscription paper was drawn up to be circulated in St. Albans and vicinity, which was in the words and figures following, viz.:

"We, the undersigned, hereby agree to pay the several sums affixed to our names, respectively, to Oscar A. Burton and E. A. Sowles, payable in three equal installments, at three, six, and nine months, for the purchase of the Tremont House, and the appurtenances and premises thereunto belonging, formerly owned and occupied by S. S. Skinner, and for giving a suitable title thereto to James MacDonald, Jr., doing business under the name and style of the Glen's Falls Shirt Company, on condition that Oscar A. Burton and E. A. Sowles, and his wife, Margaret B. Sowles, shall convey said property to George W. Foster, trustee for said MacDonald, on \$6,000 being subscribed hereto, awaiting the fulfillment of the conditions hereinafter contained or imposed upon said MacDonald, doing business under said name and style, to wit: That said MacDonald shall remove his or said Glen's Falls Shirt Company's collar, shirt, and cuff manufacturing business from Glen's Falls, N. Y., to St. Albans, Vermont, and establish the same at the said Tremont House premises, and so continue to use said premises for such purpose aforesaid for the term of five years, and work at least from 800 to 800 hands, as the business may seem to require, and as said MacDonald, under the name of the Glen's Falls Shirt Company, has done for the past year at Glen's Falls, N. Y., and to transact said business at St. Albans under the like style and name of the Glen's Falls Shirt Co., as per agreement in writing. The said Burton and Sowles, for the purpose aforesaid, valuing said property at \$10,000, and proposing to convey the same on said sum of \$6,000 being subscribed, they are herein considered and treated as contributing \$2,000 each. In case of default on the part of said MacDonald in establishing and maintaining said busi-

ness for the period of and as aforesaid, the said trustee shall convey said property as follows: The undivided four tenths thereof to said Sowles and Burton, and the remaining undivided six tenths thereof to us, the undersigned, in proportion to our respective subscriptions. Dated January 10, 1881."

February 3, 1881, the plaintiff, who had been applied to, to sign said subscription paper, wrote a letter to the defendants, which was as follows:

"St. Albans, Vt., February 3, 1881.

"Messrs. O. A. Burton and E. A. Sowles:

"Gents,—I am not disposed to sign the last form of subscription for the purchase of the Tremont House property to be used as a factory by the Glen's Falls Shirt & Collar Co. for reasons that I will state when I see you, and which I think you will approve. I will, however, agree to pay the amount of my subscription of \$500, one half in one year and one half in two years, without interest, conditioned upon the fulfillment by the Shirt Co. of their undertakings. Yours, etc. W. C. Smith."

To that letter the defendant Burton replied, by letter of the same date, as follows:

"Hon. W. C. Smith:

"D. Sir,—I want you to sign the subscription for the purchase of the Tremont—\$500—and I will take care of the same; and you pay in the same way and upon the same condition as J. Gregory Smith is to pay,—one half in one year, and one half in two years,—provided he runs the factory as he has agreed for that length of time, and without interest.

Yours truly, O. A. Burton."

Immediately after receiving said Burton's letter the plaintiff did sign said subscription paper, and set against his signature the sum of \$500. Said subscription paper was also signed by others, and the aggregate of the subscriptions made upon it was \$3,915.

Upon testimony, seasonably objected to by the plaintiff's counsel as irrelevant, I find that J. Gregory Smith agreed to give towards the shirt-factory enterprise mentioned in said subscription paper, \$1,500, and of that sum afterwards paid \$1,000; but it did not appear that such agreement was in writing; that Aldis O. Brainerd and a Mr. Seymour, each, by a letter or a short writing, agreed to give towards said enterprise \$300; and that said agreements of J. Gregory Smith, Brainerd, and Seymour were not upon, or did not contain, the same conditions stated in said subscription paper. Said sums agreed to be given, together with the subscriptions made upon said subscription paper, amount to more than \$6,000.

On February 5, 1885, and after all said subscriptions and agreements to give had been made, the said defendants, and Margaret B. Sowles, the wife of the defendant Sowles, by a deed of that date duly executed, conveyed said Tremont House property to George W. Foster, trustee. Said deed contained the following declaration of trust, namely:

"This conveyance is made to said George W. Foster, trustee aforesaid, in trust, however, for the uses and trusts and purposes as follows: To permit James MacDonald, Jr., doing business under the name and style of the Glen's Falls Shirt Company, and his assigns, to use, occupy, and enjoy the same, to wit, said above-

described premises, for the manufacturing, laundering, and selling shirts, cuffs, and collars and underwear for a period of five years from and after the 15th day of February, 1881, and at the expiration of said period convey said property and premises in fee, discharged of said trust, to said James MacDonald, Jr., now, of Glen's Falls, New York, doing business under the name and style of the Glen's Falls Shirt Company, his heirs or assigns. Said property to be, as aforesaid, conveyed to said MacDonald, his heirs or assigns, provided, and not otherwise, that the said James MacDonald, Jr., or Glen's Falls Shirt Company, shall, during said period of five years, occupy said real estate and premises for said purposes, and work thereon and in and about said business on an average each year during the aforesaid term not less than from 300 to 800 hands, as such business may require in the manufacturing and sale aforesaid."

I find, upon the testimony of the defendants, taken subject to objection, that at the time of the execution of said deed the defendants accepted the subscriptions made upon said subscription paper, and the said agreements of J. Gregory Smith, Brainerd, and Seymour, as a full compliance with the condition in said subscription paper as to the amount to be subscribed.

On said February 5, 1881, an instrument was executed by the defendants and said Foster and MacDonald, in the words and figures following, namely:

"This instrument, made the 12th day of January, A. D. 1881, between Oscar A. Burton, of Burlington, Chittenden County, and Edward A. Sowles and George W. Foster, of St. Albans, Franklin County, Vermont, of the first part, and James MacDonald, Jr., doing business under the style and name of Glen's Falls Shirt Company, witnesseth, that the said parties of the first part, in consideration of the sum of \$1 to them in hand paid, and in further consideration of the covenants and agreements hereinafter contained, hereby covenant and agree to and with the party of the second part to advance to him money in a series or line of loans, on interest at the rate of 6 per cent per annum, from time to time as he shall ask and require the same in and about the repairs and alterations of the Tremont building hereinafter mentioned, and in the purchase and putting in machinery, and in transacting and carrying on the business of the manufacture and sale of cuffs, shirts, collars, and underwear, to be manufactured at and on said Tremont-building premises during the five years next ensuing from the 15th day of February, 1881, so that the whole amount owing at any and all times during said period on said loans may and shall, if demanded by the said party of the second part, amount to the sum of \$10,000, and to take and receive therefor the commercial paper of the party of the second part, payable at the First National Bank of St. Albans. That the machinery, fixtures, apparatus, and improvements, as well as the personal property used in and about said Tremont premises in the manufacturing and sale of said property herein mentioned, shall be and remain the property of said Burton, Sowles, and Foster as security for the purchase money therefor and

liabilities hereby agreed to be assumed, as their several interests may appear.

"Said money shall be loaned or procured to be loaned by the parties of the first part in the following proportions, to wit: said Burton and Sowles shall each loan or procure to be loaned two fifths part thereof, and said Foster shall loan or procure to be loaned the remaining one fifth part thereof.

"And in consideration of the premises, said party of the second part covenants and agrees to establish, conduct, and carry on said business at St. Albans, aforesaid, and at the premises known as "the Tremont premises," for the period of five years next ensuing from the 15th day of February, 1881, and to so conduct the same under the style and name of the Glen's Falls Shirt Company, and work in and about said business on an average each year not less than from 300 to 800 hands, as said business may require, and as said MacDonald has done during the past year at Glen's Falls aforesaid, unless prevented from so doing by damages by the elements; and in case of such loss or damages by the elements that said business shall not be unnecessarily delayed or impeded. And to repay said loans with interest as aforesaid.

"This instrument and every part thereof shall apply to and bind the heirs, representatives, and assigns of the respective parties.

"In witness thereof the said parties have hereunto set their hands and seals the day and year hereinbefore written. O. A. Burton, E. A. Sowles, Geo. W. Foster, James MacDonald, Jr."

"I hereby agree to accept of the foregoing agreement with all its conditions; and further agree that none of the funds used or advanced for the purpose herein stipulated shall be diverted therefrom in any manner, but the same shall be and remain as surety to the said Burton, Sowles, and Foster for all advances made or liabilities hereafter made or assumed in every form until such obligations or liabilities are fully satisfied; and that I will ship to St. Albans, and put into said building and premises, machinery and other property to the amount of about \$13,000, to be used in the manufactory aforesaid, upon which said Burton, Sowles, and Foster shall have lien and security aforesaid for all liabilities by them assumed in any manner by this agreement; and if it becomes necessary in order to give the said Burton, Sowles, and Foster further or additional security not hereby sufficiently given, for all liabilities by them herein assumed, or that may hereafter be assumed by them in and about the establishing and carrying on said business, to give them chattel mortgage or mortgages to secure them at all times, on reasonable requests by them for that purpose, and to that end I hereby agree to give them such chattel mortgages for the purpose aforesaid. James MacDonald, Jr.

"February 5, 1881."

On February 15, 1881, said MacDonald went into possession of said Tremont House property and began to put in machinery and make repairs and alterations necessary in fitting up and adapting the premises for the manufacture of shirts, collars, cuffs, and underwear. In so preparing the premises and machinery for such manufacture he needed many materials and supplies and he advised with the defendant

Burton as to the best places for procuring them, and was advised by Burton to procure what he could from those who had subscribed in aid of the enterprise. The plaintiff, when he signed said subscription paper, was, and from that time has been, the proprietor of the St. Albans Foundry, at which many things required by MacDonald might be obtained. MacDonald sent a few orders to the plaintiff's foundry, which were entered upon the order-book as orders from the Glen's Falls Shirt Co., and were filled in due course of business. Such orders were received and entered by the plaintiff's employees and without his personal knowledge. When MacDonald sent those orders he did not intend to run an account at the foundry, but expected that money would be furnished by the defendants to pay for such things as he should get there. He sent the first order to the foundry February 19, and the last of said orders which were entered as orders from the Glen's Falls Shirt Co. was sent on June 8. Before getting anything more at the foundry, he sent word by one of the employees to the foundry that the Glen's Falls Shirt Co. was not to be responsible for things ordered in fitting up the building and machinery, and that word was reported to the plaintiff. The plaintiff examined the order-books, and then sought and had an interview with the defendant Burton, and immediately after that interview he directed the entries of orders given by and charges made to the Glen's Falls Shirt Co. to be charged, and such orders to be entered as orders from the defendants, and such charges transferred or charged up to the defendants, and all things thereafter furnished for the shirt factory to be charged to the defendants. The plaintiff and the defendant Burton each testified in the hearing before me, and their testimony as to what was said at that interview between them was conflicting. I have no reason to believe that either of them intentionally falsified in regard to it, and I think that each remembered and accurately stated some parts of the conversation which the other had forgotten; but from their testimony, from the situation of the parties and state of affairs at the time, and from what was done by the plaintiff immediately after and because of that interview, I am convinced and find that the plaintiff asked Burton who constituted the Glen's Falls Shirt Co., and was informed that MacDonald was the proprietor of it, or was doing business under that name and style, and that the plaintiff told Burton he did not know MacDonald and did not wish to trust him, and that he was told by Burton to charge whatever should be ordered from and for the shirt factory to the defendants. I also find that at that interview it was agreed between the plaintiff and Burton that the amount of the plaintiff's account for things furnished or to be furnished for the shirt factory might be applied upon the plaintiff's said subscription, and such agreement was made known to and was assented to by the defendant Sowles. But I find that the defendant Sowles never in fact authorized or assented to the charging of anything furnished by the plaintiff for the shirt factory to him.

From the time of the interview between the plaintiff and Burton, which was about June 17, 1881, to April 12, 1882, articles and labor were 1 Vt.

ordered from the foundry for the shirt factory and charged to the defendants.

On June 30, 1881, an instrument was executed by the defendants and said MacDonald, which was antedated February 15, 1881, and was in words and figures following, viz.:

"This agreement, made and entered into by and between O. A. Burton and E. A. Sowles of the first part, and James MacDonald, Jr., of St. Albans, Vt., of the second part, witnesseth, that the party of the first part agrees to stock and furnish materials, and have furnished certain materials now in and about the so-called Glen's Falls Shirt Factory, for the manufacture of shirts, collars, cuffs, and underwear in said factory in St. Albans, as may be necessary to carry on the shirt, collar, and cuff business in said factory, and in connection thereof have made certain additions to, and furnished certain machinery, including the engine and boiler now in said shirt factory, in their own name, which is to be and remain the property of said Burton and Sowles as per stipulations and agreement made by the parties. Now, therefore, in consideration thereof, the party of the second part agrees to do the superintending of the business in said shirt factory, and is to draw from the funds and earnings of said factory the sum of \$100 per month, or less if possible, while he continues to perform the services aforesaid, and at the end of five years, after paying whatever sums of money the said party of the first part may furnish or contribute towards the purpose aforesaid by way of purchasing goods or materials, or for manufacturing, or otherwise, or whatever of said items, or either of them, they may have already contributed by way of repairing or furnishing said shirt factory, and after paying all interest or necessary expenses in and about the premises, the balance of net profits, after deducting all operating and other expenses in and about said manufacturing aforesaid, and after paying the said party of the first part all indebtedness that the party of the second part may be under to the parties of the first part, shall be paid to Gertrude E. MacDonald at the end of five years as aforesaid.

"And it is further stipulated and agreed by both parties that the party of the first part shall have the right to name and furnish a clerk or cashier, who shall be paid for his services out of the proceeds of said business before any deductions aforesaid are made, who shall keep proper books of account of the business aforesaid, make all disbursements of moneys, and receive and receipt for all sales of goods and other property for the parties of the first part, and keep a general oversight of said business on behalf of the parties of the first part and under the directions of the parties of the first part; and said books shall be open to inspection of parties of first and second part; and the parties of the first part shall advance money to keep the premises and all the property herein enumerated fully insured for the benefit of the parties aforesaid, the avails of which, in the event of loss or damage by fire, shall be paid to the parties in interest in the order aforesaid and be distributed as aforesaid; and the necessary and contingent expenses connected with the buildings on the premises and the property enumerated aforesaid shall be paid out of the avails of said business and be deducted before

distribution is made aforesaid; and if at any time after a fair trial of said business for two years the business shall not be a remunerative one, either party shall have the right to terminate this contract by taking and paying to the other party whatever interest such retiring party may have in said premises. St. Albans, Feb. 15, 1881. O. A. Burton, E. A. Sowles, James MacDonald, Jr., in the presence of B. C. Hall.

On said June 30, 1881, said MacDonald executed to the defendants a chattel mortgage, in due form, of all the personal property in and about said shirt factory, which mortgage was conditioned that said MacDonald pay to said Burton and Sowles \$3,412.80, money advanced by them to him, and \$6,587.70, which they had assumed for him or obligated themselves to pay.

From said June 30, 1881, the defendants did from time to time pledge their credit or furnish money for obtaining such materials and supplies as the business at the shirt factory required, and each tried to effect sales of the goods there manufactured, and make collections for goods sold; but they did not do so for the purpose of building up or carrying on a business for themselves, but did so for the purpose of realizing from the security which they claimed to have upon the shirt factory property and business for the payment of moneys advanced and paid, and liabilities incurred, by them under their arrangements with MacDonald.

The shirt factory was run until about the month of February, 1882, when it was stopped, and the enterprise collapsed, and has not been revived. While business was done there as aforesaid the condition of the said subscription paper as to the number of hands to be employed was not complied with.

On December 29, 1880, J. Gregory Smith wrote to the defendant Burton as follows:

"St. Albans, Dec. 29, 1880.

O. A. Burton, Esq.:

Dr. Sir,—On condition that the Glen's Falls Shirt & Cuff Co. locate their manufactory at St. Albans and continue in the manufacture of sd. business for the period of ten years, in conformity with the stipulations and conditions in the agreement presented to me this day, I will give \$1,500 as a free gift to said concern, either for the purchase of the Tremont House, or otherwise, as you may determine.

Yours truly,

J. Gregory Smith."

"I consent to the new basis of five years.

J. G. S."

On February 1, 1881, J. Gregory Smith wrote to the defendant Burton as follows:

"St. Albans, Feb. 1, 1881.

O. A. Burton, Esq.:

My Dear Sir,—In reply to yours inquiring as to when payment of my donation to the Glen's Falls Shirt & Cuff Factory will be made, I would say that my object in making the donation as I did was to ensure the establishing of the factory here and its continuance in good faith and according to the terms submitted to me for the period named. If, now, I can be satisfied it is to be established here and continued on the basis proposed, I will, at the end of one year from its being put in operation, fully pay one half of the sum, and if continued in

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successful operation as proposed for two years, I will at the end of two years pay the other half, both to be without interest.

Truly yours,

J. Gregory Smith."

The writing signed by Brainerd and Seymour is as follows:

"St. Albans, Vt., January 10, 1881.

"We, the undersigned, agree to pay the several amounts affixed to our names to the Glen's Falls Shirt Company provided they employ at least 300 hands at least yearly in the manufacturing shirts, collars, etc., for three years the sum of \$100, to be paid within thirty days after they commence business in the Tremont Hotel, so called, on Main Street, in this town of St. Albans, and \$100 to be paid in one year after the first payment is made, and the last payment in two years after the first payment, making the sum of \$300. This agreement to be null and void if they do not commence business within six months from this date.

A. O. Brainerd, \$300

H. P. Seymour, \$300

in all."

I find that the subscription or donation by J. Gregory Smith was upon the terms stated in said two letters, and that the subscriptions of said Brainerd and Seymour were upon the terms stated in said writing signed by them. All questions as to the legal effect of said letters and writing are referred to the court.

Messrs. Farrington & Post, for Burton:

The subscription paper is a full and complete contract in and of itself. The rights of the subscribers are not varied by the facts, whether 800 or 800 men were employed, or whether MacDonald fulfilled the condition.

Towne v. Rublee, 57 Vt. 62.

The letters were written before the subscription paper was signed, and do not change the plaintiff's relation to the contract.

Wing v. Cooper, 37 Vt. 169; 11 Vt. 221.

The trust deed was executed with the conditions as set forth. The account prior to June 17, when the plaintiff and Burton had their talk, amounting to \$61.12, clearly should be disallowed.

Fullam v. Adams, 37 Vt. 391; *Cross v. Richardson*, 30 Vt. 641.

Mr. E. A. Sowles, pro se:

The suit is not brought against the defendants as partners, and no claim is made that they are such. Hence there can be no recovery against Sowles. The plaintiff is bound by the terms of the subscription paper, and must look to the Tremont property for compensation in common with others.

Messrs. Noble & Smith, for plaintiff:

Burton did and could pledge the credit of himself and Sowles. The whole undertaking was for their joint benefit. The defendants took a mortgage upon the very property for the purchase and improvement of which the plaintiff's account accrued as security for such money and credit. The new contract made with Burton was independent, and not within the Statute of Frauds.

Sinclair v. Richardson, 12 Vt. 38.

All the circumstances and relations of the parties imply an authorization to Burton to

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pledge the credit of Sowles jointly with his own.

Duryea v. Whitcomb, 31 Vt. 395.

"One who is not ostensibly a joint party may be held to a joint liability when the trade and business has been carried on for his benefit or in his behalf."

5 Wait, Act. & Def. 112.

The plaintiff was never liable on the subscription paper. Subscriptions on certain conditions are never binding until the acts stipulated as conditions are performed.

1 Pars. Cont. 454; *Williams College v. Danforth*, 12 Pick. 541; *Oakley v. Morton*, 11 N. Y. 33; *New York Exchange Co. v. De Wolf*, 81 N. Y. 278; *Middlebury College v. Loomis*, 1 Vt. 212; 3 Ill. 88; 67 Me. 295.

The conditions were never fulfilled as to the length of time the business was to continue. The subscribers who paid could recover their money. 8 Add. Cont. 8, 1845; *Nockells v. Crosby*, 5 Dowl. & R. 760.

Veasey, J., delivered the opinion of the court:

The plaintiff denies that he is bound by his subscription, because, as he alleges, the conditions of it have not been fulfilled, and because they were modified by the letter of Burton, and the terms of that letter have not been complied with.

Neither of these claims can be sustained.

The subscription paper is not ambiguous, but plain and complete in itself, and must be construed by itself independent of the letter. The letter was simply one of the preliminary negotiations to the subscription. To allow the letter to come in as a modification of the subscription contract would be in violation of a rule that a written contract cannot be enlarged, varied, or contradicted by parol testimony. If the letter may be regarded as an indemnity to the plaintiff for signing the subscription, it is not available to him in this action.

As to the proposition of the plaintiff, we put this construction upon the subscription contract. The only condition of the subscription was that Burton and Sowles and wife should convey the Tremont property to Foster as trustee of MacDonald. The phrase "on \$6,000 being subscribed hereto" was not a condition of the subscription strictly, but a condition in behalf of Burton and Sowles and wife, upon which they should convey. They were not obliged to convey until so much was subscribed. The object of the subscription was to secure the Tremont property for the contemplated business, and thereby promote the industry; and unless it was conveyed for the purpose, the subscriptions would not be enforceable, and if conveyed, and MacDonald did not fulfil as therein provided, then the subscribers had security on the property. If the owners were satisfied to convey upon a subscription of less than \$6,000, the primary object of the subscribers was attained and their security increased, the provision being that in case of default by MacDonald the trustee was to convey six tenths of the premises to the subscribers; therefore, the less the subscriptions, the greater the proportion to go to each subscriber. The provisions in the subscription paper in respect to MacDonald's obligations were conditions upon which he

would become entitled to said premises, and not conditions of the subscription.

We think this construction of the contract is unmistakably correct; therefore the plaintiff is bound by it as between him and the defendants. His remedy, if any, is against the trustee and the property, or against Burton on the promise in his letter, or both; but the questions that may arise in that direction are not for consideration here.

If the plaintiff's subscription is to be held enforceable against him, it is not contended but that it is to apply on the plaintiff's claim against the defendants under the agreement to that effect, as found by the auditor. But there is a small balance in addition, in the plaintiff's account, and the question is whether that is good as against Sowles as well as Burton. It appears that Burton told the plaintiff to charge the labor and supplies, which he should furnish on MacDonald's orders, to Burton and Sowles, and they were so charged. The auditor finds that Sowles never in fact authorized or assented to this, "or concurred in any arrangement between the plaintiff and Burton any further than is stated in the report, unless a further concurrence results as a legal effect of facts found by me."

We think the contracts between MacDonald and the defendants, stated in the report, should not be construed as conferring upon the defendants respectively any authority to act for each other in borrowing money or pledging credit in the performance of their obligations to MacDonald, as provided in said contracts. The provisions of the first contract strongly tend to negate such authority. The second contract, taken alone, might possibly bear such construction, but that contract does not appear to have been intended as a substitute for the first one, but rather as supplementary to it; and upon the point now under consideration it does not appear why the two contracts may not properly be considered and treated as one. But in arriving at what is the legal effect of the facts found by the auditor on the question of Sowles' liability to the plaintiff, it is proper to consider them in the light of the contract. It is upon the whole report, which contains the contract, that we are to decide the point.

Although Burton and Sowles were plainly not made, by the contract, partners or proprietors in the shirt business, they became its reliance for money and material, and interested in all the property of the concern as security for such support, and the subscriptions of all others were to go to them, and were so promised in the subscription paper which the plaintiff signed. Burton was entrusted with the paper to solicit the plaintiff's subscription, and obtained it. His account was for labor and supplies such as Sowles must have known—situated as he was—the business would demand. He knew the plaintiff was furnishing them, because he assented that he might pay his subscription in that way. Although not made partners or proprietors of the business, as between themselves, by the contract with MacDonald, the subscription paper ran to them jointly, and their attitude to the business was to appearances a joint relationship as between each other. We think the plaintiff especially had a right so to regard it. True, the auditor

says that Sowles never assented to the charges being made to him unless such is the legal effect of the facts reported; but, having authorized and assented to all the transactions stated, and standing in not only the real, but in addition in such apparent, relation to the business as is shown by the report, and having security for all that he and Burton furnished through the plaintiff, we think justice clearly demands that he should not be allowed, to repudiate the small balance of the plaintiff's account above his subscription, on the score that he never expressly assented to it.

The pro forma judgment is reversed, and judgment is rendered for the plaintiff to recover the amount of his account, with interest, above the amount of his subscription, with costs.

E. G. & S. C. GREENE

v.

O. A. BURTON and E. A. Sowles.

1. The **plaintiffs** had furnished labor and material to M, the proprietor of a manufacturing business in which the defendants, B and S, were interested by reason of their loans to M, and had an agent in the establishment to look after their interest. On the plaintiffs' refusal to furnish longer on the credit of M, B told one of them to furnish labor and material, "as the factory must be kept running;" that their agent would order what was wanted; and that B and S "would see that they had their pay for the same." Thereupon the supply of labor and material was continued on the agent's orders and upon the **credit of the defendants**. Held, that it was an **original** and not a collateral promise, **binding upon B, but not upon S, as they were not partners**, and neither had authority to pledge the credit of the other.
2. The person's **name in the account** on the books is **not conclusive as to who** was considered the **original debtor**.

(Franklin—Filed September 12, 1887.)

BOOK account. Heard on an auditor's report, September Term, 1886, Franklin County, Royce, Ch. J., presiding. Judgment for the plaintiffs. *Affirmed as against Burton; reversed as against Sowles.*

See *Smith v. Burton & Sowles*, ante, p. 900, where is fully set forth the interest which these defendants had in the Glen's Falls Shirt Factory, and their relation to each other.

The auditor found as follows, in part, as to whom the goods were originally charged: "I find that at the beginning of the account embodied in the specification, upon the books of the plaintiffs, there appear the words 'Glen's Falls,' 'Burton & Sowles,' and that where the words appear on said books there appeared to have been something erased, and said words, or part of them, written over them; and that on the day-books of the plaintiffs the charges of the goods were made in the name of the Glen's Falls Shirt Factory, Glen's Falls Shirt Company, Shirt Factory, and in other ways; and

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that said entries in said books were made by different parties, including the plaintiffs, from time to time, from memoranda kept by workmen in the employ of the plaintiffs.

"The erasure spoken of appears on page 289 of plaintiffs' exhibit B, and I was requested by the defendants to find and report when the words 'Glen's Falls,' 'Burton & Sowles,' were written on said page; but I am unable, from the evidence, to find when in point of fact such words were written, whether before or after August 26, 1881."

Mr. E. A. Sowles, pro se:

The proof shows that the charges were made to the Glen's Falls Shirt Co., and in other ways. This is strong proof to whom credit was originally given.

Reed, Fr. § 90; *Beebe v. Dudley*, 26 N. H. 252; *Hardman v. Bradley*, 85 Ill. 162.

When erasures have been made, it is conclusive evidence.

Reed, Fr. *supra*.

Burton's promise was within the Statute of Frauds.

Reed, Fr. § 120, note; *Stidham v. Sanford*, 4 Jones & S. 343.

The action should be assumpsit on the promise.

Austen v. Baker, 12 Mod. 250.

Messrs. Cross & Start, for plaintiffs:

The promise of Burton, that he and Sowles would see that the plaintiffs had their pay for the labor and material, was an original undertaking, and not collateral or conditional.

Whitman v. Bryant, 49 Vt. 512; *Bagley v. Moulton*, 42 Vt. 184; *Blodgett v. Lovell*, 33 Vt. 174.

Sowles is liable on the promise. The promise was made in and about the business of defendants, in which they had a joint interest, and in respect to which they were jointly liable. It was a promise for the benefit of the defendants. The goods and labor went for their benefit.

Duryea v. Whitcomb, 31 Vt. 395; *Tyler v. Scott*, 45 Vt. 260; *Noyes v. Cushman*, 25 Vt. 390.

Veasey, J., delivered the opinion of the court:

We think the findings of the auditor should be construed as equivalent to the finding expressly of an original undertaking on the part of Burton. Previous to his promise the plaintiff had furnished the "shirt company or factory," labor and materials on the credit of MacDonald, who was the proprietor of the business under the name of the Glen's Falls Shirt Company, but had then refused to furnish any more on his account or credit. Burton and Sowles were interested in the business by reason of their loans to MacDonald, and the character of their security therefor, and had an agent in and about the establishment to look after the business in their behalf. When this agent brought the fact of the plaintiffs' said refusal to the attention of Burton, he told one of the plaintiffs to furnish labor and material, "as the factory must be kept running," and that their said agent, Hall, "would order what was wanted, and that Burton and Sowles would see that they had their pay for the same." Thereupon the goods and labor charged, as shown in the plaintiffs' specifications, were furnished by the

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plaintiffs upon the order of Hall, and upon the credit of Burton and Sowles.

The expression, "would see that they had their pay," implies a collateral promise; but if this form of expression was intended and understood as a promise to pay directly and not conditionally, it would be so treated. The substance, and not the form, should control. We think the facts and circumstances reported show that the promisee had the right to, and did, understand that the further labor and material to be furnished should become the debt directly and not collaterally against Burton and Sowles, and that Burton so intended.

The person's name in the account on the books often has controlling influence in deciding the fact as to the person who is regarded as the original debtor, but it is not conclusive; and in this case, if the charges were not to Burton and Sowles, as first made, which does not clearly appear, we think but little importance should be attached to it under the other facts reported.

The Statute of Frauds, therefore, is not available to the defendants.

But there is the further question, whether Sowles is bound by Burton's promise.

In the case of *Smith v. Burton*, ante, p. 900, we held that the contracts with MacDonald did not create a partnership between Burton and Sowles, or make them the proprietors of the business; and did not create an authority on the part of either to pledge the credit of the other, in the performance of their contract obligations, to MacDonald. The contracts were severally signed by them, and in many respects point to a several obligation on the part of Burton and Sowles.

In the case at bar, unlike the other, there is nothing in the report to indicate an authority by Sowles to Burton, outside the contracts, to pledge the credit of Sowles to the plaintiffs. It does not appear in the report that Sowles knew of any dealings with the plaintiffs by either MacDonald or Burton. And there is nothing to show any course of dealing indicating any authority for each to act for the other.

Therefore the judgment for the plaintiffs, as against Burton, is affirmed, but, as against Sowles, is reversed, with costs.

Pamela YOUNG

v.

Orrin H. YOUNG.

1. The general rule is that when **future support is secured by a conditional deed or mortgage**, and no place is designated where the support is to be furnished, the **person to be supported has a right to choose where he will live**, provided he does not impose an unreasonable expense upon the party obligated to provide the support.
2. Where a **deed or mortgage** conditioned for future support is **ambiguous**, and refers to a former agreement, **parol evidence is admissible** to prove where the support is to be furnished.

(Caledonia—Filed September 8, 1887.)

1 Vr.

BILL in chancery. Heard on a special master's report, June Term, 1886, Caledonia County, Ross, *Chancellor*. Decree that the defendant pay to the oratrix the sum of \$200 for her support yearly so long as she shall live, payable semi-annually, and, in default of payment, to be foreclosed of all equity in the premises. *Reversed*.

The master was Judge Poland, who found, among other things:

"The oratrix is the widow of Obadiah Young, and the defendant is a son of the oratrix and the said Obadiah. On the 18th day of June, 1866, the said Obadiah Young and his wife conveyed to the defendant the home farm of said Obadiah in Waterford. The deed was in the ordinary form of a warranty deed.

"The defendant had come home to live some time before this deed was given, under a verbal agreement similar to that expressed in the condition in the deed. The defendant carried on the farm, and his father and mother lived with him till 1870, when the father died. The defendant remained unmarried till the fall of 1882, and his mother had the general charge and control of the housework and household affairs, with such occasional female help as was needed, up to the time of defendant's marriage. The defendant married a wife in the fall of 1882, and his wife took her place as the mistress and head of the household department. Matters went on ostensibly in a peaceable way, but the natural consequences followed, that the old lady was not as contented and happy in the subordinate station, as when she ruled in the domestic department. In the summer of 1883 the oratrix fell sick, and her daughter, Mrs. Newton, went to the defendant's to take care of her, and remained there till about the middle of September, 1884. Not very long after Mrs. Newton went to defendant's, difficulty arose between Mrs. Newton and defendant, and the same grew and increased in intensity, and the oratrix entered into the same feeling with Mrs. Newton, and became hostile in her feelings to the defendant and his wife.

"I do not find that the defendant was guilty of any breach of the conditions of said deed by neglecting or refusing proper support for the oratrix at his own house, which is the same place conveyed to him as above. * * * Considering the relative situation of the parties to that arrangement and their relationship; the purpose and object of the arrangement; the character of the property conveyed to Orrin and charged with his mother's support; and the practical construction given to said contract by the parties for many years; and construing the language of the condition of the mortgage in the light of all these surrounding circumstances,—I have no doubt but that the mutual understanding and expectation of all the parties to said arrangement was that said Orrin H. should support his mother in her old home, and not elsewhere, and I so find; but my finding is based wholly on the matters and circumstances above set forth."

In December, 1884, Mrs. Green, the defendant's sister, removed the oratrix to her house, where she has since been kept.

Messrs. Bates & May, for defendant:

The finding of the master is conclusive that the oratrix is bound to accept her support at

her old home. Parol evidence was admissible to show where the maintenance was to be afforded.

84 Me. 187; *Norton v. Webb*, 85 Me. 218. *Parker v. Parker*, 126 Mass. 483, is directly in point. *Knapp v. White*, 23 Conn. 529.

This case stands precisely like any other contract.

The rule is settled beyond question that collateral circumstances may designate the place of performance of contract.

2 Pars. Cont. 649; *Brown v. Leach*, 85 Me. 89; *Norton v. Webb*, Id. 218; *Wales v. Mellen*, 1 Gray, 512; *Mason v. Mason*, 87 Me. 546.

The contract of support and the deed were not contemporaneous. The contract had been made some years when the deed was executed. Evidence was admissible to show the circumstances.

Reynolds v. Hassam, 56 Vt. 449; *Abbott v. Marshall*, 48 Me. 44; *Packard v. Richardson*, 17 Mass. 122; *Fiske v. Fiske*, 20 Pick. 508; *Pettee v. Case*, 2 Allen, 546; *Joslyn v. Parlin*, 54 Vt. 670; *Adams v. Smilie*, 50 Vt. 7.

The deed does not attempt to set out the contract; and its terms must be determined, to decide whether they have been broken. It will be noticed, however, that the master does not base his findings upon parol testimony, but upon the surrounding circumstances. There was no ruling by the chancellor on this point, and it must now stand.

Re Merrill, 54 Vt. 200.

No exceptions were filed to the report.

See *Dix v. Batchelder*, 55 Vt. 562; *Winship v. Waterman*, 56 Vt. 181.

In such case the court will not revise the master's conclusions in matters of fact.

Bruce v. Continental L. Ins. Co. 58 Vt. 253; 2 Dan. Ch. 1817; *Miller v. Miller*, 26 N. J. Eq. 424; Rev. Laws, § 727.

Messrs. Nichols & Dunnnett, for oratrix:

The question is whether the defendant is bound to support the oratrix at any other place than at his own home.

This class of contracts for support have often come before the courts, and it has almost universally been held that when no place of performance is specified in the contract, the party to be supported has the right to select his place of residence and place where he will receive the support contracted for, provided the party obligated to furnish the support is not thereby put to unreasonable and needless expense.

Wilder v. Whittemore, 15 Mass. 262; *Thayer v. Richards*, 19 Pick. 393; *Fiske v. Fiske*, 20 Pick. 499; *Hubbard v. Hubbard*, 12 Allen, 586; *Pettee v. Case*, 2 Allen, 546; *Flanders v. Lamphear*, 9 N. H. 501; *Holmes v. Fisher*, 18 N. H. 9; *Roswell v. Jewett*, 69 Me. 293; *Lamb v. Clark*, 29 Vt. 273; *Borst v. Crommie*, 19 Hun, 209; *Ottaquechee Sav. Bank v. Holt*, 58 Vt. 166; *Joslyn v. Parlin*, 54 Vt. 670; 1 Jones, Mort. 391; 2 Washb. Real Prop. 66.

The contract is complete, and needs no construction. When parties have constituted the writing to be the only visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the court is to ascertain not what the parties may have secretly intended, but what is the meaning of the words they have used. It is merely a duty of interpretation; that is, to find out the

true sense of the words as the parties used them.

1 Greenl. Ev. § 277.

The referee exceeded his jurisdiction in transforming the written agreement to support into a contract to support at a particular place.

Gove v. Downer, 1 Vt. L. ed. 235 (3 New Eng. Rep. 463).

Royce, J., delivered the opinion of the court:

The general rule is that where support is secured by a conditional deed or mortgage, and no place is stipulated where the person to be supported is to receive the support, he has the right to be supported wherever he may choose to live, provided he does not impose any unreasonable expense on the party obligated to furnish the support; and the condition of the deed is broken by declining to pay for the board of the party to be supported at a suitable place. 1 Jones, Mort. 391.

The condition inserted in the deed from Obadiah Young and his wife, the oratrix, to the defendant, Orrin Young, is in the following language: "Provided, nevertheless,—and the conditions of this deed are such that, having entered into an agreement with the said Obadiah and Pamela Young, therein agreeing to maintain my mother, Pamela Young, during her natural life, by furnishing her suitable raiment, food, nursing, and medical attendance, and all other things necessary for her comfort, both in health and sickness,—now if said Orrin do and perform as expressed for him to do, then this deed to be good and valid; otherwise, if he shall neglect or refuse to do as above specified, then this deed to be null and void."

The oratrix claims that there has been a breach of that condition, and the bill is brought—treating the conditional deed as a mortgage—to foreclose the equity of redemption.

The master has found that the defendant was not guilty of any breach of the conditions of said deed by neglecting or refusing proper support for the oratrix at his own home, which is the same place conveyed to him by said deed. That finding is conclusive against the claim made by the oratrix, if it was based upon competent evidence.

The finding was based upon what appeared to the master as to the relative situation of the parties to the arrangement, their relationship, the purpose and object of it, the character of the property charged with the support, and the practical construction given to the contract by the parties for many years. And, construing the language of the condition in the light of these facts and circumstances, he reports that he had no doubt but that the mutual understanding and expectation of the parties to the arrangement was that Orrin should support his mother at her old home, and not elsewhere, and so found. It does not appear that the evidence tending to show the above facts and circumstances was objected to. And so the question is presented as to the propriety of considering them in ascertaining the place where the support was to be furnished.

It is claimed by the oratrix that the facts and circumstances above alluded to, if allowed to affect the construction of the contract recited in the deed, would alter and vary it, and so

should not be allowed. We do not so understand the law. They do not vary or impair the obligation to furnish the support, and only explain the place where it was agreed and understood it should be furnished. It will be noticed that the condition in the deed does not profess to recite the entire contract, but refers to an agreement that had been entered into. The place where it was to be furnished was not named, and without explanation it would be left as a fact to be inferred from the language used; and as that language was ambiguous, it was competent to consider the facts and circumstances developed upon the hearing as explanatory of that ambiguity. 1 Add. Cont. 188; *Gray v. Clark*, 11 Vt. 583; *Barker v. Troy & R. R. Co.* 27 Vt. 766; *Thompson v. Prouty*, Id. 14; *Richmond v. Woodard*, 32 Vt. 883.

In *Joslyn v. Parlin*, 54 Vt. 670, the court, in construing a contract for future support, says that courts must construe such contracts in the light of all legitimate surrounding circumstances.

The intention of the parties to a contract is to be ascertained by applying its terms to the subject-matter, and the admission of parol testimony for that purpose does not infringe upon the rule that makes a written instrument the proper and only evidence of the agreement contained in it. 7 Cent. Rep. 886.

It is not necessary to notice the question made as to the proper parties.

The decree of the Court of Chancery is reversed, and cause remanded, with mandate that the bill be dismissed, with costs.

Charles E. RANDALL

v.

Lloyd N. JOSSELYN.

1. An **executory devise of real estate cannot be barred by any method of alienation**; thus, the testatrix bequeathed her estate to her son, provided he died leaving issue who could inherit from him, and, on failure of such issue, to her nephew and his heirs. On a bill in equity, brought for construction of the will,—*Held*, that the son took an estate in fee simple with an executory devise, without power of alienation, and that the court could not authorize a conveyance without the consent of all the devisees over, they being parties.
2. Applying the rules that all the clauses of the will must be construed together, and that the intention of the testatrix must prevail unless it is in conflict with some fundamental principle of law, it was held that the first taker was not given **power of disposition**.
3. The children of the defendant nephew and their descendants should have been made **parties**; and, not being such, their rights are not affected by the defendant's answer consenting that the orator might be authorized to convey the fee on furnishing security to him to account for the avails.
4. Neither party is entitled to **costs**.
1 Vt.

(Windsor—Filed September 21, 1887.)

BILL IN CHANCERY. Heard on bill and answer, December Term, 1886, Windsor County, Rowell, *Chancellor*; and decree rendered. *Modified.*

The facts are stated in the opinion.

The decree rendered below was that the court had jurisdiction; that the devise over, in case the son dies without children, etc., will take effect as an executory devise; that the orator has only a qualified or base fee in the land in question, but that the will doth give him power to sell and convey the same and give good title thereto; but if he do this, he must give the defendant a bond, with sufficient sureties, to be approved by the clerk of court, which shall be in the penal sum double the amount for which the land is sold, and conditioned to account for and pay over the principal of the avails of such sale according to the terms and provisions of the will as herein construed.

The orator appealed.

Mr. William E. Johnson, for the orator:

The bill and answer call for a construction of the will. A fair construction gives the son power to dispose of this property. The testatrix gave authority to the executor to sell during the son's minority, if the son consented. Surely she did not expect him to have less sense as he grew older. There is nothing to limit the right to sell.

Jones v. Bacon, 68 Me. 34, holds that an absolute power of disposal in the first taker of an estate renders a subsequent limitation repugnant and void. When the first taker has power of disposal by deed or will, a devise over is void.

Van Horne v. Campbell, 1 N. Y. L. ed. 198 (1 Cent. Rep. 532), 100 N. Y. 287.

It was ruled in *Ide v. Ide*, 5 Mass. 500, *Parsons, J.*, that where it was the clear intention of the testator that the devisee should have an absolute property in real estate devised, a limitation over must be void. The following cases hold the same doctrine:

Gifford v. Choate, 100 Mass. 348; *Shaw v. Hussey*, 41 Me. 495; *Stuart v. Walker*, 72 Me. 146; *Hale v. Marsh*, 100 Mass. 468; *Brattleboro v. Mead*, 43 Vt. 556.

The estate, under the will, vested in the orator. *Messrs. French & Southgate*, for the defendant:

The orator took but a life estate. The gift to him is subject to "conditions and limitations." The latter clause controls the prior language of the will.

2 Jarm. Wills, 46; *Smith v. Bell*, 31 U. S. 6 Pet. 84 (8 L. ed. 828).

The defendant took a vested remainder in himself and children, to take effect on the termination of the orator's life estate, subject to be devested on the orator's having direct descendants living at his death.

2 Jarm. Wills, 407, 411; 2 Redf. Wills, pp. 598, 626; *Richardson v. Paige*, 54 Vt. 378; *Lovejoy v. Raymond*, 58 Vt. 509; *Doty v. Chaplin*, 54 Vt. 361.

In this case the remainder passes in the first instance to the defendant; and if he should die before the orator, then to his children.

McCloskey v. Gleason, 56 Vt. 264.

The rule of modern cases is to construe wills so as to create vested remainders, and not executory devises.

2 Redf. Wills, 612, 627, 643; 2 Jarm. Wills, 483, 485; 2 Greenl. Cruise, 457, 468.

The subsequent estate will be construed a remainder where it is possible.

2 Saund. 388, note 9.

A vested remainder cannot be barred by the orator's deed.

3 Greenl. Cruise, 519; 2 Saund. 388, note 9.

Walker, J., delivered the opinion of the court:

The testatrix, Sarah S. Randall, devised and bequeathed all her estate, real and personal, to her son Charles E. Randall, who was her only child and heir, subject to the following conditions and limitations:

"In the event of my decease before my son shall have attained the age of twenty-one years, I leave the care and management of my property, for the benefit of my son, to my executor hereinafter named until my son shall have attained the age of twenty-one years; my said executor is hereby authorized, before my son arrives at such age, with the consent of my son, to change any of my property into money or other property for the benefit of my son, if my executor and my son deem it best to do so. When my son has attained the age of twenty-one years, or at my decease, if thereafter, he is to have the control and management of said property, which I give to him and heirs absolutely, provided he has children, or their descendants, who can inherit said property or the avails of the same from him at the time of his decease; but in the event of the death of my said son without having any child or children or their descendants, who can inherit from him, I then will and direct that all my said property, or the avails of the same if changed into other property or into money, go to and become the property of my nephew, Lloyd Norris Josselyn, my sister's only child, and his heirs, or to his child or children and their descendants, in the event of his death before the death of my said son."

The will was duly probated. On the settlement of the executor's administration account there was left belonging to the estate of the testatrix certain personal property, a piece of land in Wisconsin, and a dwelling house, out-buildings, and land adjoining in Woodstock, Vermont, which were occupied by the testatrix as her homestead at the time of her decease. All the residue of her estate was, on the 2d day of August, 1882, decreed by the probate court to the orator, the said Charles E. Randall, pursuant to the terms and provisions of said will; and he being then of full age received possession of the whole estate from the executor. He now desires to sell and convey the real estate situated in Woodstock, aforesaid, if he has authority under the will to convey a good and perfect title to the same in fee; and brings this bill in chancery for the purpose of having the court determine what right and interest he has in the real estate in Woodstock, under the will, and prays that he may be permitted to sell and convey the Woodstock premises on such terms as to the court may seem meet and proper.

The decree of the probate court did not

settle the question involved. The question arising, then, in the case is, What estate the orator, Charles E. Randall, took in the devised premises under the will of the testatrix.

In determining this question the whole will must be considered, and all the clauses construed together. In no other way can the intention of the testatrix be ascertained. In construing the will, the mind and intention of the testatrix, if it can be discovered, must prevail, unless that intention is in conflict with some fundamental principle of law which ought not to be disregarded to meet the wish or caprice of the testatrix.

There is a devise or gift to the orator as first taker, and a limitation over to the defendant, Josselyn, or his children and their descendants. Effect must be given to both, if consistent with the rules of law, if such was clearly the intent of the testatrix.

It is contended by the orator that the will gives him, as first taker, power to dispose of the whole estate, and that this power is inconsistent with, and therefore destructive of, the limitation over, and that, as the limitation cannot be carried into effect, he takes the whole estate in absolute fee simple.

There is no doubt of the rule that where there is an absolute power of disposition given by the will to the first taker, the limitation over upon his dying without children, etc., is void as being inconsistent with the absolute estate. The power of disposal vests the whole estate in the first taker. 4 Kent, Com. 264.

But we think the orator's contention is not supported by the language of the will. The construction contended for would defeat the intention of the testatrix.

The will, in the event of the decease of the testatrix before her son attained the age of twenty-one years, leaves the care and management of her whole estate to the executor during the son's minority, and gives the executor power during that time to change any of her property into money or other property, for the benefit of the son, if both deem it best so to do.

When the son reaches the age of majority, or at her decease, if thereafter, he is to have the control and management of her property, which she "gives to him and heirs absolutely, provided he has children or their descendants, who can inherit said property or the avails of the same from him at the time of his decease." No clause of the will gives the property to the son except upon the express proviso and limitation therein stated. It gives him the fee conditionally. In the event of his decease without issue living, his interest in the estate is defeated, and the whole goes over to the nephew or his issue. The estate does not rest absolutely in the son unless he leaves issue at his decease, who can inherit it from him. The control and management of the property, which the will gives him, manifestly does not include power of disposal. It gives him the use, possession, superintendence, and direction of the property, and the power of exercising a general restraint over the same until the happening of the event that will determine who takes the property in fee simple absolute. The language of the will shows that the testatrix did not intend that her property should vest absolutely in her son, on his attaining the age of majority, with power of

disposal. In direct and clear language she makes the estate given to him a conditional one, and contingent during his life, subject to be defeated by his death without children or their descendants surviving him.

The will does not authorize or contemplate any change in her property after the son attains the age of majority. In the devise over, the language is: "I will and direct that all my said property, or the avails of the same if changed into other property or money, go to and become the property of my nephew," etc. The phrase, "or the avails of the same," in the devise to the son, and the phrase, "or the avails of the same if changed into other property or money," in the limitation over, when read in connection with the words "my property" and "all my said property," and construed with other parts of the will, we think do not indicate or imply a power of disposal in the son. They clearly have reference to changes made in her property by the executor, under the authority given him by the will, which she intended should be subject to the devise over and treated the same as property left by her. No express authority to dispose of her property is given to the orator, and none is fairly implied from the language of the will. The limitation over is not of such estate as the son, as first taker, shall have, as in *Ide v. Ide*, 5 Mass. 500, nor of such property as the son or first taker shall die possessed of, as in *Attorney-General v. Hall*, Fitzg. 814, and in *Jackson v. Bull*, 10 Johns. 19, which words were held to imply an absolute power of alienation, and consequently an absolute ownership, destructive of the limitation; but the limitation here is of "all my said property, or the avails of the same if changed into other property." The testatrix evidently intended that her son should succeed to the inheritance if he had issue at his decease to take it from him; otherwise, that the nephew or his issue should succeed to it, so that the estate should descend in the line of her blood rather than in the line of her husband's.

This view of the testatrix's meaning or intention, derived from the provisions of the whole will, is strengthened from the situation of the testatrix in respect to her son's and sister's descendants. The son was her only child and heir, and would have inherited her whole estate absolutely if she had left no will, and it is not probable that she would have attempted by will to limit and qualify his interest in her estate and give it over to her sister's descendants on the happening of the specified contingency, if she had intended that the whole should vest in him absolutely on her decease.

The general intent and controlling idea of the will is to vest the estate in the son only upon the condition and limitations expressly stated therein. To read it otherwise would be reading it contrary to its primary signification, and defeat rather than effectuate the intention of the testatrix.

The defendant insists that the orator takes under the will simply a life estate with a vested remainder in the defendant and his children, subject to be defeated on the orator's leaving children or their descendants at his death.

We think this contention is erroneous. By the terms of the will, if the son leave no children or their descendants, who can inherit from 1 Vt.

him, at his decease, then the defendant or his descendants will take the estate, given in the first instance to the son, from the testatrix under the will, not as a remainder but in substitution for the preceding estate. If the son leaves children or their descendants, they will take the estate given to him, not as a remainder under the will, but by descent from him, out of the fee devised to him, which has not been defeated by the prescribed event. The language of the primary devise does not, in terms, limit the estate to a life estate in the son; but it in terms gives to him the fee on the specified condition, on the occurrence of which the fee is to cease and go over and vest in the devisees over, if there then be any to take; and, if there be none then to take, the devise over will become inoperative, and the conditional fee will become absolute in the son. 2 Jarm. Wills, 489; 2 Redf. Wills, 647; *Drummond v. Drummond*, 26 N. J. Eq. 284; *Jackson v. Staats*, 11 Johns. 387.

Nor is the testatrix's language consistent with an estate of inheritance descendible to an indefinite failure of issue, which would constitute an estate in fee tail, which under our statute would be a life estate in the first taker with remainder in fee simple to the person to whom the estate tail on his death would first pass; for the limitation is not upon an indefinite failure of issue, but is expressly confined to a failure of issue at the time of the death of the first taker. The limitation cannot operate as a limitation of remainder after a life estate, for it is not an estate immediately expectant on the natural determination of a particular estate of freehold limited in the will. The limitation is a devise over to the defendant or his children and their descendants, in derogation of, or in substitution for, a preceding estate in fee simple in the son; the fee simple given to the son being subject to be defeated in favor of the devisees over on the simple condition of his having no issue at his decease to whom it can descend. It is a strict executory devise. 2 Jarm. Wills, 485; 2 Redf. Wills, 645. This construction of the will will carry out the intention of the testatrix. The condition of the devise over is valid and within the rule as to perpetuities; for the event under which the fee passes away from the collateral heirs of the son must happen, if at all, at the decease of the first devisee.

The rule is well settled that where the devise over depends upon a definite failure of issue at the decease of the first devisee, an estate in fee simple with an executory devise is created. The doctrine is very clearly explained by Kirkpatrick, *Ch. J.*, in *Den v. Taylor*, 5 N. J. L. 413, where the testator devised all his lands to his nephew, Stephen Sheppard, his heirs and assigns forever, with the limitation, in "case he should die before he arrives to lawful age or have lawful issue, then and in that case over" to his nephew, John Sheppard, and his nieces, Hannah and Louisa Sheppard. The court held that the devise gave Stephen an estate in fee with a limitation to John, Hannah, and Louisa, by way of executory devise, and not an estate in fee tail with a remainder over. In *Den v. Snitzer*, 14 N. J. L. 53, the words of the limitation following the gift to the testator's son of the plantation, were "if he shall die without issue, then at his decease the plantation shall be divided," the one-half part being

given over in trust for the benefit of the Monthly Meeting of Friends. The court held that an executory devise, because the limitation over was on a definite failure of issue, the devise over taking effect at the decease of the first devisee. In *Den v. Allaire*, 20 N. J. L. 6, it was held that where the limitation over is to take effect upon a definite failure of issue, the previous estate is a fee simple, subject to be defeated upon the happening of the event specified in the limitation. In *Hatfield v. Sneider*, 54 N. Y. 280, where the testatrix devised and gave her whole estate to her daughter Elizabeth and her heirs and assigns forever, providing her son, who was supposed to be lost, did not return, but, if he should return, then the daughter and son to share the same equally; and providing, further, that, if the son did not return and the daughter should have no children living at her decease, her whole estate should go to Jacob Hatfield and his heirs and assigns forever, it was held that the daughter took the estate in fee, limited by the executory devise over to Hatfield, which would defeat the daughter's fee on the happening of the specified event. To the same effect are *Richardson v. Noyes*, 2 Mass. 57; *Moffat v. Strong*, 10 Johns. 12; *Den v. Schenck*, 8 N. J. L. 94; *Seddel v. Wills*, 20 N. J. L. 223; *Pells v. Brown*, Cro. Jac. 590; *Roe v. Jeffery*, 7 Term Rep. 589; 1 Salk. 236; 4 Kent, Com. 268, etc.

The essential quality of an executory devise is that it cannot be affected by the owner of the precedent estate. 2 Jarm. Wills, 495. It is well settled that a valid executory devise of real or personal estate cannot be defeated at the will or pleasure of the first taker. It cannot be barred by any method of alienation. *Pell v. Brown*, Cro. Jac. 590; 1 Salk, 299; *Moffat v. Strong*, 10 Johns. 12; *Jackson v. Bull*, 10 Johns. 19. The first taker has nothing more than the use of the property, and any conveyance of the real property by him would be inoperative and void as against the devisee over, if the contingency happens which will vest the fee in him. If the first taker could legally exercise acts of ownership over the property, it would be useless for the law to recognize and guard such devises. Such a devise and the power of disposal are repugnant, and cannot both exist under the same devise.

Where the right to alienate the fee is not given to the first taker by the instrument creating the estate, the court of chancery cannot, by its decree, authorize a conveyance of the estate by him, which will give good title thereto in fee to the purchaser, without the consent of all the devisees over in whom the title may ultimately vest absolutely. While the instrument stands as the foundation of the estate, it is controlling upon the court. Chancery may, perhaps, in a case calling for such intervention, require the first taker of property limited by an executory devise, to give security before taking the property from the executor, and may restrain a contemplated sale of it, but it will not intervene to authorize a sale without the full consent of all persons who may have a contingent interest therein.

As in every executory devise the whole estate passes out of the devisor in the first in-

stance (3 Washb. Real Prop. 344, 345; 2 Powell, Devises, 241)—if the persons were all living who might take under the executory devise, and capable of contracting, a conveyance of the estate, joined in by the first taker and all the possible devisees over, would give a good title in fee to the purchaser. So on a bill brought for that purpose in which all the possible devisees over are made parties, where the consent of all such possible devisees over to such a decree is shown by the pleadings, the court of chancery may doubtless, by its decree, authorize the conveyance of the estate by the first taker, upon the conditions of the consent or other equitable conditions which would give a good title to the purchaser against the devisees over.

In the devise in question, on the happening of the contingency, the estate vests ultimately in the defendant Josselyn, if he survives the orator; but, if he does not, then in the defendant's children and their descendants living at the orator's decease. It cannot now be determined in whom of the devisees over the estate will ultimately vest. The person who will take may be yet unborn. The defendant's children and their descendants are not parties to this proceeding, nor have they in any way consented to the conveyance of their contingent interest. Their contingent rights are in no way affected by the defendant's answer consenting that the orator may be authorized to convey the fee on furnishing security to him to account for the avails. A conveyance of their contingent interest under such circumstances, under a decree of the court, would be inoperative, and give no title to the purchaser against them, should the fee ultimately vest in them, or either of them.

We hold that the testatrix intended to provide for the defendant, or his children and their descendants on the contingency of her son's dying without children or their descendants who could inherit from him; and that the devise over to him or them on the happening of the contingency will take effect as an executory devise, if there be any of them to take; and that the orator takes under the will a qualified or conditional fee in the land in question, subject to be defeated on his dying without children or their descendants, if any of the devisees over be then living to take the land, to whom the same would, in that event, pass in absolute fee simple; and that, waiting the happening of this contingency, the orator has no power to convey the land and give good title in fee thereto.

The decree of the court of chancery, so far as it is in accordance with these views, is affirmed; and reversed so far as it holds that the orator has power under the will to convey the land in question and give good title thereto, and authorizes him to convey the same on giving the defendant a bond with ample surety to account for the avails thereof. As this bill was filed by the devisee against a devisee over, for the purpose of determining a construction of the will, neither party is allowed costs.

The cause is remanded to the Court of Chancery, with a mandate to enter up a decree in accordance with the views herein expressed.

RHODE ISLAND.

SUPREME COURT.

William A. HAMMOND *et ux.*, *Appts.*,
v.

William H. WOOD *et al.*

1. It seems that **nonresidence** is not an insuperable objection to the appointment of an executor.
2. A **married woman** is, in this State, **incapable of being an executrix** in a case where a bond is required.
3. The **bond required of executors and executrices**, by the Rhode Island statute, is an instrument which will bind the obligor personally at common law; and such a bond a **married woman is incapable of giving**.
4. The **bond of a third party can not be accepted** in lieu of the bond of the person named in the will as executrix.

(Providence—Decided July 16, 1887.)

A PPEAL from the Probate Court of the Town of North Providence. *Affirmed*.

The facts and case are stated in the opinion. *Messrs. Walter H. Barney and George Lewis Gower*, for appellants:

I. The court of probate has no discretion in this matter.

If Mrs. Hammond is not "incapable to discharge" the trust of executrix, and fulfills the requirements of the law as to "giving" bond, the court must issue letters testamentary to her. They are not to judge of what is for the best interests of the estate; in that matter, the choice of the testator is conclusive.

See Pub. Stat. 184, § 1.

No objection is raised or can be raised to her acting as executrix, except that she is a married woman. Her residence in another State is no objection under our law.

II. A married woman is not "incapable to discharge" the trust of executrix, unless disqualified by statute.

Under the civil and canon laws a married woman had the same powers as if *sole*, and could act as executrix even without the consent of her husband, and in the face of his express dissent.

1 Wms. Exrs. 233.

Under the common law, also, a married woman was not incapacitated from acting as executrix, if her husband assented to her acceptance of the trust.

2 Bl. Com. 508; Schoul. Exrs. & Admsrs. § 82; Schoul. Dom. Rel. § 86; *English's Err. v. McNair's Admsr.* 34 Ala. 40; *Trustoul v. Coppin*, 2 W. Bl. 801; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; *Stewart's App.* 56 Me. 300; Chitty, Cont. 149, 11th Am. ed. 258; *Adair v. Shaw*, 1 Sch. & Lef. 243, 266; *Bellew v. Scott*, 1 Str. 440; *Gyger's Estate*, 65 Pa. 311; *Guldin's Estate*, 81* Pa. 362.

This requirement of the husband's assent is not in consequence of any disability on the part of the wife. She can, if appointed, execute all powers given to her under the will without any assent on his part, may sell and

convey the estate, and may even sell and convey to him.

See 2 Com. Dig. *Baron and Feme*, p. 8; 1 Rol. Abr. 329 (B.) 10; *Compton v. Collinson*, 1 H. Bl. 346; 1 Sugd. Powers, 181, 182; *Bunce v. Vander Grift*, 8 Paige, Ch. 37; *Pemberton v. Chapman*, El. Bl. & El. 1056.

The husband's assent is required on account of the legal fiction of the common law by which the husband and wife are considered as one, and in consequence the husband held liable for the wife's torts. Since the husband, therefore, is liable for a *devastavit* committed by his wife as executrix, his consent is required to her assuming the trusts of an executrix—and thereby rendering him liable for her acts in that capacity—as a protection to him, and not for the benefit of anyone else.

Pemberton v. Chapman, El. Bl. & El. 1056, 1067.

This is plainly shown from the fact that if the wife is appointed executrix, although without her husband's privity or consent, and an action is brought against the husband and wife in respect to the estate, they cannot plead that she is not executrix, nor set up the lack of his consent as a defense.

1 Wms. Exrs. and cases cited in note f.

No question therefore exists as to her capacity to act as executrix, unless there is some bar arising from the peculiar statutes of this State.

III. There is no statutory objection in Rhode Island to a married woman's acting as executrix.

There is no express prohibition in our statute against a married woman's acting as executrix. Our statutes have not even gone so far as those of other States, many of which forbid a married woman's acting as executrix without a written consent from her husband.

N. Y. Stat. at L. pt. 2, tit. 2, art. 1, § 3, p. 71; Mass. Acts & Res. 1869, chap. 409, § 1; Ind. Rev. Stat. 1881, ¶ 2230; Ala. Rev. Code, 1867, tit. 4, chap. 3, § 1973 (1860), p. 430; Md. Rev. Code 1878, art. 50, ¶ 66, p. 444.

The implied assent of our statutes to the right of a married woman to act as executrix is very strong. Not only are not married women named in Pub. Stat. chap. 184, § 1, as excepted from its provisions, but also §§ 19 and 20 of the same chapter, in varying the common law with regard to the husband's right to administer in the right of his wife, carefully mark out the extent of this change and limit it to the case of an administratrix or executrix who marries after her appointment.

Compare R. I. Pub. Stat. chap. 184, § 1, with chap. 205, § 6.

Sections 19 and 20 of chap. 184 are not to be taken as indicating any policy of the law adverse to a married woman's acting as executrix. They are to be confined to their plain intention.

Stewart's App. 56 Me. 300; *Wiggin v. Sweett*, 6 Met. 194; *Barber v. Bush*, 7 Mass. 510.

The reasons for the statutes (§§ 19, 20, chap. 184) are perfectly evident. By the common law, the marriage of an executrix, after appointment, made the husband executor in her right as a partial compensation for his liability for her frauds and injuries in that capacity. Schoul. Dom. Rel. § 86.

So radical a change of circumstances as this may well be said not to have been within the contemplation of a testator in appointing an unmarried woman as his executrix, or of other executors in accepting an appointment jointly with her. Furthermore, the husband may prefer not to assume the liability of executor. None of these reasons exist, however, in case the woman is already married at the time of her appointment.

See *Stewart's App. supra*.

IV. The statutory provisions with reference to bonds of executors do not disqualify the appellant from acting as executrix.

V. Since the testator has requested that no sureties be required, and has chosen to rely solely on the individual responsibility of the executors, it is not of the slightest consequence whether a bond be given or not. The personal responsibility of the executors is not in the least altered by giving a bond, nor does a bond without sureties furnish any additional security to the estate or those having claims upon it.

Palmer v. Oakley, 2 Doug. (Mich.) 433.

If Mrs. Hammond is appointed executrix with her husband's consent, he and his estate are liable for her acts during the coverture; and if she survives him, she and her estate are also responsible for what she does after the termination of the coverture, if indeed they are not for her acts during coverture.

Adair v. Shaw, 1 Sch. & Lef. 243, 266; *Bellevue v. Scott*, 1 Str. 440.

If, however, the formal giving of a bond is to be insisted upon, or if at any time the court should require a bond with sureties, there is nothing in the statutes requiring that the bond should be executed by her. It is sufficient if she give an effectual bond, although that bond be another's.

Palmer v. Oakley, 2 Doug. (Mich.) 433; *Stewart's App.* 56 Me. 300; *Keene v. Deardon*, 8 East, 298.

Her husband or even a stranger may give the bond in her behalf.

Gyger's Estate, 65 Pa. 311; 1 Wms. Exrs. 369; *Re Sutherland*, L. J. 1862, 31 Pr. Div. & Adm. 126; *Re Moore*, 18 W. R. 472.

This is analogous to the provisions of the English statutes in regard to recognizances, in which it is held that the giving of the bond of another is a sufficient compliance with the requirement that the appellant should "be bound," and in which "with sureties" has been construed to mean "by sureties."

2 Tidd, Pr. 1252; *Keene v. Deardon*, 8 East, 298; *Dixon v. Dixon*, 2 Bos. & Pul. 443; *Goodtitle v. Bennington*, Barnes' Notes, 75; *Lushington v. Doe*, Id. 78; *Barnes v. Bulwer*, Carthew, 121.

If the legal fiction that the husband and wife are one, and that one the husband, is to be invoked against a married woman in this case, it should also be available in her behalf; and a bond executed by her husband, or at all events a joint and several bond in which he joins with her, and upon which he is liable, should be held to be a sufficient compliance with the requirement that she should give bond.

Stewart's App. 56 Me. 300.

If, however, it is held that the statutes require that an executrix shall herself execute an effectual bond on which she can be held, then, as the statute does not exclude married women

from acting as executors, the statute requiring a bond must be construed as enabling them to bind themselves by such bonds. When words are used in a statute that necessarily include a class, and require certain acts to be done, such requirement supersedes any exception or prohibition before existing, and gives the power to do the prescribed act.

Ibid.; *McCaill v. Parker*, 18 Met. 372.

If the husband joins with the wife in making the bond, and she acknowledges it in proper manner, her covenants and agreements will be binding upon herself and her legal representatives so far as concerns her real estate, chattels real, household furniture, plate, jewels, stock, shares in the capital stock of any incorporated company, money on deposit in any savings bank or institution for savings, with the interest thereon, or debts secured by mortgage on property, which are her property before marriage or became her property after marriage.

Pub. Stat. chap. 166, § 5.

It would also be binding upon her equitable estate.

See *Elliott v. Gower*, 12 R. I. 79.

Over the rest of her legal estate she has full power of disposition as if sole, except that she cannot do business as a trader.

Mr. William G. Roelker, for appellees.

PER CURIAM:

The question here presented arises as follows, to wit: Daniel W. Lyman, late of North Providence, died December 19, 1886, leaving a will dated July 14, 1885, and a codicil thereto, dated September 18, 1886. The will contained the following clauses making provision for its execution, to wit: "I appoint as executors of this my last will and testament, William H. Wood, William A. Hoppin, and Esther D. Chapin, requesting them to use their best judgment about the time for selling the property, and direct the entire property to be kept together for one year after my death, and the income from whatever source, after necessary expenses, taxes, and so forth, are deducted, to be divided equally between them, as and for their salary or fee for being my executors."

When the will was made, Esther D. Chapin was a single woman, but before the codicil was made she married William A. Hammond, of New York. The will and codicil were admitted to probate by the probate court of North Providence, January 19, 1887, and letters testamentary were ordered to issue to William H. Wood and William A. Hoppin, as joint executors, upon their giving their joint and several bond, without sureties to the court, in the sum of \$100,000, but were refused to Mrs. Hammond for the reason that she was a married woman and a citizen of the State of New York, and therefore incapable of discharging the trusts of executrix and giving bond as required by the statute. Mr. and Mrs. Hammond appealed from the decree, and the question which we are called upon to decide is whether she is entitled to qualify as executrix and have letters testamentary issued to her jointly with the other executors.

We do not think that residence in another State creates any insuperable objection to her appointment. The question therefore is whether she is disqualified by being a married woman.

At common law a married woman was not incapacitated from acting as executrix, if her husband assented to her acceptance of the trust. Dr. Hammond does assent, and asks for his wife's appointment. We have no statute which directly makes a married woman incapable of being appointed executrix. We have a statute, however, that if an executrix marries after her appointment as such, her powers shall cease, and her coexecutor or executors shall discharge the trust the same as if she was dead; or if she was a sole executrix, administration shall be granted to some other suitable person. R. I. Pub. Stat. chap. 184, §§ 19, 20.

It has been argued that this provision impliedly makes a married woman incapable of appointment; but in the State of Maine, where a similar statute exists, the supreme judicial court has decided that it cannot be so extended by implication. *Stewart's App.* 56 Me. 300.

We do not deem it necessary to come to a conclusion upon this point, since we feel constrained to decide the case adversely to the appellants upon another ground.

Our statutes provide that an executor shall be exempt from giving a bond, or from giving a bond with securities, whenever the testator shall have ordered or requested such exemption. R. I. Pub. Stat. chap. 184, § 14. In this case the testator requested that no sureties be required on any bond of his executors, thus leaving his executors at liberty to give simply their personal bond, but making it incumbent upon them, in order to satisfy the statute, to give such bond. The question is whether Mrs. Hammond can give such bond. Doubtless she can give such bond as a matter of form, but in effect such a bond would be utterly void, and therefore, in our opinion, it would not answer the requirement of the statute. The appellants contend that she can satisfy the statute by giving her husband's bond, or the bond of some other person, and cite cases from other courts to that effect; but in *Townsend v. Hazard*, 9 R. I. 254, this court, construing a provision of a statute which required that in cases of appeal the appellant should give bond, decided that the giving of the bond of a stranger to the suit would not satisfy the requirement.

The requirement to give bond with sureties is frequent in our statutes. Thus, the general treasurer of the State, the treasurers of the several towns, the clerks of the supreme court and court of common pleas, the sheriffs and their deputies, are required to give bond, with sureties, and they have in the practice given their own bonds with sureties, and it has been supposed were required to do so. Moreover, the form of an administrator's bond, given by the statute, is a form in which the administrator or executor obliges himself as principal. We think, therefore, that the bond of Dr. Hammond, or a stranger, will not answer.

The appellants contend that if the statute requires a married woman to give a bond in order to become an executrix, then, since it does not exclude her from acting as an executrix, it must be construed as enabling her to give bond. We do not think this argument is sound; for, though the statute does not expressly exclude her, neither does it expressly permit her to act as executrix, and therefore it seems to us that 1 R. I.

the sounder inference is that, if it requires a bond, married women, being incapable of giving it, are thereby excluded.

We do not think that Mrs. Hammond has authority jointly with her husband to give bond as executrix, by virtue of R. I. Pub. Stat. chap. 166, § 4; and it does not appear that she has any equitable estate which she can bind by her bond, even if in equity such a bond would bind her equitable estate. We think, however, the bond required by the statute is an instrument which must bind the obligor personally at common law.

The appellants argue that a bond without surety gives no security to the estate, or those having claims upon it, beyond what they would have without it, and that the purposes of the testator will be disappointed if Mrs. Hammond cannot receive the appointment, because he intended the year's income which he gives to her and the other persons named as executors "as and for their salary or fee for being my executors," partly by way of testamentary bounty as well as compensation. We shall regret it if the testator's purposes are disappointed in this respect, or if any benefit which he intended for Mrs. Hammond fails to come to her; but if, as the appellants assume, her receiving her share of the year's income depends upon her becoming executrix, and she cannot become such on account of her inability to give the bond required, we have no power to help her by dispensing with such bond.

We think the decree of the court below must be affirmed.

Arthur L. ALMY *et al.*, Exrs.,

v.

Marius S. DANIELS.

1. When a **tenant in common** has the entire and exclusive occupation of the whole or any part of the common estate, he is **liable to account** therefor.
2. When he has the income or profit of more than his share, he is liable to account for the **excess**.
3. **When he uses** the estate only to an extent **less than his share**, and not to the extent of an ouster or denial of right of his cotenant, he is not liable to account. Hence such use **cannot be offset against the excessive use** by his cotenant.
4. In an **action of account** the defendant pleaded the general issue and the Statute of Limitations. No replication was filed to the plea of the Statute of Limitations, but a general verdict was rendered for the plaintiff. *Held:*
 - (a) That the **plea of the Statute of Limitations not being replied to was a bar** as to matters of account prior to the six years next before action brought.
 - (b) That the **plaintiff was entitled to an account for the six years prior to and ending with the date of his action.**

(Providence—Decided July 30, 1887.)

ACTION of account.

After the decision in this case reported in 1 R. I. L. ed. 148 (2 New Eng. Rep. 615), the matter was referred to an auditor to state the account between the former tenants in common. While the matter was before the auditor, the plaintiff applied to the court for instructions to the auditor on questions of law raised before him.

The application was argued by counsel before Stiness and Wilbur, *JJ.*

Messrs. Herbert Almy and Joseph C. Ely, for plaintiff, on petition for instruction to the auditor:

I. Was that part of the common property which has been occupied by both parties as tenants in common subject to be taken into the account in this action before the auditor? The plaintiffs contend that it was not.

1. Because the question of the use of the sidewalks in the manner shown by the testimony was raised at the trial before the jury, and the court ruled the testimony inadmissible. The point was therefore *res judicata*.

Almy v. Daniels, 1 R. I. L. ed. 143 (2 New Eng. Rep. 615).

2. Because, to require such an accounting would destroy the fundamental idea of tenancies in common; *i. e.*, the right to use in common with the cotenant the entire common property. "Each tenant in common is seised *per my et per tout*, and has a right to occupy the whole if his cotenant does not interfere." 12 Me. 56.

3. Because the testimony does not show an exclusive use by the plaintiffs' testator of any part of the common property which would amount to an ouster.

When one of several tenants occupies simply as tenant in common, and not to the exclusion of the others, he is not liable to account. 37 N. J. Eq. 114.

An exclusive occupation of part of the land for a temporary purpose, such as piling boards and lumber, is not an ouster.

Freem. Coten. § 240. See also *Izard v. Boline*, 11 N. J. Eq. 406.

4. The verdict in this case finds "that said defendant has taken, received, had the use and benefit of more than his just share, part, or proportion of said premises declared on, and that the plaintiffs are entitled to an account."

If this testimony is allowed before the auditor, it might happen that we should have two findings in the same case directly opposed to each other.

II. The evidence does not show any exclusive use of either sidewalk.

As to the Statute of Limitations:

1. Must be pleaded in bar before the jury, and cannot afterwards be pleaded before auditors after verdict and judgment.

3 Wilson, 113, 114, 2d & 3d Rule; T. Raym. 57.

2. The account must be taken upon the record as it stands; *i. e.*, the declaration, verdict, and judgment. If the verdict is general, it follows that the jury must have found against the defendant upon his plea of the Statute of Limitations, as well as upon his several other pleas; otherwise we should be put to the trouble and expense of trying our case all over again.

Carroll v. Graham, 8 R. I. 242; *Burdick v.*

Burdick, 1 R. I. L. ed. 101 (1 New Eng. Rep. 861).

3. There must be a demand and refusal to account before the statute begins to run against a cotenant.

Barnum v. Landon, 25 Conn. 150; *Northcott v. Casper*, 6 Ired. Eq. 306; *Huff v. McDonald*, 22 Ga. 131, 164; *Jolly v. Bryan*, 86 N. C. 457, 460.

After going to trial on the merits, the court will not reverse the judgment because there is no plea or issue, and blanks are left for dates and sums in the declaration.

Sauerman v. Weckerly, 17 Serg. & R. 116.

After a trial upon the merits, a judgment will not be reversed because there was neither a declaration nor replication to the defendant's plea; and this principle is as applicable to a trial upon the plea of *nul tiel record* as upon one of fact.

Glenn v. Copeland, 2 Watts & S. 261.

A party who consents to go to trial without a plea or an issue waives exception to the want of either of them.

Ensley v. Wright, 3 Pa. 501.

After verdict it is too late to raise an objection that pleas remain unreplicated to, unless the defendant shows that he endeavored to obtain replications prior to the trial. The parties will be presumed to have gone to trial upon issues formed by general replications, traversing the special pleas.

Couch v. Barton, 1 Morris (Iowa), 354.

Counsel for defendant at the hearing expressly admitted that he knew at the time of trial before the jury that there was no replication filed, because he had made a note of the pleadings.

If pleas are interposed which conclude with verification, and the parties proceed to trial without perfecting the issues, the irregularity will be waived and judgment will not be arrested for that cause; but if the record does not show that the party complaining was present at the trial, or that he in some way consented to the irregularity, the rule is otherwise.

Taylor v. McLaughlin, 2 Col. 12.

When the general issue and several special pleas were pleaded, and the replications to the several pleas were so defective as not to put them in issue, the defendant, going to trial without objection, held to have waived the benefit of them.

Cherry v. Smith, 10 Heisk. 389.

A *similiter* is cured after verdict, but a verdict of a jury without an issue to try is a nullity, and affords no legal authority for a judgment thereon.

Trabue v. Higden, 4 Cold. 621.

In this case at bar there were pleas filed which required only a *similiter* to complete an issue, the want of which was cured by verdict.

In *Black v. Nichols*, 68 Me. 227, the court held: (1) that whatever would constitute a bar to the action must be pleaded in bar before the interlocutory judgment to account, and that no such matter can be pleaded before the auditor; (2) the Statute of Limitations was pleadable in bar.

It goes to the right of the plaintiffs to require the defendant to account, and can be pleaded only before the interlocutory judgment. That

1 R. I.

judgment determines the defendant's liability to account.

Mr. Benjamin N. Lapham, for defendant.

Per Curiam:

When this case was before the court upon petition for new trial the court held that the plaintiff's intestate had the right to use the entire strip in common with the defendant, and that the defendant's exclusive possession and ouster of his cotenant of any portion was, *ipso facto*, a use of a greater portion than his interest therein, which entitled the plaintiff to an account. That decision did not depend upon the use which it was claimed had been made of the balance of the land in connection with the plaintiff's estate, because the defendant's occupancy of the half covered by his building was such an ouster of the plaintiff as to interfere with his rights as a tenant in common, and thus to entitle him to an account.

The question now comes upon the right to charge the plaintiff with the use which he had made of the other half of the land. The land in question is 40 feet on Custom House Street, and 36 feet deep. A strip 20 feet wide on Custom House Street is covered by the defendant's building, and the remaining 20 feet is and has been used as a gangway. On the plaintiff's side is a sidewalk 4 feet wide, and on the defendant's side one which is 2½ feet wide. Each of these has been used from time to time by the tenants of the adjoining buildings for storing oil barrels. We are now asked to instruct the auditor whether he is to consider such use in making up the account. We think the following rules, derived from decided cases, will sufficiently answer the question.

1. When a tenant in common has the entire and exclusive occupation of the whole or any part of the common estate, he is liable to account therefor.

2. When he has the income or profit of more than his share, he is liable to account for the excess.

3. When he uses the estate only to an extent less than his share, and not to the extent of an ouster or denial of right of his cotenant, he is not liable to account; and therefore such use cannot be offset against the excessive use by his cotenant. A charge for such use would be a charge for the use of one's own property and for the exercise of his legal right. See *Almy v. Daniels*, 2 New Eng. Rep. 615; *Knowles v. Harris*, 5 R. I. 402; *Hayden v. Merrill*, 44 Vt. 336; *Edsall v. Merrill*, 87 N. J. Eq. 114; *Colburn v. Mason*, 25 Me. 434.

The question of exclusive occupation calls for a finding of fact, in regard to which it is not the province of the court to instruct the auditor.

As to the Statute of Limitations: The rule is that the statute begins to run from the time a tenant in common denies the right of his cotenant. This denial of right may be shown by a refusal to pay or account on demand, or by an ouster. Although a tenant in common is bailiff of his cotenant, yet if he denies the right of the cotenant and holds adversely to him, the confidential relation ceases, and the statute begins to run from that time. *Terrill v. Murry*, 4 Yerg. 104; *Northcott v. Casper*, 6 Ired. Eq. 1 R. I.

303; *Jolly v. Bryan*, 86 N. C. 457; *Huff v. Mc Donald*, 22 Ga. 181. See also *Crapo v. Cameron*, 61 Iowa, 447; *Tarleton v. Goldthwaite's Heirs*, 23 Ala. 346; *S. C.* 58 Am. Dec. 296; *Wagstaff v. Smith*, 2 Dev. Eq. 264.

As the ouster in this case consisted in the exclusive appropriation of a portion of the land to the defendant's building, the statute began to run, as to that portion, when such appropriation took place, and not from the time of demand for an account, as claimed by the plaintiff.

But the plaintiff contends that the benefit of the statute is not now open to the defendant. The statute must be pleaded before the interlocutory judgment to account. *Closson v. Means*, 40 Me. 337; *Black v. Nichols*, 68 Me. 227.

The defendant pleaded to the declaration with the general issue and special pleas that the cause of action did not accrue within six years. To this plea no replication was filed, but the case went to the jury upon all the pleas, and the jury returned a general verdict for the plaintiff without any findings on the special pleas. The plaintiff says that upon such a verdict all the issues must be taken as found in his favor, because otherwise the verdict could not have been found at all, and hence that the plea of the Statute of Limitations has been found against the defendant. It is an established rule that a verdict for the plaintiff on the general issue, which could not have been found if a special plea had been sustained, is, in effect, a verdict also for the plaintiff on the special plea. *Burdick v. Burdick*, 1 New Eng. Rep. 861; *Curroll v. Graham*, 8 R. I. 242.

In this case, therefore, the record shows that the plaintiff had a cause of action, which accrued within six years. This point is not now open to dispute. Although there was no replication, and so no issue on this point properly framed to submit to the jury, yet, as the case was submitted upon the pleadings as they stood, we must consider that the defendant waived the want of a replication to his plea of the Statute of Limitations, and that the jury, on that plea, found that the cause of action did accrue within six years. *Glenn v. Copeland*, 2 W. & S. 261; *Enslly v. Wright*, 3 Pa. 501; *Sauerman v. Weckerly*, 17 Serg. & R. 116; *Coutch v. Barton*, Morris (Iowa), 854.

The plea of the statute is a bar to the plaintiff's recovery unless it is avoided by his reply thereto, which may be disability, new promise, part payment, fraud, etc. But if there is no replication, what effect shall we give to a finding in favor of the plaintiff on the plea alone? The verdict imports simply a cause of action within six years—nothing more. If a part of the account is barred by a plea of the statute, how can we say the bar is avoided? Clearly not in either one of the ways mentioned above, because neither of them has been set up or passed upon. Nor is it avoided by the effect of the verdict, for the jury only say the plaintiff has a cause of action accruing within six years. To all back of that period the plea is a bar because it is not replied to, nor avoided, nor involved in the verdict. We therefore think the plaintiff is entitled to an account, under the rules we have laid down, for the period of six years prior to the date of his action, but not be-

yond that. We see no other conclusion that is consistent with the record as it stands upon this somewhat extraordinary state of pleadings and finding.

Maria L. GOURLAY

v.

George GOURLAY.

Declarations of a petitioner for divorce, as to domicile, unaccompanied by acts, are worthless as evidence.

(Providence—Decided July 16, 1887.)

PETITION for divorce.

This petition was heard at the October Term, 1886, and again heard at this term (April Term, 1887), on further evidence submitted by the petitioner as to her domicile.

Mr. Harmon S. Babcock, for petitioner.

Mr. Amasa M. Eaton, for respondent.

Per Curiam:

The court is not satisfied that the petitioner had her domicile in this State for a year before the filing of her petition.

The new evidence consists mainly of her declarations, most of them unaccompanied by any act of which they were explanatory. Such declarations are entitled to little or no weight as evidence. *Pickering v. Cambridge*, 4 New Eng. Rep. 47.

Daniel A. CHAPIN *et al.*

v.

Jeremiah BROWN.

1. **Owners of land in a country town platted it into sixty-six house lots with streets, and recorded the plat.** A purchased one of the lots by reference to the plat. At the time of purchase the street on which the purchased lot fronted was in fact closed by a gate, though the plat showed it unobstructed. A removed the gate, whereupon B, a purchaser of lots adjoining A's, erected a gate across the street on the line between his lots and A's. On a bill in equity brought by A to enjoin B from maintaining the gate,—*Held:*

(a) That A was entitled to the relief sought.

(b) That the fact of A's deed conveying to A no part of the street on which his lot fronted was immaterial.

2. **Other streets on the plat were obstructed by fences, but it did not appear that A had or would have occasion to use these streets.** *Held*, that as to these streets, A, notwithstanding his technical right to free passage over them, might properly be left to his remedy at law.

(Newport—Decided July 23, 1887.)

BILL in equity for an injunction. *Granted in part.*

The facts are stated in the opinion.

Messrs. Nicholas Van Slyck and Cyrus M. Van Slyck, for complainants.
Mr. William P. Sheffield, for respondent.

Durfee, Ch. J., delivered the opinion of the court:

This bill is brought against the defendant by Daniel A. Chapin as owner, and by John H. Jackson as lessee, of a lot of land in Tiverton, to have the defendant enjoined from maintaining fences across certain avenues, so called, over which they claim a right of way as appurtenant to said lot. The lot is parcel of a larger tract, formerly belonging to William C. Davol, Jr., Alexander D. Easton, and James T. Milne, who in August, 1871, caused the same, together with an adjoining tract belonging to them and one Joseph Osborne, who co-operated with them, to be platted, in the language of the bill, "into lots and avenues on one plat, described as 'a plan of house lots surveyed by Benjamin C. Borden for Davol, Easton, and Milne, and Joseph Osborne,' and on or about the 1st day of January caused said plat to be recorded" in the town clerk's office of said town of Tiverton. The bill alleges that thereafter Davol, Easton, and Milne sold parts of the first-mentioned tract, and described them in the deeds whereby they conveyed them as lots on said plat; and that Davol, Easton, Milne, and Osborne sold parts of the last-mentioned tract, and described them in the deeds whereby they conveyed them as lots on said plat, reference thereto being specifically made,—the complainant Chapin being a purchaser by mesne conveyances of one of the lots so sold, and the complainant Jackson lessee thereof under him. The lots are delineated on the plat as intersected by four avenues, three running east and west from a highway on the east to a highway on the west, and called North Avenue, Middle Avenue, and South Avenue, and one running north and south from said North Avenue to said South Avenue, about midway between said highways, and having no name. The bill avers that the purchasers of lots as aforesaid became entitled, under their deeds referring to said plat, to a right of way over all said avenues as appurtenant to their lots, and prays that the defendant may be enjoined to remove the fences from said avenues, and keep them removed.

The defendant sets up in his answer that he is the owner, by various conveyances, of the land lying next west of lot 31*; that when he purchased the same there was a wall across the east end of North Avenue, so called, with a gate therein, by which the land was protected from intrusion from the highway, and that this protection was an inducement to his purchase; that Chapin subsequently removed said wall and gate, and that thereupon he, the defendant, erected a fence with gate across North Avenue, so called, in the line of the boundary between his land and lot 31, for the protection of his land; that said North Avenue was never laid out or fenced out as a street or way, or laid open, or contemplated to be laid open, for the benefit of lot 31, and was never, in contempla-

*The same land as that spoken of in *Brightman v. Chapin*, 1 R. I. L. ed. 87 (1 New Eng. Rep. 807).

tion of any seller or buyer of any lot in the plat, as being in any way appurtenant to lot 31.

The plat adduced in evidence shows that the two tracts of land as platted contained sixty-six numbered lots. Quite a number of them came to the defendant by deeds referring to the plat, designating the lots by their number thereon, and mentioning the avenues by way of boundary or description; and constitute the land belonging to him lying west of lot 31. The complainant Chapin holds lot 31 under deeds referring to the plat, designating the lot by its number, and mentioning North Avenue by way of boundary or description. The complainants maintain that by reason of these sales and conveyances, so made, the complainant Chapin acquired lot 31 with a right of way appurtenant thereto over all the avenues delineated on the plat; and the defendant took the lots conveyed to him, and whatever interest, if any, he acquired in the said avenues, subject to said right and all the consequences thereof. The question is whether the complainants' position is tenable.

In *Breed v. Cunningham*, 2 Cal. 361, decided in 1852, the law is thus laid down: "Where lots are sold as fronting on or bounded by a certain space, designated in the conveyance as a street, the use of such space as a street passes as appurtenant to the grant, and vests in the grantee, in common with the public, a right of way over said street." And see *Smiles v. Hastings*, 24 Barb. 44; 22 N. Y. 217; *Cox v. James*, 45 N. Y. 557.

In *Dubuque v. Maloney*, 9 Iowa, 450, decided in 1859, the court held the following language, to wit: "If the owner of land lays out a town, and exhibits a plan thereof on which are represented various plats of space or vacant ground, such as streets, alleys, squares, quays, etc., and the lots are sold with reference to the plan, the purchasers of the lots acquire, as appurtenant to the same, every easement, privilege, and advantage which the plan represents as belonging to them. The sale and conveyance imply a grant or covenant to the purchasers that the streets and other public places indicated as such upon the plan shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use." Citing *Rowan v. Portland*, 8 B. Mon. 232; *Livingston v. Mayor of N. Y.* 8 Wend. 85, 106; *Wyman v. Mayor of N. Y.* 11 Wend. 486.

In *Bartlett v. Bangor*, 67 Me. 460, decided in 1878, the court says: "When the owner of land within or near to a growing village or city divides it into streets and building lots, and makes a plan of the land thus divided, and then sells one or more of the lots, he thereby annexes to each lot sold a right of way in the streets which neither he nor his successors in title can afterward interrupt or destroy; and we think reason and the weight of authority are in favor of holding that such a platting and selling of lots constitute an incipient dedication of the streets to the public, which the owner of the land cannot afterward revoke. The dedication is not complete till the streets are accepted by competent authority, or the public has used them for at least twenty years. But, so far as the owner of the land is concerned, such acts constitute a proposition to dedicate, which he cannot afterward withdraw." And see *Dill*, 1 R. I.

Mun. Corp. §§ 508-505; *Ang. Highways*, § 149; *Indianapolis v. Kingsbury*, 101 Ind. 200.

In *Taylor v. Hepper*, 2 Hun. 646, decided in 1874, the rule is stated thus: "When the proprietor of land surveys, maps, and lays out such land into lots, numbering them, with streets designated, named, and put down on the map,—as between him and a grantee of a lot bounded on one of the designated streets, his conveyance is *per se* a dedication of the street to the use of his grantee as a street. As between the grantor and grantee it is a street, which the latter has a right to use as such as soon as the conveyance is made to him. By force of the grant, an easement is attached to the land granted, which thereby becomes an appurtenant, viz., a right of way on and over the street designated as a street, for the use of the lot conveyed." And see *De Witt v. Ithaca*, 15 Hun, 568; *Potter v. Iselin*, 31 Hun, 134; *Cox v. James*, 45 N. Y. 557; *Re Elerenth Avenue*, 81 N. Y. 436.

The ratio decidendi of these cases is this: that when the grantee of a lot so platted purchases it, the existence of the streets as platted, inasmuch as they add value to the lot by the conveniences or advantages which they promise, is an inducement to the purchaser, and so enters into the consideration as between the grantor and grantee, and operates by way of implied covenant, implied grant, estoppel, or dedication,—whichever way of operation may be the truer,—to secure to the grantee a right of way over such platted streets, and, reciprocally, to subject any interest which the grantee may acquire therein to a right of way for the benefit of the other platted lots. And see *Providence S. E. Co. v. Providence & S. S. Co.* 12 R. I. 348; *Grogan v. Hayward*, 6 Sawy. 498.

In some of the cases above cited the doctrine is not laid down as applicable to other than plats of urban or village lots. But we can see no reason why it should not equally apply, at least as between the lotowners, to a plat of lots numbering sixty-six, delineated with intersecting streets; for that number of lots, if occupied with houses, would be a village.

The defendant directs our attention to the description of lot 31, as conveyed in the deed to Chapin, and contends that the conveyance does not extend to the centre of North Avenue, on which lot 31 abuts, but covers only the land indicated as lying within the lines of lot 31 as platted. We do not think it makes any difference to the question at issue here whether Chapin is owner of any portion of the fee of North Avenue or not, for whether the fee of the Avenue in front of his lot to the centre be in him or in the original owners of the land as platted, or in any intermediate grantee, whoever has it, according to the doctrine above laid down, holds it by force of the conveyances referring to the plat, subject to a right of way for the benefit of the lotowners.

The defendant contends that, inasmuch as the east end of North Avenue was closed by a wall and gate when he purchased, he is entitled either to have the wall and gate replaced or to maintain his fence and gate across the avenue for the protection of his land. He adduces no authority for his position. Certainly, if every lot along North Avenue had been bought by a different person, it could not be maintained that every purchaser, if he chose, would have

the right to obstruct the avenue by a fence and gate for the protection of his lot. The language of the cases generally imports that the right which a purchaser of a lot on a plat of lots acquires to pass and repossess over the platted streets or ways is as full and unrestricted as if such streets or ways were public highways. North Avenue is represented on the plat as open at the east end; and the plat does not indicate any obstruction anywhere in it which would lead a purchaser to suppose that it was intended to be incumbered by gates and fences, from the highway on the east to the highway on the west.

Our conclusion is that the complainants are entitled to have the fence and gate removed from North Avenue, on which lot 31 abuts, and kept removed, and we will decree accordingly.

The complainants also ask for a decree for the removal of fences across other avenues. It does not appear that either of the complainants has occasion, or is ever likely to have occasion, to use the other avenues, and therefore, though they may have a technical right to pass and repossess freely over them, it would seem that a removal of the fences therefrom would be no real benefit to them, while it would oblige the defendant to incur a great deal of additional trouble and expense to protect his property. In these circumstances we think we may properly leave the complainants, as to these fences, to their remedy at law, without ordering the removal.

John E. GOLDSWORTHY, Assignee,

v.

ROGER WILLIAMS NATIONAL BANK.

1. Unless a creditor knows facts which sustain a reasonable belief that his debtor is insolvent, securities given by the debtor to the creditor cannot be invalidated in the creditor's hands as fraudulent preferences. It is not enough that the creditor has cause to suspect that his debtor is insolvent.
2. Under R. I. Pub. Stat. chap. 237, § 15, amended R. I. Pub. Laws, chap. 274, of March 22, 1882, knowledge of insolvency which avoids a preference is knowledge which the creditor has when he receives the preference from his debtor, not knowledge subsequently acquired.
3. Hence, when a creditor received a mortgage December 4, which he recorded December 15,—*Held*, that the creditor's knowledge was to be judged as of December 4, not as of the date of record.
4. R. I. Pub. Stat. chap. 237, § 21, merely gives creditors reasonable time in which to begin proceedings to test preferences given by a debtor.

(Providence—Decided July 23, 1887.)

TROVER and conversion. Heard by the court, jury trial being waived. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. Arnold Green, for plaintiff.
Messrs. Simon S. Lapham and John T. Blodgett, for defendant.

Matteson, J., delivered the opinion of the court:

This is an action of trover for the conversion of a stock of musical instruments and other goods and chattels. The plea was the general issue, with an agreement that any matter in defense might be proved which could be introduced under any special plea in bar. The case was heard by the court, jury trial having been waived.

The plaintiff claimed title to the property under an assignment to him for the benefit of creditors, dated December 17, 1886, made by Christian C. Heintzeman and Alfred E. Tenney, under R. I. Pub. Stat. chap. 237, § 12, for the purpose of dissolving attachments by creditors. The defendant claims title to the property under a mortgage to it given by Heintzeman and Tenney, copartners as C. C. Heintzeman & Co., dated December 4, 1886, and recorded December 15, 1886. The plaintiff contended that the mortgage was made by the mortgagors when insolvent, or in contemplation of insolvency, with the intent to give a preference to the bank; and that the latter had reasonable cause to believe that they were insolvent at the time of such preference, and hence, that the mortgage was void under R. I. Pub. Stat. chap. 237, § 15, which provides that "conveyances and payments made, and securities given by an insolvent debtor or by a debtor in contemplation of insolvency, within sixty days of the commencement of the proceedings against such debtor, under the provisions of §§ 12 and 13 of this chapter, shall be void as to all creditors receiving the same who shall have reasonable cause to believe that such debtor was insolvent at the time of such preference," etc.

The bank did not deny that Heintzeman & Co. were, in fact, insolvent when the mortgage was given, but did deny that it had reasonable cause to believe them insolvent.

The circumstances which led to the giving of the mortgage, as they appeared in testimony, were as follows: Heintzeman & Co. were dealers in musical instruments. In the course of their business they sold pianos and organs under contracts which purported to be leases of the instruments at a specified rent, and which provided that when an amount had been paid equivalent to the price and interest, the lessors should execute and deliver to the lessee a bill of sale of the instrument, but that until such payments the instruments should remain the property of the lessors, and that in case of default in payment, according to the terms of the contract, the lessors might retake the instrument. They took from the purchasers notes for the price, usually upon four months' time, but which were renewed from time to time as they fell due, the renewal notes being generally from \$10 to \$15 smaller in amount, being reduced by payments of installments of the price or rent. In some instances the loans extended over a period of two years before they were fully paid. Some time in 1883 Heintzeman & Co., having previously opened an account and begun to deposit moneys with the

defendant, applied to it to discount for them such notes as they might take from their customers for musical instruments sold under the contracts above described. The bank consented, and, thenceforward, from time to time, down to the making of the assignment, discounted such notes upon the indorsements of the firm, and of Tenney individually, and with the understanding that all such notes were secured by contracts of the character above described, and that such contracts were held by the firm for its, the defendant's, benefit. In the fall of 1885 the aggregate amount of such notes outstanding, which had been so discounted, was \$15,000. The bank then called upon Heintzeman & Co. to reduce the amount by the payment of \$100 a week. Under this requirement Heintzeman & Co. continued to pay to the bank \$100 a week until December, 1886, when the amount of such outstanding discounts had been reduced to between \$10,000 and \$11,000. They then asked to be relieved for a time from this weekly payment. They represented to the bank that they had a large stock of goods on hand, on which they owed but comparatively little, but that by reason of having sold their goods in the manner stated, on long credits, and their inability to collect payment therefor except in small installments, they needed more money. They also represented it as annoying and inconvenient to them to be obliged to attend to the renewal from week to week of so many small notes, and they therefore asked to be permitted to substitute their own note or notes, indorsed by Tenney individually, on four months' time, in place of the small trade notes outstanding. To this the bank demurred, being unwilling to surrender the small notes, which it deemed secured, as above described, and to take in place thereof simply the note or notes proposed, the liability of the makers and indorser of which it already had on the small notes. As the bank would not consent to this proposition, Heintzeman & Co. finally offered to give the bank their note, on four months' time, for \$6,000, indorsed by Tenney individually, and secured by the mortgage in question, on condition that they should be relieved from the weekly payment of \$100, and should have surrendered to them an equal amount of the small trade notes. The bank assented to this proposal, and accordingly the note and mortgage in question were made and delivered to the bank, and the bank surrendered to the firm small trade notes to the amount of \$6,000.

The burden of proving that the bank had reasonable cause to believe that the mortgagors were insolvent when it took the mortgage was upon the plaintiff. "Reasonable cause to believe a trader insolvent," as the phrase is used in bankrupt and insolvent laws, means knowledge of such a state of facts in respect to the affairs and pecuniary condition of the debtor as would lead prudent business men to the conclusion that the debtor cannot meet his obligations as they mature in the ordinary course of business. *Toof v. Martin*, 80 U. S. 13 Wall. 40 (20 L. ed. 481); *Buchanan v. Smith*, 83 U. S. 16 Wall. 277 (21 L. ed. 280); *Wager v. Hall*, 83 U. S. 16 Wall. 584 (21 L. ed. 504); *Burfee v. Janesville First Nat. Bank*, 9 Nat. Bankr. Reg. 314, 317.

It is not enough to invalidate, as a fraudulent
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preference, a security taken for a debt, that the creditor has some cause to suspect the insolvency of the debtor. He must have a knowledge of such facts as to induce a reasonable belief that such is the debtor's condition. *Grant v. Monmouth First Nat. Bank*, 97 U. S. 80, 81 (24 L. ed. 971), affirmed in *Barbour v. Priest*, 103 U. S. 293, 297 (28 L. ed. 478), and reaffirmed in *Stucky v. Masonic Sav. Bank*, 108 U. S. 74, 75 (27 L. ed. 640).

In view of these principles we do not think that the evidence is sufficient to sustain the plaintiff's claim that the defendant, when it took the mortgage in question, had reasonable cause to believe the mortgagors to be insolvent. The facts chiefly relied on by the plaintiff were the sales of the notes of the firm by brokers on the street, the exchanging of its checks with other firms, and overdrafts of its bank account. It was not shown, however, that these practices had become habitual with the firm in the conduct of its business, to the knowledge of the officers of the bank. With respect to the first, it was shown that only in a single instance, which occurred six months or more before the giving of the mortgage, the president of the bank had knowledge that a broker had offered a note of the firm for sale upon the street. He testified, and there was no testimony to the contrary: "I only knew that on one occasion I heard of one of their notes being in the hands of a broker who was offering it upon the street for sale. It surprised me very much, and I told Mr. Heintzeman it ought not to be. I saw Mr. Tenney and told him of it. He was surprised, and said it should be stopped. I saw Tenney afterwards, and he said it had been stopped." With respect to the exchanging of the checks of the firm with other firms, it was not shown that the officers of the bank had knowledge of more than one such instance, and that also occurred six months or more prior to the giving of the mortgage. With respect to overdrafts of its bank account, the evidence shows that such overdrafts occasionally occurred during the last year of the business of the firm; but in such cases the checks were not paid by the bank, and they were subsequently taken care of by the drawers. It was not shown that the firm had, to the knowledge of the officers of the bank, or in fact, failed to meet any of its obligations at maturity in the ordinary course of business. We think that the most that can be claimed for the evidence is that it was sufficient to charge the bank with knowledge that the firm was embarrassed in carrying on its business by the want of ready money, and that, though this was a circumstance which, standing by itself, might tend to create a suspicion of insolvency, yet it was not sufficient to necessarily induce belief that the firm would not be able to continue its business and to meet its obligations as they matured, when taken in connection with the knowledge which the testimony shows the officers of the bank had, or supposed they had, concerning the assets and liabilities of the firm.

The officers of the bank, cognizant of its transactions with the mortgagors, all testified that they knew of no particular indebtedness of the mortgagors, outside of their indebtedness to them as indorsers of the small trade notes, and that they believed them to be solvent, and

amply able to pay all they owed. They admitted that they knew that the firm was straitened for ready money by reason of having sold its goods on long credits, and its inability to collect payment for the goods sold except in small installments, for the firm had so represented to them as a reason for being relieved from the weekly payment of \$100; but coupled with this representation, as they testified,—and this is not denied,—was the assurance that the firm had assets largely in excess of its liabilities, and that it only needed a little accommodation to enable it to go along with its business, which assurance was strengthened by the fact that the mortgagors had previously, on two different occasions, the latter within six months prior to the mortgage, submitted to the officers of the bank written statements of their financial condition, showing assets in excess of liabilities to the amount of from \$12,000 to \$15,000. Even Heintzeman and Tenney, themselves, testified that they believed that at the date of the mortgage their assets largely exceeded their liabilities, and the former also testified that his first knowledge to the contrary was the result of the inventory taken by him under the direction of the assignee.

The plaintiff contended that the reasonable cause to believe a debtor insolvent which avoids a conveyance, payment, or security given as a preference, under R. I. Pub. Stat. chap. 237, § 15, quoted above, is the reasonable cause to believe the debtor insolvent, which the creditor has at the time when the preference becomes effectual against other creditors of the debtor; and hence, as the mortgage in the present case was not recorded until December 15, 1886, and therefore did not take effect as against other creditors of the mortgagors until that date, it is void under said section if the bank then had reasonable cause to believe the mortgagors insolvent. We do not assent to this view. The statute makes the reasonable cause for belief in the insolvency of the debtor which avoids a preference, the belief of the creditor at the time of receiving the preference. The preference is the act of the debtor. The preference is received by the creditor when the conveyance creating it is made and delivered; for then it is that the conveyance becomes operative as against the debtor, and he parts with his interest in and control over the property conveyed. The subsequent act of recording the conveyance is the act of the creditor, not of the debtor. We think, therefore, that the reasonable cause to believe the debtor insolvent which avoids the preference, is such reasonable cause at the time the conveyance creating it is delivered, and not such reasonable cause when the conveyance is recorded. *Re Wynne*, 4 Nat. Bankr. Reg. 23, 28, 29; *Seaver v. Spink*, 8 Nat. Bankr. Reg. 218, 219; also in 65 Ill. 441; *Folsom v. Clemence*, 111 Mass. 273, 275, 277.

We think that the purpose of R. I. Pub. Stat. chap. 237, § 21, which enacts "that the sixty days mentioned in § 15 of this chapter, within which mortgages and other conveyances shall be liable to be set aside and be made subject to the provisions of this chapter, shall begin to run from and after the leaving of such mortgage or other conveyance for record at the office of the proper registering office, provided that such mortgage or conveyance is one re-

quired by law to be recorded," is merely to afford creditors a reasonable time within which to institute proceedings to test the validity of a mortgage or other conveyance alleged to be a preference, after such mortgage or conveyance has come to the knowledge of creditors by being left for record.

Judgment for defendant for costs.

John G. CLARKE, Admr. of Jonathan N. Hazard, *et al.*

Attmore ROBINSON *et al.*

1. **A mortgaged corporate stock to B and C.**—*Held*, that the effect of foreclosure was to vest the stock in B and C, at least in equity, as tenants in common, in proportion to their respective claims.
2. C subsequently transferred his claim and his interest in the stock to B, and afterwards B sued A for the whole amount of the original mortgage debt from A to B, and obtained judgment. *Held*, that the judgment opened the mortgage to redemption, as to the original debt from A to B.
3. Whether the mortgage, after the judgment, was wholly redeemable as to the original debt from A to B and C, or only as to the original debt from A to B, is not decided.
4. The judgment taken by B against A included claims other than those covered by the mortgage. After judgment entered, B filed what purported to be a remittitur of so much of the judgment as was covered by the mortgage. *Held*, that the remittitur was inoperative. A remittitur avails between verdict and judgment, not after judgment.

(Washington—Decided July 23, 1887.)

BILL in equity to redeem a mortgage, and for an account.

After the opinion reported in 1 R. I. L. ed. 122 (1 New Eng. Rep. 882), (which see for the facts), a trustee was appointed to represent the legal title conveyed to Elisha R. Potter, and the bill of complaint was amended. The respondents answered the amended bill, and the cause was heard on bill, answer, and proofs.

Messrs. Edwin Metcalf, Joseph C. Ely, and Amasa M. Eaton, for complainants.
Mr. Arnold Green, for respondents.

Per Curiam:

We think the defendant, by suing for the full amount of the debt secured to him by the mortgage, and taking judgment therefor, must be held to have disclaimed the foreclosure, if the mortgage was ever foreclosed, and to have opened the mortgage to redemption. He claims that his only purpose was to prove that the debt had never been paid by the mortgagor, as alleged in an earlier suit in equity, and that he ought not to be held to have opened the foreclosure, since he did not intend to do so. But

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he might have proved the nonpayment in the suit in which it was alleged, as properly as in the action at law. It appears that the debt had been reduced to judgment, and the defendant in his declaration in the action at law alleged that it remained wholly unsatisfied; an allegation inconsistent with the claim that the mortgage has been foreclosed, since the debt must have been satisfied, in part at least, by foreclosure. The defendant prosecuted the action to final judgment after the commencement of the present suit in equity, in which the complainant had made the claim that the foreclosure was opened by the action; so that he cannot say that, in taking the judgment for the full amount of the debt, he acted inadvertently. It is true that after the judgment he filed a paper purporting to be a *remittitur* of so much of the judgment as was made up by the debt; but this was after the court had decided that, presumptively at least, the foreclosure must be held to have been disclaimed and opened by the action at law, and, as the cases and authorities cited by the complainant show, the paper is inoperative as a *remittitur*, since a *remittitur* avails only after verdict and before judgment to remedy an excess, but after judgment it is of no effect. The result is that the debt, by force of the judgment, subsists as a valid claim for its full amount, and if the debt so subsists, the mortgage, which was given only as security for it, must also still subsist and be redeemable.

In the brief report of the ancient case of *Dashwood v. Blytheay*, 1 Eq. Cas. Abr. 317, case 3, the decision is given thus: "If a mortgagee has a decree of foreclosure, though that decree be signed and enrolled, yet if he after brings an action of debt on the bond given at the same time for the payment of the money and performance of the covenants in the mortgage deed, such action opens again the foreclosure and lets in the equity of redemption of the mortgagor." It was long questioned whether an action for the deficiency, when the mortgage was insufficient to satisfy the debt, did not also open the foreclosure, it being assumed beyond question that an action prosecuted to final judgment for the full amount would have that effect. Here the defendant took the judgment, reviving the judgment in full deliberately, after being put on his guard; and we think that, whatever intention or want of intention he may have in his own mind, he must abide the legitimate effect of such revival.

The mortgage was originally given to secure not only the debt due to the defendant, but also a debt due to one William A. Robinson. If the mortgage was ever foreclosed, the effect of the foreclosure was, in our opinion, to vest the mortgaged property in the defendant and said William, at least in equity, as tenants in common, proportionately to their respective claims. The bill alleges that after the time of the alleged foreclosure said William transferred his claim and his interest in the property to the defendant. Whether, if this be so, the mortgage is wholly open to redemption, or only proportionately to the debt thereby secured to the defendant, is an interesting question which has not been discussed at the bar nor considered by the court. *At present, we only decide that the mortgage, as originally security for the debt due the defendant, is open to redemption.*

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Harland G. BACON

v.

Amanda G. HARRIS *et al.*

1. **Bills and notes drawn, indorsed, or accepted for accommodation** are subject to the general rule that one taking overdue negotiable notes takes them **subject to all equities.**
2. A **demand note** is overdue for purposes of negotiation unless negotiated within a reasonable time. What this **reasonable time** is is a mixed question of law and fact, which, unless the facts are simple and undisputed, should be determined by a jury, under proper instructions from the court.
3. A **note made by a copartnership, payable on demand, to one of the copartners, was indorsed by A for the accommodation of the copartnership.** Twenty-one months afterwards it was negotiated by the payee. The note showed indorsements of interest paid up to a date later than the negotiation, but A denied knowledge of such interest payments. *Held:*
 - (a) That A, being accommodation indorser for the copartnership would, if compelled to pay the note, be entitled to reimbursement from the copartnership. Hence the payee, a copartner, could not maintain an action against her.
 - (b) That A was not liable to the holder unless the note was negotiated within a reasonable time.
 - (c) That the question of reasonable time was, in the circumstances, a question for the jury.

(Providence—Decided July 30, 1887.)

EXCEPTIONS by defendant Amanda G. Harris to the Court of Common Pleas. *Sustained.*

The facts are stated in the opinion.

Messrs. Walter B. Vincent and George B. Barrows, for defendant Amanda G. Harris.

Mr. Oscar Lapham, for plaintiff.

Durfee, Ch. J., delivered the opinion of the court:

This is assumpsit on a promissory note for \$2,800, dated at Providence, May 1, 1883, payable on demand to the order of A. S. Southwick, value received, with interest, and indorsed by Southwick. It was signed, originally, on its face by Harris, Van Nortwick, & Co., and on its back by Amanda G. Harris. At the time it was given, the firm of Harris, Van Nortwick, & Co. consisted of Joseph Harris, George W. Van Nortwick, and Andrew S. Southwick, the payee, and the action is brought by the plaintiff, as indorsee or holder, against them and Mrs. Harris, as makers. The defendants pleaded the general issue, but defense is made only by Mrs. Harris.

At the trial in the court of common pleas it appeared in evidence that the note was given for \$2,800 advanced in cash to the firm of

Harris, Van Nortwick, & Co., for the use of the firm exclusively, and that Mrs. Harris, who was the mother of Joseph Harris, one of the partners, put her name upon the back, at his request, for accommodation; that Southwick continued to hold the note until February 11, 1885, making, meanwhile, indorsements thereon as follows, to wit: "Interest received in full to May 1, 1884;" "Interest received to May 1, 1885;" and that on February 11, 1885, he indorsed the note and delivered it to one Wesley S. Block. Southwick testified that he received the interest the first year but not the second year, the interest for the second year being simply credited to him on the books of the firm; that he did not notify Mrs. Harris of the indorsements, but supposed she knew of them, the books being open to her. Mrs. Harris testified that she knew nothing of the indorsements. There was also testimony going to show that February 11, 1885, the firm, then consisting of Harris and Southwick, Van Nortwick having retired, was insolvent, or on the verge of insolvency, and that on February 24, 1885, the copartners made a general assignment for the benefit of their creditors. Southwick testified that he indorsed the note because he had been told that it was not collectible in his hands, and because he had heard that Mrs. Harris intended to contest her liability to the utmost; also that he sold the note to Block for \$500, considering that better than nothing; that he received the money, or a check for the money, expecting to retain it, but Block wanted it again as he was going west, and he gave it back, telling Block he could pay him on his return, but that Block had not repaid it. Block testified to the same effect, but added that it is now understood that he is to pay for the note when it is collected, and that if the note is collected he is also to pay a debt due from Harris & Southwick to his firm, less what is received by his firm under the assignment. He said that when he bought the note he knew that Southwick & Harris were embarrassed; also that Mrs. Harris disputed her liability, and also that it was necessary for Southwick to get the note out of his hands to collect it. The plaintiff testified that he bought the note of Block for \$2,100, but with a verbal understanding with Block, at the time, that if he could not collect the note he was not to lose anything by his purchase. Mrs. Harris testified that she put her name on the note, supposing that it was to be but for a short time, at the request of her son Joseph, who asked her to put it there for a short time.

The court instructed the jury that, unless they were satisfied upon the testimony that the transfers of the note to Block and Bacon were a mere device or scheme to enable Southwick to collect it notwithstanding the obstacles to his suing in his own name, the plaintiff was entitled to recover, there being no equities attaching to the note which would preclude his so doing. The jury returned a verdict for the plaintiff. The defendant petitions for a new trial for the reason, among others, that the instruction aforesaid was erroneous.

We think the court below erred in supposing there were no equities attaching to the note. We think there were such equities. Mrs. Harris signed the note for the accom-

modation of the firm of Harris, Van Nortwick, & Co. She was a mere voluntary surety as to them, and, if she were obliged to pay the note, she would be entitled to look to them for reimbursement. Clearly, therefore, Southwick, the payee, being himself a member of the firm, could not maintain an action against her, since she would be a voluntary surety for him as a member of the firm, as well as for the firm itself.

The general rule is that he who takes a note after it is due, takes it subject to all equities to which it was liable in the hands of him from whom he takes it. Two questions arise here, therefore, namely: (1) Is the general rule applicable to a note like the one in suit? and, if so, (2) was the note overdue when it passed from Southwick to Block? As to the first question, Daniel, in his book on Negotiable Instruments, vol. 1, § 726, says that in England it is held that the rule does not apply to bills and notes drawn, indorsed, or accepted for accommodation, it being considered that parties to accommodation paper hold themselves out to the public to be bound to every person who shall take the same for value, the same as if it were paid to themselves,—though Mr. Daniel also says the earlier authorities were otherwise. But see *Parr v. Jewell*, 16 C. B. 684. The English rule has not been followed in this country. In *Chester v. Dorr*, 41 N. Y. 279, the court decided that an accommodation indorser, without consideration, of a promissory note, is not liable to a transferee of the note after maturity, although such transferee paid a full consideration; for the reason that it cannot be supposed that such an indorser intends to give the note currency by the loan of his credit for a period longer than it is to run according to its terms. In *Boever v. Hastings*, 36 Pa. 285, it was held to be a good defense to an action by an indorsee against the maker of a promissory note, that it was made for the accommodation of the payee, without consideration, and negotiated by him when overdue. The New York case and the Pennsylvania case were both carefully considered on both reason and authority, and are entitled to the more weight because New York and Pennsylvania are the leading commercial States in this country. See also *Hoffman v. Foster*, 43 Pa. 137. In *Kellogg v. Barton*, 13 Allen, 527, the Supreme Judicial Court of Massachusetts decided in the same way, though apparently without special consideration or inquiry; and, to same effect, see *Cummings v. Little*, 45 Me. 183, and *Battle v. Weems*, 44 Ala. 105. We know of no American case which directly applies the English rule, though there are American cases which refer to it as the rule. Of course it is highly important that the rule in this country should be uniform, and we therefore think that the rule laid down in the great commercial States of New York and Pennsylvania, the same being, in our opinion, just and reasonable, should be, as it probably will be, adopted in the other States.

Perhaps it may be objected that Mrs. Harris was not an accommodation maker for the payee, within the ordinary meaning of the term. She was an accommodation maker for the payee only because she was such for his firm; but she was not, in our opinion, any the less an accommodation maker for him on that account. The only way in which he could make the note

available against her was by negotiating it; and therefore, if it was his intention to negotiate it, it was incumbent on him to do so while it was current, or before maturity.

We come to the second question: whether the note was overdue when it passed from Southwick to Block. The rule in this country is that a note payable on demand is overdue for the purposes of negotiation unless it is negotiated within a reasonable time; and what constitutes such reasonableness of time cannot be determined by any fixed and exact rules, but must depend upon the circumstances of each case. 1 Pars. N. & B. 375-379; *Herrick v. Wolberton*, 41 N. Y. 581; *Carll v. Brown*, 2 Mich. 401.

It has been said that where the note is given for a loan of money, or is payable with interest, it may be presumed that an immediate demand was not within the contemplation of either party, and that, even after the lapse of months, in some cases, the note may be considered as still not overdue. 1 Dan. Neg. Inst. §§ 607, 608. Whether what is reasonable time is a question of law for the court or a question of fact for the jury, is a matter which has been a good deal controverted; but, undoubtedly, the better view is that it is a mixed question of law and fact, and that, except where the facts are few, simple, and undisputed, in which case the court shall decide it, it should be left to be decided by the jury, under the direction of the court, upon the particular circumstances of the case. 1 Dan. Neg. Inst. § 612; 1 Pars. N. & B. 269; *Wyman v. Adams*, 12 Cush. 210, 214.

We think the question of reasonable time in the case at bar is a question for the jury, under instructions from the court.

The point is made that the note here cannot be treated as overdue when it passed from Southwick to Block, because the interest thereon had at that time been paid in advance up to a later period. In reply to this we deem it sufficient to say that, if the payment of interest had this effect, it is because it changed the character of the instrument, converting it from a note payable on demand into a note not payable on demand during the period for which the interest was paid; and that, to hold Mrs. Harris after such a change, it would be necessary to show that she knew of, or assented to, or in some way ratified, the change or the payment which effected it; and this Mrs. Harris, as we understand her testimony, denies. And see *Hosea v. Rowley*, 57 Mo. 357.

Exceptions sustained.

Re LIQUORS OF John E. MCSOLEY.

A statute provided for the seizure of liquors and their condemnation by a district court. A jury trial could be had only on appeal, and an appeal was possible only upon condition that it be taken immediately on judgment of forfeiture, and be accompanied by a recognizance, with sureties in the sum of \$200, to prosecute the appeal, and during its pendency not to violate any of the provisions of the Act. If no appeal was taken, the district court was forthwith to order the liquors destroyed.

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R. I. Pub. Laws, chap. 596, May 27, 1886, §§ 19-26; chap. 634, May 4, 1887. *Held:*

(a) That the statute was not unconstitutional because no time was given to procure sureties and perfect the recognizance.

(b) That the amount of the recognizance was a matter of legislative discretion, at least, unless it is clearly exorbitant.

(c) That the condition of the recognizance not to violate any provision of the Act pending the appeal was in violation of the constitutional guaranty of a trial by jury, but that this condition was separable from the rest of the recognizance, and could be regarded as a nullity.

Saco v. Wentworth, 87 Me. 165; *Greene v. Briggs*, 1 Curtis, 811, distinguished.

(Providence—Decided August 2, 1887.)

CONSTITUTIONAL questions certified to the Supreme Court under R. I. Pub. Stat. chap. 220, §§ 1-9.

The case is stated in the opinion.

Mr. Ziba O. Slocum, Atty-Gen., for the State.

Mr. George J. West, for claimant:

1. The claimant contends that this proceeding is criminal in its nature.

Fisher v. McGirr, 1 Gray, 1-40; *Greene v. Briggs*, 1 Curtis, 811, 327-329; *Commonwealth v. Liquors*, 115 Mass. 142; 1 Bish. Cr. L. §§ 884, 885, and notes; *Commonwealth v. Newell*, 5 Gray, 76; *Commonwealth v. Liquors*, 122 Mass. 8.

2. That the Act of the Assembly which compels the defendant to appeal, and to give a recognizance in order to obtain a jury trial, impairs his rights and is inconsistent with the constitutional guaranty.

Saco v. Wentworth, 87 Me. 165; *Saco v. Woodsum*, 39 Me. 258; *Sullivan v. Adams*, 3 Gray, 476; *Wynehamer v. People*, 13 N. Y. 378.

3. Even if the Legislature has the power to compel the giving of a recognizance, the one required by said section is an obstruction and a clog to the right of jury trial.

State v. Gurney, 37 Me. 156.

Per Curiam:

This is a constitutional question, certified to us for decision from the District Court of the Sixth Judicial District. It is raised on a complaint made against certain intoxicating liquors for the purpose of procuring their condemnation, forfeiture, and destruction as liquors kept for illegal sale. The complaint is brought under R. I. Pub. Laws, chap. 596, of May 27, 1886, §§ 19-26, and chap. 634, of May 4, 1887, in amendment thereof. The first seven of these sections provide for complaint, seizure, and trial, and, upon proof that the liquors are kept for illegal sale, for judgment of condemnation and forfeiture. Section 26 provides that "upon entry of judgment of forfeiture against such liquors and the vessels containing the same, unless an appeal be then taken and recognizance given as prescribed in case of an appeal from a sentence of a district court for an offense under the provisions of this Act, the court shall forthwith issue a warrant commanding the of-

ficer entrusted with the service of the same forthwith to destroy said liquors, and also to destroy the vessels containing the same, or to sell said vessels at public or private sale as the court may direct." The recognizance required to be given is a recognizance in the sum of \$300, with good and sufficient surety, with condition that the appellant "will file his reasons of appeal in the court appealed to at least five days before the sitting of said court; that he will appear before said court and there prosecute his appeal with effect, and abide or perform the order or sentence of said court in said case, and that he will not, during the pendency of such appeal, violate any of the provisions of this Act."

The claimant of the liquors contends that these sections are unconstitutional, because under them he has no proper opportunity to obtain the jury trial which he is entitled to by the Constitution, art. 1, §§ 10, 14, 15. Jury trial is obtainable only by appeal; and the claimant complains that the appeal is ineffectual unless it is accompanied by the prescribed recognizance with surety, for the procurement of which no time is afforded; and that the recognizance prescribed is excessive in amount, and subject to unreasonable conditions. He contends that the requirement of any recognizance is unconstitutional, but insists particularly on the three objections mentioned, to wit: (1) that time to procure surety is not allowed; (2) that the recognizance required is excessive in amount; and (3) that unreasonable conditions are imposed, notably the condition that the claimant will not, during the pendency of his appeal, violate any of the provisions of the Act.

There is no doubt, in our opinion, but that a proper recognizance may be required as prerequisite to an appeal. *Jones v. Robbins*, 8 Gray, 329, 341; *Haggood v. Doherty*, 8 Gray, 373; *Commonwealth v. Whitney*, 108 Mass. 5; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; *Lincoln v. Smith*, 27 Vt. 323, 361; *Beers v. Beers*, 4 Conn. 535; *Biddle v. Commonwealth*, 13 Serg. & R. 405; *Littlefield v. Peckham*, 1 R. I. 500.

The recognizance in ordinary criminal cases serves the purpose not only of an appeal bond, but also to hold the appellant to bail. The right of jury trial is preserved by the appeal if the provision for it and the conditions imposed be reasonable. The question in this case, therefore, is largely a question of reasonableness; and upon such a question it is natural—almost inevitable—for men to differ. It will not do for the court to condemn the provision for the appeal, or the conditions of the recognizance, simply because they are more stringent or more burdensome than the court would have prescribed if it had enjoyed the privilege of legislating. Some latitude must be allowed for differences of opinion. The right of appeal may be used to delay or defeat, as well as to further, the ends of justice, and restrictions having a tendency to guard against the abuse should not be too harshly condemned because they may likewise, in some measure, hamper the legitimate exercise of the right. The doctrine of this court in *Littlefield v. Peckham* is that the Legislature has a discretion which it must be left to exercise, unless it clearly exercises it in an unreasonable and oppressive manner.

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The first objection specifically urged, as we have seen, is that § 26 directs the court to order the liquors to be forthwith destroyed after judgment, unless appeal be then taken and recognizance given as prescribed. Under this provision, it is urged, the claimant may lose his property without jury trial, unless he can instantly find surety for appeal. He directs our attention to the difference between this and other cases; for in other cases the appeal avails though no recognizance be given, the appellant being committed until recognizance is given. But the other cases are cases in which the appellant is under arrest, the complaint being against him personally; but the proceeding here is against the liquors only, and the claimant not being in custody is not amenable to commitment. The most the claimant can ask, therefore, is reasonable time to find surety. Doubtless it would have been better if some definite time had been allowed, but in our opinion the use of the word "forthwith" does not imply that a reasonable time is not to be allowed, since that, like all other directions to judicial tribunals, is to be judicially carried out with due regard to individual rights. Besides, we need not ignore for the sake of theory what we know as matter of fact, that a party who intends to take an appeal if judgment goes against him is seldom unprepared for it, having had time to prepare for such a contingency before the trial; and, if he can furnish surety, is little likely to fail to do so for want of time merely. We are not prepared to sustain the first objection.

The objection that the recognizance required is excessive in amount was not much pressed in argument, and we do not think it can be sustained. It is reasonable that the amount should be large enough to discourage the taking of appeals without cause, since the keeping of the liquors is attended with trouble and expense, and, though probably a less sum than \$300 might have sufficed, we cannot say that \$300 is clearly exorbitant. It is the amount required in other cases, in which it is unquestionably reasonable.

The objection that the conditions of the recognizance required to perfect the appeal are unreasonable and oppressive does not seem to us to have any force, except as it applies to the condition that the appellant, during the pendency of the appeal, shall not violate any of the provisions of the Act. In *Saco v. Wentworth*, 37 Me. 165, where, in a provision for appeal from the sentence of a municipal court, or justice of the peace, upon a complaint for unlawfully selling spirituous liquors, the requirement was that the appellant should give bond in the sum of \$200, upon condition, among others, that he would not violate any provision of the Act pending his appeal. The requirement was held, in a suit on the bond, to be unconstitutional, and the bond given in compliance with it void. The ground taken by the court was that the accused was entitled, by the Constitution, to have a jury decide whether he was guilty or not of the offense laid to his charge; and that it was therefore incompetent for the Legislature to say that he should not have the right so secured to him, unless he would first give security not to violate any of the provisions of the Act under which he

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was complained of, pending the complaint,—the imposition of such a condition being foreign to the purposes for which an appeal bond could be properly required. We see no escape from this reasoning, certainly not in cases where, as here, the appellant himself is not held to bail. We do not think, however, that it follows that the sections providing for seizure and forfeiture are void. It is not these sections which offend, but the irrelevant condition. Why, then, not strike directly at the condition? The recognizance is complete without it. It is merely something added by itself without any vital connection with what precedes. Striking it out leaves no gap to be filled. If the requirement were that the accused should give a separate recognizance, simply containing such a condition as a prerequisite to his getting a jury trial, it seems to us that there could be no question that the proper decision would be, not that the sections providing for seizure and forfeiture were unconstitutional and void, but only that the requirement was unconstitutional and void, and that the recognizance with its obnoxious condition should cease to be insisted upon. The recognizance required, though subject to other conditions, is in effect separate as to this, the condition being separate, and it might be sued for breach of this condition as if there were no others in it. We think, therefore, we need go no further than to say that the requirement of the condition is unconstitutional and void, and that the recognizance may be given without it; and that, even if the condition be left in, it will be a mere form of words without effect,—a nullity.

It is true that in *Saco v. Wentworth*, *supra*, the court held that the recognizance itself, not simply the condition, was void; but, so far as appears, the recognizance, for the other purposes for which it was taken, was *functus officio*, and was not supposed to have any vitality. Perhaps, too, it may be supposed that our decision is in conflict with *Greene v. Briggs*, 1 Curtis, 811; but there, though the recognizance was condemned on account of one of its conditions, the seizure and forfeiture sections were themselves infected with unconstitutionality. We deem it our duty to sustain legislation so far as we can, and not to condemn the whole for some unconstitutionality in a part, if the part can be stricken out, and a consistent, valid whole still remain. And see *Allen v. Staples*, 6 Gray, 491.

Our conclusion is that the objection must be overruled, and the cause remitted to the district court for further proceedings.

Order accordingly.

Edward W. HOWLAND

v.

Julius A. PETTEY *et al.*

1. Land was levied on and sold at an execution sale as one lot. It was, in fact, divided by stone walls into six lots. *Held*, immaterial; the land being accurately described and under one ownership.
2. The sale, after proper advertisement, took place at the sheriff's office, some 20 miles distant from the land. *Held*, immaterial; the time and place being in

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the discretion of the officer, and he having acted in good faith in advertising and conducting the sale.

3. To satisfy the execution, a strip was sold from the side of the lot, but so that the portions sold and unsold both abutted on the highway. *Held*, that the mode of sale was proper.
4. The execution debtor claimed the sale to be unfair because an understanding that the land was redeemable on paying the debt and costs prevented a fair price being obtained. *Held*, that he had no cause for complaint; it not appearing that the understanding was traceable to the officer or detrimental to the debtor; and it appearing that the debtor had refused to take the land back at the price paid, with costs and expenses; that he delayed for five years to institute proceedings to annul the sale, and then made no offer to pay the amount of the judgment.

(Newport—Decided August 2, 1887.)

BILL in equity to set aside an execution sale of land. *Dismissed.*

The facts are stated in the opinion.

Messrs. E. L. Barney and Charles A. Ines, for complainant.

Messrs. William P. Sheffield and William P. Sheffield, Jr., for respondents.

Stiness, J., delivered the opinion of the court:

In November, 1881, the complainant was the owner of a tract of land in Little Compton, on which an execution was levied in a suit against him by the collector of taxes of that town. A portion of the land was sold under this levy in February, 1882, and the complainant now seeks to set aside that sale, upon the ground that it was improperly conducted. The first ground of objection is that the land was advertised and sold as one lot, when in fact there were six lots, separated from each other by heavy stone walls. If the entire tract was accurately described—and there is no suggestion to the contrary—we do not think that the sale was invalid on this account. It was, in fact, one tract, under one ownership, and a description of the whole tract designates what land is to be sold. The purpose of the notice is satisfied by such a description, for it points out the land to be sold, which is all that is required. We do not see how the existence of stone walls on the land can affect the case. It could hardly be contended that, in the sale of a farm, for instance, every field and pasture into which it might be divided should be separately described, when the description of the whole farm by outside boundaries was correctly given.

The next objection is that the sale took place at the sheriff's office in Newport, about 20 miles distant from the land itself. Sales of this character must be conducted with the utmost fairness and due regard for the interests and rights of the parties to the suit. When so conducted they will stand, whatever the pecuniary result may be. Without doubt, in most cases a sale on the premises is best calculated to draw together those who live in the vicinity, from whom competition may be expected, and thus

to secure the best price for the sale. But the law does not require this to be done. It requires the officer to give notice of the sale, leaving the time and place to be determined by him, in the proper discharge of his duty. If, then, the law does not require a sale to take place on the premises sold, the question in this case is whether the sheriff's office, in view of its distance from the premises, is an improper place. We think it is not uncommon for execution sales to take place in the sheriff's office, and we are not prepared to say that this is improper. It is a public place; generally accessible; the place to which the debtor would go to redeem, and to which those who wanted to purchase would be likely to go to make inquiries about the sale. A place within the town might be nearer, and yet quite as difficult of access. But it is not to be assumed, in all cases, that the only bidders will be those who live near by. Others may desire to bid who can better attend a sale at the sheriff's office than on the premises, or in the particular town where the land lies. As the law does not require a sale to be at or near the premises, we do not see how we can require it, provided the officer acts in good faith in naming the place. In this case we do not doubt the good faith of the officer. He was disinterested as to the parties; he was an officer of long experience, and did what has frequently been done in sales of this kind. The sale was in winter, when it was less likely that bidders would go to examine land in the country, and when, with the present facilities for travel, there would be little difficulty in reaching the city of Newport. There is no evidence to show that anybody who wanted to attend the sale was prevented from doing so by reason of the distance. Moreover, it is of some significance that a notice of three months is required, before the sale, which notice was brought to the complainant's attention by the officer at the outset; and yet, during all that time, he made no objection to the place of sale, and did not bring this bill to set the sale aside until more than five years had elapsed and the property had passed from the purchaser into other hands. It appearing that the officer acted in good faith; that the place of sale, under the circumstances, was not an unreasonable place; nor one shown to have been injurious to the complainant, and that the selection of the place was not objected to during the three months preceding, nor steps taken to set it aside for more than five years after the sale,—we do not see that the complainant makes a case for relief on this ground.

The next objection is that the sale was not properly conducted. The testimony does not show that the sale was conducted differently from other auction sales, or that it was conducted unfairly. The sheriff stated what land was to be sold, read the terms of sale, and an auctioneer of the city of Newport acted for him in selling. One lot was sold, which did not bring enough to satisfy the execution, but about which no question is made; and then so much of another lot, along its northerly side, as would be sufficient to satisfy the execution, was next sold. The complainant's contention is that the sale of a strip along the northerly side was an unfair mode of sale, and one calculated to depreciate the price. We do not see that this was

so. Had the land been sold across the lot, at the rear end, it would have been cut off from the highway; or if across the lot at the front, the land back of it would have been cut off from the highway; and either mode of sale might have involved controversies and litigation as to rights of way. As it was, both the land sold and the land remaining were accessible from the highway. We do not think the mode of sale was unfair or unreasonable, under the circumstances, even though, as is urged, it might result in considerable expense in building a long partition fence.

The complainant avers that the land did not bring an adequate price, because of an understanding by those present at the sale that he was to receive it back upon his paying the price paid, and costs. "Generally, when a sale is set aside for inadequacy, etc., it will be on the principle of redemption, allowing the deed to stand as security for all money honestly advanced." *Aldrich v. Wilcox*, 10 R. I. 405, 417, and cases cited. The sheriff says he thinks this matter was spoken of, and that there was such an understanding among the attendants. There is no other proof. It is not shown that he had anything to do with it, or that he gave it currency at the sale. It was an auction sale, where all had an equal chance to bid. It had none of the ordinary marks of a fraudulent sale; such as unreasonable terms, misrepresentation, or trickishness. It does not appear that anybody refrained from bidding on account of the understanding; but if he did, it was not for the purpose of taking advantage of the complainant, but it was rather in his favor, for it would enable him to regain his land simply for the price of the judgment and costs, for which he was liable. The understanding, if there was one, was not a mere pretense, fraudulently given out to deter persons from bidding; for after the sale the land was offered to the complainant, by the purchaser, for the price paid, with costs and expenses, which offer he did not accept. No reason is given for the refusal to accept the offer, but it was not on account of inability to redeem; for he avers in the bill his ample ability to pay the amount of the debt. He has never offered, and does not even now offer, to redeem the land by paying the amount of the judgment against him, if the ownership of the land were such that this could now be done. The judgment against him having been satisfied, he here claims to retake the land without paying anything at all, either on the land or the judgment.

Before seeking equity he should do equity. By way of excuse for the delay in bringing his bill, the complainant states that the officer told him that the sale was good for nothing, and void. This the officer emphatically denies, and we do not doubt the correctness of his statement in this respect. A previous levy was made, which was informal; and of this the complainant was notified by the sheriff, who seemed to have taken great pains to inform him of the steps taken in this matter. After this lapse of time the complainant has probably confused the former levy with the one on which the sale was made.

We do not think the complainant makes out a case for relief; and his bill must be dismissed, with costs.

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The points decided are denoted by the name of the case appended or "*Id.*," other points indexed as "authorities cited" are such as are found in the decisions, either as *dicta* or argument, references to statutes, or in dissenting opinions.

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ARBITRATION AND REFERENCE.

1. An agreement to submit to arbitration

will not be held valid when its effect is to oust the court of jurisdiction.

Chamberlain v. Connecticut U. R. R. Co. (Conn.) 477

2. An oral submission governs as to what was submitted.

Hathaway v. Hagan (Vt.) 128

3. A lease covenanted that rent should be fixed by two or three persons, agreed on by parties. The parties submitted to two persons, and if they could not agree they should appoint a third, and the award of two should be binding. The arbitrators selected a third, and he, with one of the original two, united in an award. *Held*, the submission departed from the covenant in making a majority award binding; and hence one of parties to submission had a right to revoke it before award made, and an award, after such revocation, is invalid.

Sherman v. Cobb (R. I.) 794

BRIEFS AND NOTES.

Submission determines what was submitted. (Vt.) 129

Agreement to arbitrate; ousting court of jurisdiction. (Conn.) 479

ARREST. See FALSE IMPRISONMENT.

A debtor owning a patent-right which, being intangible, is incapable of seizure on execution, is liable to commitment, under Pub. Stat. chap. 222, § 14, for fraud in detention of his property, if, still retaining the patent-right, he refuses to pay his debt. Authorities cited.

Maxon v. Gray (R. I.) 598

ASSAULT AND BATTERY.

An act done by legal authority does not constitute an assault.

Langford v. Boston & A. R. R. Co. (Mass.) 209

ASSESSMENT. See MUNICIPAL CORPORATIONS, V.; TAXES, III.

ASSIGNMENT. See DEVISE AND LEGACY, X.; INSOLVENCY; MASTER AND SERVANT, 1.

A request by a creditor to the debtor to pay the balance owing him to plaintiff amounts to notice of assignment of such balance to plaintiff; and where the debtor garnished in the suit of a third person against said assignor pays such balance on the judgment in such suit, he is still liable to plaintiff therefor.

Whitman v. Winchester Repeating Arms Co. (Conn.) 835

BRIEFS AND NOTES.

Of debt by parol. (Me.) 897

Of choses in action. (Me.) 501

Of part of entire chose in action; right of assignee. (Me.) 397

Equitable assignment of fund; how far good against assent of debtor. (Me.) 397

Right of assignee of chose in action to sue in assignor's name. (Me.) 189

Until assignee has given notice, he cannot hold as against *bona fide* creditors without notice. (Conn.) 836

N. E. R., V. IV.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Property held in trust will not pass under general assignment, without special words to pass it.

Barrows v. Keene (R. I.) 271

2. Where a general assignment is made upon the trust to apply the proceeds of debtor's property, after paying preferred creditors, for the equal benefit of all creditors in proportion to their respective claims; all the creditors, including those secured, should be allowed to bring in their claims in full, and are entitled to dividends on the full amount thereof.

Allen v. Danielson (R. I.) 106

3. If a secured debt is so reduced by the dividends that the security will more than pay it, the assignee should redeem for the benefit of creditors. *Id.*

4. Where the assignee had already made two dividends, and no part of the first was paid to the secured creditors, and on the second such creditors received dividends, the secured creditors are entitled to be paid so much as is necessary to put them on an equality with the other creditors before a third distribution. If the assignee has not enough for that purpose he is not bound to make good the deficiency out of his own means. *Id.*

BRIEFS AND NOTES.

Secured creditors; rights. (R. I.) 107

Duty of assignee to make dividends. (R. I.) 106

ASSUMPSIT. See INDEMNITY, 1; INTOXICATING LIQUORS, 24; JOINT TENANTS AND TENANTS IN COMMON, 7; USE AND OCCUPATION.

1. To sustain an action for money paid, the plaintiff must show that the money was paid at the defendant's request, either express or implied.

Davis v. Smith (Me.) 663

2. Where a special contract is not under seal, plaintiff may either declare on the implied promise, or set out special contract in his declaration. Authorities cited. *Id.* 667

3. An action for money had and received will lie on a promissory note or bill of exchange. Authorities cited. *Id.*

4. Assumpsit for money had and received is now the usual mode for trying a title to office to which fees are annexed. Authorities cited.

State v. Village of St. Johnsbury (Vt.) 891

5. Want of privity is no objection to maintaining assumpsit for money had and received. Authorities cited. *Id.* 896

6. The creditor may maintain assumpsit against one promising to pay a debt due a third party.

Wood v. Moriarty (R. I.) 269

7. In assumpsit for goods sold, when defense is poor quality of goods, plaintiff cannot show that goods of the same grade sold other parties turned out good.

Henkel v. Burke (Me.) 678

8. In such an action it is not error to instruct

the jury to find what damage defendants suffered from breach of the warranty,—how much of the goods have been proved worthless and bad,—and deduct that from contract price. *Id.*

9. A count in assumpsit, declaring on a promise to pay a sum certain if plaintiff would provide another with necessities, and also on a promise to pay as much as plaintiff reasonably desired to have on the same account, is both double and repugnant. Authorities cited.

State v. Haven (Vt.) 619

10. If defendant pleads set-off, plaintiff may reply Statute of Limitations. Authorities cited.

Gage v. Dudley (N. H.) 532

BRIEFS AND NOTES.

When assumpsit upon account annexed maintainable. (Me.) 142

When assumpsit for money had and received lies. (Vt.) 895

Not lie to try title to property. (Mass.) 661

Promise to debtor to pay debt to third person. (R. I.) 269

Waiver of tort. (Mass.) 651

Trover and assumpsit may be joined by amendment. (N. H.) 299

ATTACHMENT. See BENEFIT SOCIETIES, 2; EXECUTION; MORTGAGE, 60-66.

1. One claiming the exemption of property in trustee process must show it. It is not enough to prove that it is of the kind exempted by statute,—as a cow or hog.

Rollins v. Allison (Vt.) 723

2. Whether such property is exempt is to be determined by commissioner. *Id.*

3. Under Rev. Laws, § 1556, actual use of a horse is not essential to its exemption.

Steele v. Lyford (Vt.) 111

4. An allowance by the probate court for the support of the widow and children of decedent out of the estate, during the settlement thereof, is not attachable by a creditor of the widow.

Barnum v. Boughton (Conn.) 94

5. An attachment under State laws is invalid against mortgagees of a vessel by mortgage duly registered under Federal shipping laws.

Howe v. Tefft (R. I.) 108

6. A debtor is under no legal duty to his creditors to convert his property into a form in which it will be attachable.

Mason v. Gray (R. I.) 597

7. Assignee of part of fund in possession of alleged trustee may claim same.

Horne v. Stevens (Me.) 897

8. In foreign attachment, trustee's acceptance of service is not an attachment upon which he can be charged against defendant's objection.

Nelson v. Sanborn (N. H.) 895

9. Compulsory payment under process of law, by trustee to plaintiff, will bar a recovery of same debt by defendant. Authorities cited. *Id.* 896

N. E. R., V. IV.

10. But his indebtedness will not be discharged by payment to plaintiff, made upon judgment, after attachment is dissolved. *Id.*

11. Or if the judgment was obtained through collusion with him or by his willful default. *Id.*

12. A plea in abatement must allege non-residence of trustee at commencement of action.

Biddeford Sav. Bank v. Mosher (Me.) 401

13. An allegation of nonresidence at service of writ is not sufficient. *Id.*

14. An action not brought in the same county where trustees live is abatable, even though plaintiff discontinues as to trustee upon entry of action in court. Authorities cited. *Id.* 403

15. It appeared from record of justice's court that the parties in attachment against an absent and absconding debtor were inhabitants of this State when the writ was served; that service was made by leaving a copy of writ at usual place of abode of defendant; that defendant was then absent from the State; that on return day defendant did not appear, and the justice adjourned the case for three months, at expiration of which time he rendered judgment against defendant by default. Held, the judgment was conclusive upon defendant in an action against him thereon.

Hurlburt v. Thomas (Conn.) 586

16. When animals are sold on a judgment to enforce a lien claim for keeping, and the proceeds in excess of judgment are paid into court, the judgment creditor can not, by process in equity, recover from that fund pay for keeping animals from date of his original petition to enforce his lien to time of sale.

Lord v. Collins (Me.) 402

17. It is discretionary with the court to allow counsel fees to trustee.

Rollins v. Allison (Vt.) 723

18. R. I. Pub. Stat. chap. 257, § 21, authorizing the court to allow to an officer for the keeping of personal property, relates only to the keeping of personal property attached and held on mesne process.

Doliver v. Collingwood (R. I.) 104

BRIEFS AND NOTES.

What trust fund not attachable. (Vt.) 720

Of allowance to widow during settlement of estate. (Conn.) 94, 95

Of fund due on certificate of corporation. (Mass.) 172

Of chattel mortgagee's interest. (Mass.) 214, 680

Mode of attaching funds of debtor in hands of another. (N. H.) 895

Exemption. (Conn.) 94, 95

Proof. (Vt.) 723

Letters patent. (Mass.) 182

Trustee process; equitable right of claim to fund. (Me.) 397

County where writ returnable. (Me.) 401

Plea in abatement, on ground of nonresidence of trustee; form and requisites. (Me.) 402

Counsel fees to trustee. (Vt.) 738

Liability of plaintiff for illegal attachment. (Mass.) 681

ATTORNEY AND CLIENT. See ATTACHMENT, 17.

1. The entry of a voluntary appearance, by attorney of insolvent debtor, without his knowledge, in a pending action, curing the insufficient service of the writ, amounts in law to procuring his property to be seized on execution, within Pub. Stat. chap. 157, § 96.

Sartwell v. North (Mass.) 51

2. The knowledge of a creditor's attorney in receiving the preference is imputable to the creditor. Authorities cited. *Id.* 54

3. An attorney has authority to do in behalf of his client all acts incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action. Authorities cited. *Id.*

4. An attorney may bind his client by entering into a recognizance for him.

Mahoney v. Middlesex County Comrs. (Mass.) 248

5. If the attorney is unable to act, he may employ another attorney to act for him, who may bind the client in the same manner. *Id.*

6. Such a recognizance entered into in petitioner's name, and also by such latter attorney, as surety, is sufficiently evidenced by noting of clerk on the petition as follows: "February 11, 1885, P. recogna. as pr. & su. in \$200." *Id.*

7. An attorney, withholding funds unconscionably or to an amount clearly above any legal claim, will be required to pay so much as is beyond dispute.

Windsor v. Brown (R. I.) 99

8. The summary jurisdiction of the court cannot be invoked when the relation of attorney and client has been changed to that of debtor and creditor, by the rendition of a judgment in favor of the client against the attorney. *Id.*

9. A contract between an attorney and client for compensation of so much of amount collected if successful is not void for champerty or maintenance.

Blaisdell v. Ahern (Mass.) 847

10. Where the right to compensation gives a right of action against the party, though pledging the avails of the suit, or a part of them, as security for payment, the agreement is not champertous. *Id.*

BRIEFS AND NOTES.

Agreement of counsel with reference to subject-matter of suit is binding upon parties. (Mass.) 217

Appearance by attorney; how far binding on client. (Mass.) 58

Gontingent fee. (Mass.) 847, 849

BAIL AND RECOGNIZANCE. See N. E. R., V. IV.

ATTORNEY AND CLIENT, 4-6; JUSTICE OF THE PEACE, 1, 2.

BAILMENT. See MILLS AND DAMS, 6, 7.

1. A refrigerating company is liable for damage from decay to fruit stored by it, caused by raising temperature of its storehouse to a height above that agreed upon.

Hyde v. Mechanical Refrigerating Co. (Mass.) 253

2. The diminution in the market value may be considered as an element of damage. *Id.*

BRIEFS AND NOTES.

Liability of bailer for negligence, where property is left with him to perform work on. (Vt.) 713

Liability of bailor for negligence. (Me.) 773

BANKRUPTCY. See INSOLVENCY.

1. A discharge in bankruptcy is not a bar to the equitable liability between co-sureties in contribution, when payment was subsequent to the discharge.

Liddell v. Winsell (Vt.) 123

2. The only mode of contesting a discharge under United States Bankruptcy Act is by application by creditor, within two years, in United States District Court, whether the creditor actually knew of the proceedings and discharge or not.

Fuller v. Pease (Mass.) 261

3. The Act provides for personal notices and notices by publication of various stages of proceedings. *Id.*

4. That defendant fraudulently omitted plaintiff's name in his schedule of creditors will not estop defendant from setting up his discharge in an action brought upon plaintiff's claim. *Id.*

5. Until appointment of assignee, bankrupt is the proper person to tender money for redemption of land sold for taxes. Authorities cited.

Trust v. Syltaster (Me.) 401

BRIEFS AND NOTES.

An act of bankruptcy cannot be purged by subsequent conduct. (Me.) 669

Dividends. (R. I.) 107

Discharge; effect. (Vt.) 123

Effect; plea. (Mass.) 263

Special judgments after. (Me.) 677

Contribution between sureties not discharged by. (Vt.) 123

Assignee, title. (Me.) 499

BANKS AND BANKING. See CHECKS; GUARANTY, 4; TAXES, 8.

1. A subscriber to a proposed increase of the capital stock of a national bank is compelled to pay the subscription before the final action of the comptroller of the currency.

Eaton v. Pacific Nat. Bank (Mass.) 63

2. A subscriber to the proposed increase of stock does not run the risk that, if it is all paid in, the comptroller may reduce the

amount of the increase; because the comptroller has not the lawful power to do this. *Id.*

3. Upon the failure to receive subscriptions to the full amount of the proposed increase, a vote of the directors, authorizing the increase, will not render a subscriber who has paid her money under the original proposal, but has not accepted a certificate, a stockholder; nor will the certificate of the comptroller enable the bank to appropriate, to a payment for the stock, a debt it owes on account of such payment upon the proposed increase which has failed, or to treat one who has thus become one of its creditors as a stockholder. *Id.*

4. Where the proposed increase was voted September, 1881, and the attempt to appropriate the subscriptions to a proposed increase of a less amount was made December 18, 1881, the subscriber to the original proposal who demanded the return of her money on January 10, 1883, will not be guilty of laches. *Id.*

BRIEFS AND NOTES.

National banks; liability of subscriber. (Mass.) 65

Increase in capital; stockholder's liability. (Mass.) 65

Conclusiveness of certificate of comptroller as to validity of increase of stock. (Mass.) 65

BASTARDY.

Pub. Stat. chap. 171, § 1, does not apply to bastardy proceedings, and a judgment is not irregular because entered on day of default.

Keith v. McCaffrey (Mass.) 645

BRIEFS AND NOTES.

Is civil action. (Mass.) 645

BAWDY AND DISORDERLY HOUSES.

1. A man who is not the owner of the house or tenement, or of the business conducted therein, but manages it as agent, may be convicted of keeping the premises. Authorities cited.

Commonwealth v. Dale (Mass.) 201

2. An indictment for keeping a place for the habitual resort of disorderly persons need not give the names of the resorting persons.

State v. Doyle (R. I.) 600

3. Such indictment is not bad because it charges the same offense in two different counts; nor because of omission of words "then and there," as indicated in motion in arrest. *Id.*

BENEFIT SOCIETIES. See POLICE AND POLICE DEPARTMENTS.

1. When, in the certificate of incorporation, members of Supreme Council of Royal Arcanum are referred to as those for whose benefit the association is intended, all who, through the subordinate councils, become members of the organization, are included.

Saunders v. Robinson (Mass.) 171

2. The fund due on the certificate of a corporation organized under Pub. Stat. chap. 115, N. B. R., V. 1V.

§ 8, is not subject to attachment in hands of the corporation. *Id.*

3. Where, in an application for membership, the following questions and answers were asked and given: "Q. To whom will you have your death loss paid? A. To my heirs. Q. State relationship to you, if any, of the person or persons to whom payable? A. Wife or daughters,"—the applicant then having a wife and two minor daughters,—*Held*, that he intended the payment should be to his widow, or, if he left no widow, to his surviving daughters.

Addison v. New England Com. Trav. Assn. (Mass.) 689

4. A treasurer is not allowed for expenses in carrying out an illegal vote to dissolve the association; nor for the costs of suit by members to restrain him from carrying into effect the illegal vote.

Saint Mary's Ben. Assn. v. Lynch (N. H.) 168

BRIEFS AND NOTES.

Attachability of fund due on certificate. (Mass.) 171, 173

"Or" is often construed to mean "and," to carry intention into effect. (Mass.) 641

BILLS AND NOTES.

I. IN GENERAL; PARTIES.

II. PAYMENT; NOTICE OF DISHONOR.

III. ACTION, ETC.

BRIEFS AND NOTES.

See EXECUTORS AND ADMINISTRATORS, 5-7; GUARANTY; INSANE PERSONS, 2; PAYMENT, 1.

I. IN GENERAL; PARTIES.

1. One taking accommodation notes takes them subject to all equities.

Bacon v. Harris (R. I.) 923

2. A demand note is overdue for purposes of negotiation unless negotiated within a reasonable time. *Id.*

3. What this reasonable time is, is a question for the jury. *Id.*

4. A note by a copartner, payable on demand to one of copartners, was indorsed by A for accommodation. *Held*, that A, if compelled to pay the note, would be entitled to reimbursement from the copartnership; that copartner could not maintain an action against A; that A was not liable unless the note was negotiated within reasonable time, which was a question for the jury. *Id.*

5. On application of maker of overdue note for renewal, the holder replied that he preferred to hold the old note, but would carry it thirty to sixty days "as it is, if nothing material transpires to change the status of the security and the names," providing the maker immediately remit three months' interest to a time stated, then past. The maker remitted the three months' interest at 7 per cent, and the holder indorsed the payment of three months' interest, without stating the amount, which was not sufficient to pay all the back interest at the legal rate. The transaction was governed by the law of Vermont,

which applies all excess above 6 per cent to the contract on which it was paid. *Held*, the transaction was not a contract that would discharge the indorsers.

Nat. Bank of Derby Line v. Dow (Me.) 496

6. The indorser cannot have applied, as partial payments, money received by indorsee under contract to assign note to person from whom money was received.

Casco Nat. Bank v. Shaw (Me.) 678

7. One to whom a note has been transferred before due, as collateral security for indorsements to be made by him, and who takes it without notice of a defense existing against it in hands of transferor, is a bona fide holder. Authorities cited.

Noyes v. Landon (Vt.) 726

8. Bona fide holders defined. *Id.*

II. PAYMENT; NOTICE OF DISHONOR.

9. Notice to indorser of nonpayment, sent to proper address when note was issued is sufficient, although he has changed his residence.

Importers & Traders Nat. Bank v. Shaw (Mass.) 844

10. Such holder is not affected by knowledge of agents to make demand of maker, who were not agents to give notice to indorser. *Id.*

11. Where assignee of indorser continued the business at same place, it may be inferred that assignee had authority from indorser to receive notices of protest sent there. *Id.*

12. Notice of dishonor sent to former place of business of indorsers,—an insolvent firm,—where it was received by the trustee for creditors, is sufficient.

Casco Nat. Bank v. Shaw (Me.) 678

13. A statute making the deposit in post-office notice—to the party to a negotiable instrument—of nonpayment or nonacceptance, contemplates two modes of its delivery to him,—at the postoffice where it is deposited, and by a letter carrier; and requires that it shall be sufficiently directed to his residence or place of business, for both modes.

Morse v. Chamberlain (Mass.) 211

14. The provision is intended to cover and be applied to all kinds of places. *Id.*

15. In a small town, a direction to post-office is sufficient. Even if another person of the same name received it, it must be deemed notice to party intended. *Id.*

16. The notice of protest may be deposited in a street letter-box.

Casco Nat. Bank v. Shaw (Me.) 678

17. Plaintiff held a note of defendants, with stock in a company as collateral. After nonpayment of note, plaintiff wrote defendant that she intended to sell the stock on a certain day, and did so. Defendant made a transfer of the stock to plaintiff's vendee, and allowed six years or more to pass without making any objection to sale, and was thereafter sued for unpaid balance of note. *Held*, that defendant waived any right to a more formal or longer notice.

Downer v. Whittier (Mass.) 817

18. Defendant waived the right to further notice of sale of life insurance policy also held as collateral. *Id.*

19. The court properly ruled that judgment should be entered for amount found by computing interest at rate provided in note to time of first payment, which was less than the interest then due; then computing further interest on the principal to the time of the next payment; then subtracting both payments, which together were more than enough to reduce the principal debt below the original amount; and then computing interest on the balance of the original note, as thus given, to the date of judgment. *Id.*

III. ACTION, ETC.

20. An existing right of action upon a note secured by a chattel mortgage was not taken away by repeal of statute which made period of limitation the same as that within which plaintiff might bring an action on the mortgage.

Hall v. Hall (N. H.) 283

21. A declaration against a surviving partner as indorser of a note may be amended by the addition of a count against him as an individual indorser.

Lane v. Barron (N. H.) 283

22. Where defense to action upon note is that note was given for a horse, which plaintiff warranted to be sound, and which proved not to be sound, it is error to instruct the jury there is no evidence to find that plaintiff warranted, when defendant testified that, while trading for horse, plaintiff said "She is sound and all right."

Works v. Croswell (Me.) 777

BRIEFS AND NOTES.

Consideration. Extension of time is good. (Vt.) 129

Presumption of. (Vt.) 129; (Conn.) 339

Burden of proving. (Vt.) 129

Accommodation bill defined. (Me.) 677

Presentation; demand; parties. (Me.) 675-677

Notice of dishonor; where to be sent. (Me.) 678-677; (Mass.) 212, 345

Notice to assignee in bankruptcy; to attorney. (Mass.) 345

Deposit of notice in postoffice. (Mass.) 213, 215

Deposit in street letter-box. (Me.) 674

Waiver of demand and notice. (Me.) 676

Method of computing interest on notes. (Mass.) 318, 319

Effect of payment of interest in advance of contract of indorser. (Me.) 497

Liability of indorser or surety when right of action against principal has expired. (N. H.) 239

Right of action by surety on account of nonpayment of negotiable paper by principal. (N. H.) 163

Indorser not discharged by mere indulgence at will of creditors. (Me.) 496

Indorser can pay at any time. (Me.)	497
Surety. (Me.)	677
Negotiability; notice; question of construction. (Mass.)	240
Transfer before maturity, as security for antecedent debt. (Vt.)	724
Bona fide holder, who is. (Vt.)	724
Knowledge of unsoundness of mind of payee. (Me.)	789
Rights of. (Me.)	677

BOARD OF HEALTH. See **HEALTH.**

BONA FIDE HOLDERS. See **BILLS AND NOTES**, 7, 8; **SALE**, 10; **VENDOR AND PURCHASER**, 4-7.

BONDS. See **APPEAL**, IV.; **EXECUTORS AND ADMINISTRATORS**, 8, IV.; **GUARANTY**, 4; **INTOXICATING LIQUORS**, VI.; **PRINCIPAL AND SURETY**; **REPLEVIN**, 7, 8; **VENDOR AND PURCHASER**, 8.

1. Under a bond by two persons for the support of a third person, there is no implied authority in such third party to obtain assistance from others at the expense of the obligors, if they fail to perform their bond.

Shaw v. Graves (Me.) 143

2. A physician, called with knowledge of one of obligors, and forbidden by the other, cannot maintain an action against the obligors for services rendered. *Id.*

3. It is essence of a bond to have an obligee as well as an obligor. Authorities cited. *Garrett v. Shove* (Conn.) 744

BRIEFS AND NOTES.

Blank. (R. I.) 747

BOUNDARY. See **DEED**, 15; **MORTGAGE**, 9, 10.

1. In case of discrepancy in area, the lines of ascertained boundaries must control. *Doyle v. Mellen* (R. I.) 272

2. A deed of land bordering upon sea, describing it as running "to the water and thence by the water," conveys to low-water mark.

Babson v. Tainter (Me.) 661

BRIEFS AND NOTES.

When monument controls other terms of description. (N. H.) 286

Mistake. (Me.) 548

BOYCOTT. See **CONSPIRACY**, 6.

BREACH OF THE PEACE.

1. A count in an indictment under Rev. Laws, § 4238, is sufficient, which charges that respondent "quarreled * * * by cursing * * * and calling * * * opprobrious names * * * which carriage * * * had the effect * * * to disturb the public peace," although there was no allegation of intent.

State v. Archibald (Vt.) 112

2. The statute provides that a person who disturbs the public peace by tumultuous and

offensive carriage, etc., shall be punished, etc. The sufficiency of a count charging that respondent broke the public peace "by his tumultuous carriage," is doubted. *Id.*

3. A plea of prior conviction of an offense which is part of offense charged in indictment is sufficient on demurrer.

State v. Looklin (Vt.) 808

BRIEFS AND NOTES.

Indictment; form. (Vt.) 112

CARRIERS. See **RAILROAD COMPANIES**; **STREET RAILWAYS**.

1. An express company is not bound to transport and deliver intoxicating liquor, if thereby it would incur a penalty.

State v. Goss (Vt.) 518

2. Nor is such company, as a general thing, bound to know contents of packages offered for carriage; nor are its agents presumed to know. *Id.*

3. An express agent knowingly receiving a package containing intoxicating liquor marked C. O. D., delivering to consignee, collecting and transmitting to consignee the pay therefor, is liable to conviction under an indictment charging him with the illegal sale of such liquor; but when he does not know the contents, the rule is otherwise. *Id.*

4. The rule is the same where the agent delivered the liquor to a stagedriver, for such delivery was a delivery to consignee. *Id.*

5. Notice to a carrier not to deliver goods need not state basis of claim to right of stoppage in transitu.

Allen v. Maine O. R. R. Co. (Me.) 548

6. The shipper should, if requested, furnish carrier, in due time, with reasonable evidence of validity of his claim. *Id.*

7. No particular form of notice to carrier to stop goods in transitu is required. Authorities cited. *Id.* 545

8. A seller's right of stoppage in transitu can not be defeated, after refusal by insolvent purchaser to receive the goods in order that seller might reclaim them, by acceptance of goods from carrier by insolvency messenger, before appointment of assignee.

Tufts v. Sylvester (Me.) 400

9. Where a passenger was injured while in a car, by the falling of a porcelain shade from the upper part of the car, the fact that the act of the railroad company in placing and using the fixture in the car caused the injury would be evidence that it was caused by the negligence of the defendant.

White v. Boston & A. R. R. Co. (Mass.) 267

BRIEFS AND NOTES.

Common; defined, and illustrations given. (Mass.) 320

Street railways. (Mass.) 321

Of goods; liability of carrier for carrying and delivering intoxicating liquors in violation of the law. (Vt.) 518

Delivery and acceptance; effect. (N. H.) 292

- Right of **stoppage in transitu**. (Me.) 400, 544
 Duty of carrier upon notice. (Me.) 545

CEMETERIES.

A petition for leave to take land by power of **eminent domain** was held bad on demurrer, because it did not show there would be a public right of burial in the land. Authorities cited.

- Holt v. Town of Antrim* (N. H.) 894

CERTIORARI.**BRIEFS AND NOTES.**

Will lie to quash in regular proceedings of city councils. (Mass.) 265

But not to remove record of proceedings of town in location of town or private way. *Id.*

Lies only to correct errors in law. (Me.) 406

CHAMPERTY. See ATTORNEY AND CLIENT, 9, 10.

CHARGE OF COURT. See TRIAL, 7-11.

CHARITIES AND CHARITABLE USES. See TAXES, 2.

1. A conveyance "in trust for the use of a Sabbath school, and for the diffusion of Christian principles, with power to erect, repair," etc., constitutes a public charity.

- Morville v. Fowle* (Mass.) 89

2. The trustees, being invested with discretionary power of sale or exchange, and the manner of filling a vacancy in trustees being provided for, were not empowered to make a conveyance to, and to confide all these large discretionary powers to, a single corporation, acting as a unit, and to reserve to themselves only a right of entry in case they were not properly exercised. *Id.*

3. Where two of the trustees, without the consent of the third, convey the trust property to a corporation, and receive in exchange land which would be comparatively valueless for the purposes of the trust; and five months later, without knowledge of other trustee, reconvey to same corporation the land which had been conveyed to themselves and the other trustee, without consideration other than the conditions stated therein, which bound defendant corporation to erect upon premises buildings suitable for Sabbath school work, and, in substance, to perform and execute all the trusts imposed upon trustees by original trust deed,—these conveyances must be treated as one transaction, but the whole transaction is a violation of the duties of the trustees. *Id.*

4. The power to sell or exchange the trust property, given by the deed, is not one that could be exercised by two of the trustees without the consent of the third. *Id.*

Characteristics and definition of charity. (Conn.) 820

Public charity. (Mass.) 89

Right of majority to control management of charity. (Mass.) 89

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CHARTERS. See MUNICIPAL CORPORATIONS, VIII.

CHattel MORTGAGE. See MORTGAGE, VIII.

CHECKS.

In a loan of a check, which borrower uses as money, it is not necessary that the check should be paid before commencing suit to recover amount of it from borrower.

- Hilliard v. Bethel* (N. H.) 163

BRIEFS AND NOTES.

Loan of check; consideration for promise to pay. (N. H.) 163

CHURCHES. See RELIGIOUS SOCIETIES.

CITIES. See MUNICIPAL CORPORATIONS.

CLIENT. See ATTORNEY AND CLIENT.

COMITY. See CONFLICT OF LAWS.

COMMERCE. See CONSTITUTIONAL LAW, 18, 14.

CONDEMNATION PROCEEDINGS.

See EMINENT DOMAIN; MUNICIPAL CORPORATIONS, IV.; RAILROAD COMPANIES, 1-3; ROADS AND HIGHWAYS, II.

CONFLICT OF LAWS. See DISCOVERY, 2.

1. Comity does not require the enforcement of any contract injurious to public rights, offensive to morals, or contravening public policy, or violating public law.

- Jones v. Surprise* (N. H.) 223

2. Comity will not extend a remedy to enforce a contract valid where made, when it is tainted by the illegal conduct of the party seeking to enforce it in the State where enforcement sought. *Id.*

3. Construction of a will and its effect depend upon law of State of testator's domicile. Authorities cited.

- Emery v. Union Soc.* (Me.) 543

4. The rights and liabilities of parties under local laws do not, of necessity, follow them into other jurisdictions. Authorities cited.

- Pierce v. Equitable L. Assur. Soc.* (Mass.) 833

5. An action cannot be maintained under Vt. Rev. Laws, § 8873, which makes railroads liable to day laborers employed by contractors, for labor in constructing their roads, where the work was done and the contract made and to be performed in New York.

- Cartwright v. New York & M. R. R. Co.* (Vt.) 361

BRIEFS AND NOTES.

Extraterritorial operation of State laws. (Vt.) 361

Contracts. (Me.) 677

Construction of. (Mass.) 848

Law of; travels with it. (N. H.) 203

Construction of will depends upon laws of State where testator had domicile. (Ma.) 539

Lex loci rei sitæ governs as to construction of will; existence of will determined as to real estate by *lex loci*. (Mass.) 851

CONSPIRACY. See COURTS, 18.

1. If two or more persons combine to coerce a man's choice in the employment of his talents, industry, and capital, it is a **criminal conspiracy**, whether the means employed are actual violence or a species of intimidation that works upon the mind.

State v. Stewart (Vt.) 878

2. A count is sufficient which charges an unlawful combination to **prevent**, by violence and intimidation, a certain **company** from retaining and **taking** into its employ **certain workmen**. *Id.*

3. So also a count charging unlawful conspiring to terrify, intimidate, and **drive away** by threats, **workmen**, with malicious intent to control and injure said company. *Id.*

4. A count is sufficient which merely charges a conspiracy to do an **unlawful act**. *Id.*

5. It was unnecessary to aver that respondents had **knowledge** of wrongful character of matters charged against them. *Id.*

6. The **boycott** is not the remedy to adjust differences between capital and labor. *Id.*

BRIEFS AND NOTES.

Definition. *Note*, 878; (Vt.) 879

Against personal and property rights. *Note*, 878

Labor associations; combinations of workmen. *Note*, 878

Impediments to trade; interference with business. *Note*, 878

Strikes; picketing; boycotting, origin of term. *Note*, 878

A joint offense. *Note*, 878

Indictment; materiality of allegation of knowledge of respondents. (Vt.) 879, 880

CONSTABLE. See TROVER AND CONVERSION, 7, 8.

CONSTITUTIONAL LAW. See INTOXICATING LIQUORS, 6, 21; STATUTES.

1. Any provision of a **State Constitution** in **conflict with the Federal Constitution** is void.

Re Plurality Elections (R. I.) 108

2. An entire **statute** will not be condemned for some **unconstitutionality in a part**, if the part can be stricken out and a consistent **valid whole** remain. Authorities cited.

Re Liquors of McSoley (R. I.) 927

3. A **special Act** assessing a land tax is not limited by a general law.

Wells v. Austin (Vt.) 799

4. The **Legislature** can not **enforce a contract** neither entered into nor adopted.

Andrews v. Beane (R. I.) 86

5. Where protection to persons or property may require otherwise, the **Legislature** is not **restrained by** the principle of the common law that for a lawful, reasonable,

and careful use of property the owner cannot be made liable.

Grissell v. Housatonic R. R. Co. (Conn.) 85

6. The Legislature may pass **retrospective laws** unless prohibited by the Constitution, or unless they are violative of vested rights affecting substantial equities. Authorities cited.

Smith v. Hard (Vt.) 114

7. This doctrine is extended to irregularities in tax assessments. *Id.*

8. A statute compelling a railroad company to maintain so much of a highway crossing its track, at grade, as comes within its limits, will not **impair the obligation of any contract** of the company.

Boston & M. R. R. Co. v. County Comrs. (Me.) 657

9. The **police power** may **protect business** interests by prohibiting discriminations, by regulating tariffs, by enforcing facilities for the public. Interstate Commerce Act of Congress illustrates this proposition. Authorities cited. *Id.* 660

10. Police powers of State defined. *Id.*

Village of St. Johnsbury v. Thompson (Vt.) 512

11. The Legislature may **pronounce** certain things or acts **nuisances** in themselves. Such laws are not unconstitutional because they do not provide compensation.

Train v. Boston Disinfecting Co. (Mass.) 487

12. The Legislature may determine when that which is otherwise property shall cease to be such if kept against law. *Id.*

13. **Commerce.** That part of Rev. Laws, § 8952, requiring a license of a person peddling tea,—the growth of a foreign country,—conflicts with Federal Constitution, art. 1, §§ 8, 10.

State v. Pratt (Vt.) 857

14. The law of Maryland requiring the taking out of a license for the sale of imported goods in the original package is in conflict with the Federal Constitution, in that it purports to tax all imports, and seeks to regulate commerce with foreign nations. Authorities cited. *Id.*

15. **Due process** of law defined.

Bartlett v. Wilson (Vt.) 119

16. The scope of the words "**infamous crime**" in Rhode Island Constitution, providing that "no person shall be held to answer for any infamous crime unless on **indictment** by grand jury," is to be determined solely by the character of the crime, and not by the punishment. Authorities cited.

State v. Nolan (R. I.) 754

BRIEFS AND NOTES.

Restrictions upon **Legislature** in regulating suffrage defined. (Mass.) 458

The Legislature can regulate, but not destroy or suspend, the right to vote. (Mass.) 458

Legislature may make certain facts *prima facie* evidence of another fact. (Conn.) 742

Legislature has no power to declare what shall be conclusive of given fact. (Conn.) 88

The Legislature may prescribe what shall be presumptive evidence. (Conn.) 742

Legislature cannot restrain party from setting up good defense to action against him. (Conn.) 741

Retrospective statutes. (N. H.) 288; (R. I.) 86

Laws cannot have a retrospective effect. (Vt.) 898

Retroactive statutes. (Mass.) 324, 464

Ex post facto laws. (Mass.) 242

Impairing obligation of contracts. (Conn.) 86-90; (R. I.) 86

Vested rights. (R. I.) 86

Interstate commerce; State regulation void. *Note*, 357; (Vt.) 357; (Mass.) 440

Police power of State defined and illustrated. (Me.) 657, 658

Extent. (Conn.) 86-90

Fourteenth Amendment; rights and privileges of citizenship. (Conn.) 86-90

Right to jury trial. (R. I.) 925

Due process of law. (Conn.) 88, 742; (Vt.) 117

Rights of accused. (Conn.) 738

CONSTRUCTION. See CONTRACT, III.; DEED, II.; DEVISE AND LEGACY; STATUTES, I.

CONTINUANCE AND ADJOURNMENT.

The continuance of an action until termination of insolvency proceedings, when defendant is in insolvency, is a matter of discretion with the court.

Casco Nat. Bank v. Shaw (Me.) 678

CONTRACT.

I. IN GENERAL; WHAT CONSTITUTES.

II. VALIDITY.

III. CONSTRUCTION.

IV. RESCISSION.

BRIEFS AND NOTES.

See ANIMALS; ARBITRATION AND REFERENCE; BAILMENT; CONFLICT OF LAWS; CONSTITUTIONAL LAW, 8; CONTRIBUTION; DEED, 10; INDEMNITY; INSANE PERSONS; INSURANCE; SPECIFIC PERFORMANCE; SUBSCRIPTION.

I. IN GENERAL; WHAT CONSTITUTES.

1. The Legislature can not enforce a contract neither entered into nor adopted. *Andrews v. Beans* (R. I.) 86

2. The rule of law, that no person shall be permitted to deliver himself from a contract by saying he did not read what he signed or accepted, is subject to the limitation that it is not to be applied in behalf of any person who by word or act has induced the omission to read. *Palmer v. Hartford F. Ins. Co.* (Conn.) 470

3. Where a sender himself elected to communicate by telegraph, the message received by the other party is original evidence of any contract. Authorities cited. *Hyer v. Western U. Tel. Co.* (Me.) 787

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4. A valid oral agreement may be made to leave a sum of money by will to a particular person in consideration of services thereafter to be rendered by the promisee to the promisor.

Wellington v. Aphorpy (Mass.) 883

5. The performance of the consideration renders the contract binding, and gives a right of action upon it. *Id.*

6. A promise made with the understood intention that it is not to be legally binding, but only expressive of a present intention, is not a contract. Authorities cited. *Id.* 886

II. VALIDITY.

7. In minor offenses the locus penitentie continues until execution of act. *Tyler v. Carlisle* (Me.) 409

8. It best comports with public policy to arrest the illegal transaction before consummation. Authorities cited. *Id.* 411

9. Stipulation upon telegraph blank limiting company's liability for negligence in transmitting message, unless message is repeated at sender's expense, is void as against public policy. *Hyer v. Western U. Tel. Co.* (Me.) 784

10. Where a contract grows immediately out of, and is connected with, an illegal or an immoral act, it will not be enforced. Authorities cited. *Jones v. Surprise* (N. H.) 295

11. Every contract made for any matter prohibited by statute is void. Authorities cited. *Id.* 294

12. Where a transaction is not on its face unfair or illegal, the burden is on assailing party. Authorities cited. *Shaw v. Waterhouse* (Me.) 156

III. CONSTRUCTION.

13. The court will look at the circumstances of the case, the nature of the property, and the relations of the parties, and then adopt that construction which will best and most nearly carry the contract into effect as parties intended. Authorities cited. *Dwellely v. Dwellely* (Mass.) 43

14. When a contract for board at an agreed price per week is not for a specified time beyond one week, and terminable at the end of any week, the boarder is entitled to a deduction for an absence extending one or more weeks. *Greene v. Lavander* (Vt.) 733

15. When a contract has been reduced to writing, and one party refuses to sign unless a certain construction, stated by him, should be put upon it, the other party, who by his silence and conduct has induced him to sign, will be estopped from claiming a different construction. Rowell, J., dissents on facts. *Flint v. Johnson* (Vt.) 376

16. Where a written promise is made to pay money or guarantee the use of a certain farm during promisor's lifetime, an action can not be maintained to recover the

money if the promisee left the farm without cause.

Bennett v. Bennett (Me.) 501

17. A contractor is entitled to the contract price less the amount of diminution in value of building by reason of his departure from the contract. PARDEE and LOOMIS, JJ. dissent.

Pinches v. Swedish E. L. Church (Conn.) 805

IV. RESCISSION.

18. There was no error in the charge by which the jury were instructed that if the insolvent represented that a mortgage on his property was all "fixed up," which was confessedly false, and the plaintiffs, in reliance upon the truth of the statement, would not have made the sale without it, then they had the right to rescind; nor was there error in charging the jury that the insolvent could have remained silent; but when he undertook to tell, he should tell them fairly and fully.

Chamberlain v. Fuller (Vt.) 614

19. Whether one acts with reasonable promptitude in rescinding a contract induced by fraud is a mixed question of law and fact, proper for the jury. *Id.*

20. Plaintiffs, upon the rescission of a contract of sale of goods for fraud, are under no obligation to reimburse insolvent purchaser for money paid for freight on the goods. *Id.*

21. A contract must be rescinded in toto and the parties put in statu quo.

Snow v. Alley (Mass.) 808

22. When consideration of a contract is entire, but promises of defendant are several, and all of them except one have been performed, even if the promise unperformed was made, wrongfully intending not to perform it, such contract cannot be repudiated by aggrieved party, where restitution impossible. *Id.*

23. Where property has passed into possession of a party cognizant of the fraud, it may be reclaimed without proving that defrauding party has been restored to his original position. Authorities cited. *Id.* 818

24. Where the note of a party, against whom rescission of a contract is claimed, has been given to rescinding party, it is sufficient for latter to tender a return of it at the trial. Authorities cited. *Id.*

BRIEFS AND NOTES.

Consideration. (N. H.) 555

Mutuality. (N. H.) 388

Offer; acceptance. (Mass.) 885

A promise, upon a sufficient consideration, to bequeath a legacy to the promisee, is valid. (Mass.) 885

Parties; mental capacity; undue influence. (Vt.) 120, 121

Rendered voidable *ab initio* by fraud. (Mass.) 810

Mistake; reformation. (Conn.) 471

In restraint of trade. (Mass.) 285

Against public policy. (Mass.) 57

Void as against public policy; stipulation on telegraph blank limiting liability for negligence in transmission of message. (Me.) 786

Joint and separable liability. (N. H.) 895

Implied. (Me.) 142; (Mass.) 329

Not presumed to injury of innocent parties. (Mass.) 455

Rules of construction. (Vt.) 875; (Mass.) 42

Rule in case of ambiguity in language. (Mass.) 885

Intention of parties. (Mass.) 284, 285; (N. H.) 284-286; (Vt.) 125

Alternative conditions. (Me.) 501

Entirety and separability. (Mass.) 57; (Vt.) 728

Offer of performance. (N. H.) 387

For benefit of third party cannot be enforced by such third party. (Mass.) 281

Collateral circumstances may designate place of performance of contract. (Vt.) 908

Abandonment on express contract, and recovery on implied. (Me.) 148

Rescission for fraud. (Mass.) 455; (Me.) 400

Time of; election. (Mass.) 809, 810

Plaintiff must put defendant in statu quo. (Mass.) 810, 811; (Vt.) 615

CONTRIBUTION. See MILLS AND DAMS, 2-4.

An agreement by legatees, in equal parts, to aid and take care of testatrix, entitles one furnishing more than an equal part of care, etc., to a ratable contribution from others.

Odiorne v. Moulton (N. H.) 299

BRIEFS AND NOTES.

When bill for, will lie. (N. H.) 800

CONVERSION. See TROVER AND CONVERSION.

CORPORATIONS. See BANKS AND BANKING; BENEFIT SOCIETIES; CARRIERS; CRIMINAL LAW, 7-9; DISCOVERY; INSURANCE; MUNICIPAL CORPORATIONS; RECEIVER; RELIGIOUS SOCIETIES; SCHOOLS AND SCHOOL DISTRICTS; SPECIFIC PERFORMANCE, 1, 8; STREET RAILWAYS.

1. Where a corporation seeks to escape from the burdens imposed upon it by the Legislature, clear evidence of the legislative assent to such exoneration should be found.

Braslin v. Summerville Horse R. R. Co. (Mass.) 890

2. In ascertaining whether a company has a surplus which may be divided among shareholders, permanent improvements made by means of borrowed money may often be valued as counterbalancing the liability of the company for the money used in construction. Authorities cited.

Haseltine v. Belfast & M. R. R. Co. (Me.) 709

3. Preferred stockholders are not protected to extent of endangering creditors'

rights, when wrecking or crippling the enterprise of the road. Authorities cited. *Id.* 709

4. Where the by-laws provide that the capital stock shall be divided into 400 shares, and that "no business shall be transacted at any meeting unless a majority of the stock is represented," it will take 201 shares to constitute a quorum for the transaction of business, although but 248 shares of the stock were ever subscribed for.

Ellsworth Woolen Mfg. Co. v. Faunce (Me.) 679

5. Directors elected at a meeting where only 188 shares were represented could not be regarded as officers *de facto*, as against directors holding over, under a provision of the by-laws, from a previous election at a legal meeting. *Id.*

6. There is no such conclusive presumption that a director knows the affairs of the company as will prevent his recovering against a person who has defrauded him.

Reese v. Dennett (Mass.) 438

7. Equity will grant relief to a corporation against fraudulent acts of directors.

Ellsworth Woolen Mfg. Co. v. Faunce (Me.) 679

8. Pub. Stat. chap. 106, § 68, restricts the liability of an officer of the corporation for its debts or contracts, to a case where the corporation has neglected to pay or disclose property for thirty days after judgment and demand made on execution. Under § 64, the liability becomes a general liability to all creditors of the class.

George Woods Co. v. Storer (Mass.) 219

9. The president of a manufacturing corporation, as such, can not commence an action in the corporate name. Authorities cited.

Ellsworth Woolen Mfg. Co. v. Faunce (Me.) 681

10. Upon dissolution of mutual insurance company, its personal property, after payment of legal liabilities, vests in State.

Titcomb v. Kennebunk Mut. F. Ins. Co. (Me.) 411

11. Members of unincorporated association are individually liable as principals for goods purchased for association by authorized agents.

Davison v. Holden (Conn.) 818

12. Individuals uniting under associate name for trading purposes, an action is maintainable against them under assumed associate name or individually. *Id.*

13. In an action against them individually, if plaintiff names only part of those who should be named, a plea in abatement should be interposed; if no such plea is interposed, those who are named must submit to judgment. *Id.*

BRIEFS AND NOTES.

Exoneration from liabilities imposed by charter. (Mass.) 888

Power to make by-laws. (Me.) 680

Rule for membership. (Mass.) 171

Capital stock defined. (Me.) 680

N. E. R., V. IV.

Capital stock is trust fund. (Mass.) 65, 705

Dividends; preferred stock. (Me.) 705, 706

Right of shareholder to dividends. (Me.) 705

Courts will not interfere with the declaration of a dividend. (Mass.) 879

Liability of stockholder upon subscription where whole amount of capital not subscribed. (Mass.) 64, 65

Liability of stockholders for corporate debt. (Conn.) 89; (Mass.) 57

Corporate meeting; majority of stock to prevail. (Me.) 680

Corporate seal attached to mortgage, *prima facie* evidence that it was duly authorized act of corporation. (Mass.) 644

Officers *de facto*. (Me.) 680

Director presumed to know nature of company's business. (Mass.) 434

Liability of officers to pay corporate debts. (Mass.) 220

Acts of individual officers cannot bind the corporation in absence of authority. (Mass.) 243

Existence after dissolution. (N. H.) 301

Unincorporated society; suable by distinguishing name or members individually. (Conn.) 631

Liability of members as partners. (Conn.) 819

COSTS. See ATTACHMENT, 17; BENEFIT SOCIETIES, 4; EMINENT DOMAIN; EQUIT, 29; EXECUTORS AND ADMINISTRATORS, 12; MUNICIPAL CORPORATIONS, 1.

BRIEFS AND NOTES.

In partition. (Me.) 153

In eminent domain proceedings. (R. I.) 733

Counsel fees to trustee in trustee process. (Vt.) 723

Taxation; attorney's fees. (Mass.) 348

COTENANTS. See JOINT TENANTS AND TENANTS IN COMMON.

COURTS. See JUSTICES OF THE PEACE.

1. Courts are the mere instruments of the law, and can will nothing. Authorities cited. Dis. Op.

Boody v. Watson (N. H.) 573

2. The right of free access to courts is inalienable. Authorities cited.

Dugan v. Thomas (Me.) 263

3. A court once regularly convened continues open until adjourned.

Eastman v. City of Concord (N. H.) 161

4. Jurisdiction once acquired is not defeated by change of residence of parties. Authorities cited.

Biddisford Sav. Bank v. Mosher (Me.) 403

5. Courts can not be ousted of jurisdiction by agreements between parties.

Dugan v. Thomas (Me.) 261

6. An agreement to submit to arbitration will not be held valid when its effect is to oust the court of jurisdiction.

Chamberlain v. Connecticut C. R. R. Co. (Conn.) 477

7 **Consent of parties can not give courts of United States jurisdiction**, but parties may admit the existence of facts which show jurisdiction, and courts may act judicially upon such admission. Authorities cited.

Thornton v. Baker (R. I.) 759

8. After a court has acted judicially on such admission, it seems as if the **party making it should be debarred from denying it** for the purpose of attacking the judgment dependent thereon. *Id.*

9. Where jurisdiction depends upon finding of a particular alleged fact, the **exercise of jurisdiction implies the finding of that fact**. Authorities cited. *Id.*

10. The **decisions of the United States Supreme Court** are controlling upon State courts only in cases affecting rights under Federal cognizance.

Lyman v. Central Vt. R. R. Co. (Vt.) 726

11. Justice of **Superior Court of County of Aroostook** may grant new trial when occasion demands it.

Brown v. Moore (Me.) 280

12. An **inferior court can not revise or review a decree of a superior court**, sent down to it to be executed, without leave first being given by appellate court. Authorities cited.

Gale v. Nickerson (Mass.) 338

13. The **Municipal Court of Boston** has original criminal jurisdiction of all crimes under the degree of felony, except conspiracies and libels, and cases prosecuted by indictment or information.

Commonwealth v. Murray (Mass.) 55

BRIEFS AND NOTES.

Power of courts over own process to prevent abuse thereof. (Mass.) 384

Jurisdiction; amount in controversy. (Vt.) 515, 802

Question of jurisdiction can be raised at any stage of proceedings. (Vt.) 364; (Mass.) 326, 878

Every fact essential to special jurisdiction must appear upon record. (Me.) 277

Probate; jurisdiction. (Mass.) 384; (R. I.) 758

Authority to vacate decrees obtained by fraud.

Original criminal jurisdiction of Municipal Court of Boston. (Mass.) 55

COVENANT. See SALE, 2, 3.

1. Where a covenant is expressly and positively **joint**, covenantors must join in an **action** upon it, although, as between themselves, their interest is several. Authorities cited.

Clapp v. Pawtucket Inst. for Savings (R. I.) 99

2. Where defendant covenanted that he would **transfer to E. T. the moneys** originally deposited in her name, amounting to about \$284, and in a suit upon the covenant he denied every allegation of the declaration; and it appeared there was on deposit, at a date

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prior to the date of the covenant, to credit of J. T. \$284.01, and to credit of E. T. \$491.72, and that on that date both sums had been transferred to the defendant; and there was no evidence that E. T. ever had anything to do with deposit of J. T., or that she was aware of its existence, or that covenant of defendant applied to that deposit,—plaintiff was held entitled to **recover the \$491.72** which stood to her credit, **with interest from date of covenant**, no demand being necessary.

Birch v. Hutchings (Mass.) 685

3. Where plaintiff was an **ignorant woman**, and the **indenture was read to her**, and there may have been a **mistake** on her part, her receipt of the bank-book containing credit of \$284.01 transferred to her by defendant created no estoppel, no injury having happened to the defendant in consequence. *Id.*

BRIEFS AND NOTES.

All joint covenantees must sue. (Vt.) 127

CRIMINAL LAW.

I. MISDEMEANORS; PRINCIPALS.

II. INDICTMENTS; INFORMATIONS.

III. MOTIONS; PLEAS.

IV. ARGUMENT.

BRIEFS AND NOTES.

See **BAWDY AND DISORDERLY HOUSES; BREACH OF THE PEACE; CONSPIRACY; CONSTITUTIONAL LAW, 16; COURTS, 13; FORGERY; GAMING, 4-6; INCEST; INTOXICATING LIQUORS; JUSTICE OF THE PEACE, 3; LOTTERY; SCHOOLS AND SCHOOL DISTRICTS, 20.**

I. MISDEMEANORS; PRINCIPALS.

1. **Inciting another to commit a misdemeanor is itself a misdemeanor.** Authorities cited.

Jones v. Surprise (N. H.) 294

2. In **misdemeanors, all knowingly and intentionally participating in the offense are principals**, and may be convicted jointly or severally.

Commonwealth v. Dale (Mass.) 200

Village of St. Johnsbury v. Thompson (Vt.) 513

II. INDICTMENTS; INFORMATIONS.

3. A complaint must state **day, month, and year when offense was committed.**

State v. Beaton (Me.) 552

4. An indictment charging an offense in **language of statute** is generally sufficient.

State v. Kane (R. I.) 600

5. Where a complaint is in a form declared by statute to be sufficient, the words "**against the statute**," etc., may be **read as a part of the charge**, if the charge without them would not set forth the offense with completeness.

State v. Murphy (R. I.) 755

6. **Felonies and misdemeanors, or different felonies, may be joined in same indictment**, if counts cover same transactions.

State v. Stewart (Vt.) 878

7. A count in an indictment, under Rev. Laws, § 4160, is bad for **argumentative-ness**, in which it is alleged that the treasurer of a railroad company did sign, with intent that same be issued and used, a certain false certificate of ownership of 1,000 shares of its capital stock, falsely certifying that a person was then and there owner of 1,000 shares which he did not own or have standing in his name, and was not entitled to any share.

State v. Haven (Vt.)

617

8. An indictment is bad for **repugnancy**, in which it is alleged that the respondent caused to be issued to Ma false and fraudulent certificate of the ownership of 1,000 shares of stock; that it was then and there signed in blank, and was and is of the following tenor, setting it out; as a blank certificate cannot certify or purport ownership, or have a tenor, *Id.*

9. A count is bad for **duplicitv**, in which it is alleged that the respondent signed a certain false certificate of stock, with the intent that it be issued and used, and that he caused it to be issued and used,—as two offenses are charged. *Id.*

10. No matter, however **multifarious**, will operate to make a count double, if they constitute but one connected charge or transaction provided that in no view can they be regarded as more than one offense. Authorities cited. *Id.*

619

11. When a crime may be committed in **different ways**, in contemplation of law the ways are the same act, and the count charging this commission in **all the ways** is not double. Authorities cited. *Id.*

12. A complaint, under Pub. Laws, chap. 590, § 8, charging that defendant did "offer to sell, sell, and suffer to be sold," is not bad for **duplicitv**.

State v. Nolan (R. I.)

758

13. Where several **cognate acts** are forbidden disjunctively, the complaint or indictment may ordinarily charge them all **conjunctively** in a single count. Authorities cited. *Id.*

754

14. Cases in which counts **charging distinct acts** have been held not to be bad for **duplicitv**. Authorities cited. *Id.*

755

III. MOTIONS; PLEAS.

15. A motion to **quash** is addressed to court's discretion, and its refusal is not reversible.

State v. Stewart (Vt.)

878

16. A plea of **prior conviction** of an offense which is part of offense charged in later indictment is sufficient on demurrer.

State v. Locklin (Vt.)

808

17. An allegation of prior conviction, in complaint, for search and seizure, alleging that respondent had been convicted of unlawfully keeping intoxicating liquors with intent that same should be sold in violation of law, is sufficient.

State v. Howley (Me.)

897

IV. ARGUMENT.

18. Under Gen. Stat. p. 61, § 9, each party may occupy two hours in argument without previous request to the court.

State v. Nyman (Conn.)

785

19. It is immaterial whether such time shall be occupied by one counsel or by two; and if by two, whether in equal or unequal proportions. The practice is to **divide the time** into unequal portions by **agreement** between themselves. *Id.*

BRIEFS AND NOTES.

Ignorance of law is no defense against criminal act; but ignorance of any fact that is an essential part of criminal act is always an excuse. (Vt.)

518

One acting through an ignorant instrument is guilty as **principal**. (Mass.)

58

Indictment; statutory language. (Vt.)

618;

(R. I.)

755

Allegation as to time of commission of offense must be certain. (Me.)

553

Joinder of felony and misdemeanor. (Vt.)

383

Accusing in general terms is uncertain. (Vt.)

113

Repugnancy. (Vt.)

618

Grand jury. (Me.)

406

Allegation of **prior conviction; defenses**. (Me.)

397

Prior conviction of offense which is part of offense charged in later indictment is barred. (Vt.)

808

Nolle prosequi alone will not operate as an acquittal. (Mass.)

310

Argument; length of time for. (Conn.)

737

CUSTOMS DUTIES.

Customs duties, under statutes enacting that certain duties shall be levied, collected, and paid on imported goods, are personal debts of importers, **recoverable** by the government in **common-law actions**, without previous assessment. Authorities cited.

Boody v. Watson (N. H.)

559

DAMAGES. See BAILMENT; EMINENT DOMAIN; FALSE IMPRISONMENT; LIBEL AND SLANDER; LIVERY-STABLE KEEPER; MASTER AND SERVANT; NEGLIGENCE; NUISANCE, 4, 6; RAILROAD COMPANIES, 1-8; REPLEVIN, 8; SEDUCTION; VOTES AND ELECTIONS, 2; WATERS AND WATER-COURSES, 21; WHARVES.

Upon an action for damages by plaintiff to property and business, the evidence tended to show a **joint interest** of plaintiff and his son in the business damaged. *Held*, it was error for the court to rule that the plaintiff could recover the full damages, and to refuse to submit the **question of the joint interest to the jury**.

Furnum v. Howell (Vt.)

899

BRIEFS AND NOTES.

Measure of damages for breach of contract. (Mass.)

253

DAMS. See MILLS AND DAMS.

DEBT. See JUSTICES OF THE PEACE, 2.

DEBTOR AND CREDITOR. See ACCORD AND SATISFACTION; ACCOUNT; ARREST; ASSIGNMENT; ASSIGNMENT FOR BENEFIT OF CREDITORS; ATTACHMENT; ATTORNEY AND CLIENT, 8; BANKRUPTCY; CHECK; CORPORATIONS, 8; EXECUTION; INSOLVENCY; SUBROGATION.

One cannot be made a debtor, whether he will or not, for **gratuitous services.**

State v. Village of St. Johnsbury (Vt.) 894

DECEDENTS' ESTATES. See DESCENT AND DISTRIBUTION; DEVISE AND LEGACY; EXECUTORS AND ADMINISTRATORS; WILL.

DECLARATIONS. See EVIDENCE, III.

DEDICATION. See ROADS AND HIGHWAYS, I.

DEED.

I. IN GENERAL; VALIDITY.

II. CONSTRUCTION.

a. *In General.*

b. *Estate Granted; Easement.*

c. *Reservations; Conditions.*

BRIEFS AND NOTES.

See BOUNDARY; CHARITIES AND CHARITABLE USES; COVENANT; EASEMENT; HUSBAND AND WIFE, III.; MILLS AND DAMS, 1; MORTGAGE, I.; PARENT AND CHILD, 1; VENDOR AND PURCHASER.

I. IN GENERAL; VALIDITY.

1. When a **grantor's mental incapacity** is only by "spells," and the deed is not lacking consideration, nor obtained by fraud, the **burden of proving incapacity** is on party claiming that the deed is invalid.

Stewart v. Flint (Vt.) 120

2. Where the master found that **grantor**, at time of conveyance, was **neither wholly incompetent**, nor, unaided, fully competent to understand the nature of the transaction, but thought that, under proper advice, which it did not appear she had, she could have understood it, and have had papers drawn that would have effectuated her intentions, the court refused to set aside the deed; and this, although grantor intended to take back an obligation for her support during life, secured on the farm conveyed, but by mistake got only a life lease. Taft and Rowell, *JJ.*, dissent. *Id.*

3. **Marriage is a good consideration** for a deed.

Gibson v. Bennett (Me.) 412

4. A deed executed and recorded, if not delivered, will convey no title.

McGraw v. McGraw (Me.) 415

5. A deed cannot be reformed in an action at law.

Winnepisiogee Paper Co. v. Eaton (N. H.) 395

II. CONSTRUCTION.

a. *In General.*

6. In construing a deed, **every word** and

clause should be **given some force** and meaning, so far as possible.

Robinson v. Missisquoi R. R. Co. (Vt.) 891

7. Where it is doubtful what the construction should be, **resort may be had to the circumstances.** *Id.*

8. When future support is secured by a conditional deed or mortgage, and no place is designated where the support is to be furnished, the **person to be supported has the right to choose where he will live.**

Young v. Young (Vt.) 907

9. Where such deed or mortgage is **ambiguous** and refers to a former agreement, **parol evidence** is admissible to prove where the support is to be furnished. *Id.*

10. A deed of one half-part of premises upon which valuable mineral substances may be discovered, which grantees may deem proper to open and improve on said half, is in effect an **agreement for one half the minerals, with the right to operate.**

Rowell v. Bodfish (Me.) 771

11. A conveyed to B an undivided half of land "which was conveyed" in a certain deed, describing it. A at the time held title of other half through a different conveyance. **Held**, B took the title derived through the conveyance named, though that was incumbered by mortgage.

Bailey v. Knapp (Me.) 280

12. The owners of land platted it into lots with streets. A purchased one of the lots by reference to the plat. At the time of purchase the street was closed by a gate, though the plat showed it unobstructed. A removed the gate, whereupon B, a purchaser of lots adjoining A's, restored the gate. **Held**, A was entitled to an injunction enjoining B from maintaining the gate.

Chapin v. Brown (R. I.) 918

13. Other streets on the plat were obstructed by fences, but it did not appear that A would have occasion to use these streets. **Held**, that as to these streets he might be properly left to his remedy at law. *Id.*

b. *Estate Granted; Easements.*

14. **Implications do not add to extent of grant** as expressed in deed.

Fiske v. Wetmore (R. I.) 794

15. When one accepts a deed bounding him by another's land, **land referred to in deed becomes a monument**, and will control distances.

Bryant v. Maine Cent. R. R. Co. (Me.) 418

16. Where descriptive words of a grant are wholly unambiguous and are followed by a repugnant clause, the second clause is to be rejected. A **mistake in detail will not control the general and perfect description.** Authorities cited.

Birch v. Hutchings (Mass.) 636

17. Where the granting part of a deed would convey a fee, and to the description clause was added the clause, "for the use of a plank road,"—**Held**, the last clause was a **limitation upon the grant**, and that only an **easement was conveyed.**

Robinson v. Missisquoi R. R. Co. (Vt.) 891

18. A conveyance of a sawmill with privilege of occupying land in front of mill sufficient for timber yard adjacent thereto grants only an **easement** in the mill yard.

Cross v. Pike (Vt.) 804

c. *Reservations; Conditions.*

19. Grantor may **reserve** to himself and wife a **life estate** in premises.

Watson v. Cressey (Me.) 672

20. Grantee takes a vested remainder by such a deed, and he may **convey before termination of life estate**.

Id.

21. **Reservation can not create an easement** in a stranger.

Murphy v. Lee (Mass.) 202

22. Where plaintiff's deeds contained the words "there is a passageway on the southeasterly side of the said premises, which is to be used in common with the abutters thereon," they do not necessarily include defendant's land.

Id.

23. Where owner of water rights conveyed right to take water from dam to mill site below, except a single use in a certain time, which, by reference, was fully defined in reserving clause in deed,—the **reference in the exception to language in the reservation made it a part of the exception**.

Gage v. Barnes (N. H.) 891

24. The City of Boston caused land on Tremont Street, which it owned, to be divided into building lots. A **condition** in deeds conveying the lots, that "the front line of the building which may be erected on the said lot shall be placed on a line parallel with, and ten feet from, the said Tremont Street," is a **valid restriction** which plaintiff can enforce.

Hamlen v. Werner (Mass.) 288

25. A **condition** in a deed making a gift of land to an academy, that when the land should for two years together cease to be used as a **location for a schoolhouse**, etc., it should revert to grantor and his heirs, is not broken by a conveyance by grantees to a school district, and the establishment, by the district, of a public school in the schoolhouse erected thereon; or by the **failure**, for two years together, to **keep any school** in such schoolhouse.

Gage v. School Dist. No. 7 (N. H.) 284

26. It is not important that a witness to an entry upon land for **condition broken** knows the purpose of it.

Dugan v. Thomas (Me.) 291

BRIEFS AND NOTES.

Parties; mental capacity; undue influence. (Vt.) 120, 121

Consideration. (Mass.) 451

Valuable; defined. (Me.) 412

Want of. (Me.) 416

Delivery; presumption. (Me.) 412

Essential. (Me.) 416

Prima facie evidence given to execution and delivery. (Me.) 155

Record; notice. (Me.) 149, 150

N. E. R., V. IV.

Possession must be open, unequivocal, and apparently by virtue of an unrecorded deed to be equivalent to registry. (Me.) 149

Construction; intention of parties. (Mass.) 234; (Vt.) 804

In cases of doubt, construed most favorably to grantees. (Me.) 776

General terms yield to specific. (Vt.) 892

Actual use of premises under doubtful deed is often regarded as practical construction. (Mass.) 254

Effect to be given to all phrases and language. (Vt.) 892

Support secured by deed; parol evidence is admissible to show where the support was to be afforded. (Vt.) 906

Habendum determines the estate granted. (Vt.) 893

Boundaries. (Me.) 418

Easements. (Mass.) 202, 203; (Vt.) 804

Such as right of way may be created by reservation. (Mass.) 208

Restrictions. (Mass.) 236

Forfeitures, for condition broken, not favored. (Me.) 281; (N. H.) 284

DEFINITIONS.

1. Accident.

Kopper v. Dyer (Vt.) 369

2. Accord and satisfaction.

Burgess v. Denison Paper Mfg. Co. (Me.) 398

3. Agency.

Noyes v. Landon (Vt.) 725

4. **Bona fide** holders. *Id.* 726

5. Debt.

Bullock v. Town of Guilford (Vt.) 363

6. Due process of law.

Bartlett v. Wilson (Vt.) 119

7. Infamous crime.

State v. Nolan (R. I.) 754

8. Net earnings.

Haseltine v. Belfast & M. L. R. R. Co. (Me.) 706

9. Transient person.

Town of Rockingham v. Town of Springfield (Vt.) 374

BRIEFS AND NOTES.

Accommodation bill. (Me.) 677

Capital stock. (Me.) 680

Charity. (Conn.) 830

Choses in action. (Me.) 501

Conspiracy. Note, 378; (Vt.) 379

Constructive notice. (Conn.) 837

Discovery. (Mass.) 234

District. (Conn.) 559

Domicile. (Vt.) 373

Equitable notice. (Conn.) 836

Estoppel in pais. (Me.) 407

False imprisonment. (Mass.) 250

Heirs. (Mass.) 44, 463

Judgment. (R. I.) 109

Law. (Vt.) 896

Libel. (Mass.) 51

Negligence. (Me.) 773

Next of kin. (Mass.) 43

Receipt. (Conn.) 89

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Valuable consideration. (Me.)	412
Waiver. (Me.) 502; (Mass.)	818
Watercourses. (Me.)	407

DEMURRER. See EQUITY, 22; PLEADING, 12-14.

DEPOSITION.

On the taking of a deposition, one making a general objection to a part of an interrogatory cannot, on trial, enlarge his objection to include the whole.

Baldwin v. Doubleday (Vt.) 124

BRIEFS AND NOTES.

Discretion of court as to admission of depositions taken out of State. (Me.) 788

DESCENT AND DISTRIBUTION.

1. Section 8 of statute provides for cases where property comes to a man's children under settlement, trust deed, or will; and establishes a rule governing rights of adopted children in such cases.

Wyeth v. Stone (Mass.) 462

2. By Pub. Stat. chap. 148, § 7, an adopted child will take the same share of property which the parent owns, but he cannot take property which would come to a natural child by right of representation. *Id.*

3. He can inherit directly from parents, but he can not inherit in lieu of them. *Id.*

4. Under said statute, the term "child," in a grant, trust, settlement, or devise will include a child adopted by the settlor, grantor, or testator, unless the contrary plainly appears. *Id.*

5. Where the settlor, etc., is not the adopting parent, the adopted child will not have the right of a child born in lawful wedlock to the adopting parent, unless the intention plainly appears. *Id.*

6. When a legal and an equitable estate in realty, coming through different persons, unite in the same holder, the legal estate determines whether the holder has an ancestral estate, under R. I. Pub. Stat. chap. 187, § 6.

Shepard v. Taylor (R. I.) 751

7. A devised to his son B, in trust for his son C, realty, giving B power to appoint a successor in the trust, and to convey the realty to C or his heirs when B might think proper. C died, and his son, C, junior, inherited the equitable estate. B conveyed the legal title to C, junior, and C, junior, died under age and without issue. *Held*, the legal title did not come to C, junior, by descent, gift, or devise; that the estate of C, junior, in the realty was not an ancestral estate; and that the mother of C, junior, inherited the realty from him. *Id.*

8. Where a legatee under a will providing that, in case legatee should die before testatrix, the sums given to him should go to those persons. E. R., V. IV.

sons living at the time of testatrix's death who shall be next of kin, died in testatrix's lifetime, leaving as next relations a brother and three nephews, sons of another brother, all of whom survived testatrix, the legacy was payable, under the words "next of kin," to the brother.

Swasey v. Jaques (Mass.) 43

BRIEFS AND NOTES.

Next of kin. (Mass.) 43, 172

Adopted child. (Mass.) 403

DEVISE AND LEGACY.

I. CONSTRUCTION; GENERAL RULES.

II. BENEFICIARY; DISTRIBUTION.

III. ESTATE GRANTED; ABSOLUTE.

IV. LIFE ESTATE; LIMITATIONS; POWERS, ETC.

V. DEMONSTRATIVE.

VI. EXECUTORY; CONDITIONAL; CONTINGENCY.

VII. RESIDUARY.

VIII. TRUST.

IX. WIDOW.

X. ADEPTION; ASSIGNMENT; AFTER-ACQUIRED PROPERTY.

XI. INTEREST.

BRIEFS AND NOTES.

See CONFLICT OF LAWS, 8; WILL.

I. CONSTRUCTION; GENERAL RULES.

1. To a bill for the construction of a will, an attaching creditor is not a necessary party.

Phelps v. Phelps (Mass.) 188

2. Testator's intention, as collected from the entire will, is the criterion for interpretation. Authorities cited. *Id.* 188

Emery v. Union Soc. (Me.) 542

3. All the clauses of the will must be construed together, and the intention of testator must prevail unless it is in conflict with some fundamental principle of law.

Randall v. Josslyn (Vt.) 909

4. Where construction of a clause is difficult on account of meagre or contradictory phraseology, the true meaning of testator may be sometimes ascertained by examining other provisions.

Towle v. Delano (Mass.) 178

5. A court can not speculate on motives which might have governed testator. *Id.*

6. The time when and the circumstances under which a will was made may be considered in the construction of the will.

Staigg v. Atkinson (Mass.) 851

7. If the reading of the whole will produces a conviction that testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication. Authorities cited.

Phelps v. Phelps (Mass.) 187

8. The presumption is that the testator

did not intend to leave any part of his estate undisposed of. Authorities cited. *Id.*
Warner v. Willard (Conn.) 487

II. BENEFICIARY; DISTRIBUTION.

9. A legatee may take by a reputed name.

Vermont Baptist State Conv. v. Ladd's Est.
 (Vt.) 874

10. A will devised remainder of estate to testator's adopted daughter in her own right; but, if she died without issue before death of testator's wife, then it devised such remainder to heirs at law of said wife. The adopted daughter died without issue before wife's death. The wife had no natural children, but, after testator's death, she adopted defendant, who survived her. *Held*, as testator was not the adopting parent, the burden is upon defendant to show that it was his intention to include an adopted child.

Wyeth v. Stone (Mass.) 463

11. Testator gave portions of his estate to his son, a grandson, and two grand-daughters, and provided that if either should die without issue, his or her share should go to others. *Held*, the term "dying without issue" meant so dying before testator's death, and that, as legatees survived testator, they each took an absolute estate.

Coe v. James (Conn.) 591

12. A will gave, after death of testator's wife, all the estate to the children of a nephew and the children of a niece, to be equally divided between said children, and directed if either of said children should die and leave lawful issue, such issue should stand in place of deceased parent. *Held*, legatees took per stirpes.

Lockwood's Appeal (Conn.) 579

III. ESTATE GRANTED; ABSOLUTE.

13. Where testator gave his wife the use of his real estate during life, and then, after giving some legacies, gave residue of his estate, after payment of debts, to his wife,—*Held*, she took fee of real estate.

Warner v. Willard (Conn.) 487

14. Testator, after giving small sums to each of his heirs, devised one half of his estate to widow during widowhood, and the other half to a daughter, and remainder in half given widow to same daughter. *Held*, the daughter took a fee in whole estate, subject to devise to widow.

Bromley v. Gardner (Me.) 489

15. A will, after disposing of part of estate, gave testator's wife the residue, "for her benefit and support, to use and dispose of as she may think proper," and then provided if any of the estate should be left, at her death, in her possession, it should be equally divided between testator's brothers and sisters. *Held*, the wife took an absolute estate, and the remainder over was void for repugnancy.

Stowell v. Hastings (Vt.) 184

16. The decree of the probate court, unappealed from, ordering the executor to pay N. E. R., V. IV.

the residue to the residuary legatee, "in accordance with the will," did not settle the question whether she took an absolute estate or one for life. *Id.*

17. If an estate be given generally or indefinitely, with an absolute power of disposition, it carries a fee, and a remainder over is void for repugnancy. Authorities cited. *Id.* 185

18. Where an absolute estate is in terms given, if subsequent passages unequivocally show testator meant legatee to take a life interest only, the prior gift is restricted accordingly. Authorities cited. *Id.*

19. A testatrix first devised her whole estate, a farm, to her husband, then provided that he should have a life support on farm, and that another should receive his support from the farm, "in accord with a former agreement," when there was no such agreement; she then attempted to make some provision for gravestones for herself and husband, and finally ordered that still another have the residue upon a certain contingency. *Held*, the husband took the estate in fee, subject only to debts.

Wallace v. Hawes (Me.) 147

IV. LIFE ESTATE; LIMITATIONS; POWERS, ETC.

20. A devise prior to Maine Statutes of 1841, without words of inheritance, gave only a life estate, unless it could be gathered from whole will that a fee was intended.

Bromley v. Gardner (Me.) 489

21. A beneficiary under a will, entitled to a life support out of an estate held by a trustee, can not mortgage the estate.

Barnes v. Dow (Vt.) 717

22. A mortgage executed by such beneficiary and the remainderman is valid only as against the latter, except so far as it secured money used in paying debts resting on the estate. *Id.*

23. Testator gave a life support to his sister, and secured it by a devise in trust to his executor, and remainder to D. The legatees executed a mortgage of trust property to H to secure a note for money, a part of which was used in paying the debts of the estate. *Held*, that H, having notice of the trust, was not an innocent purchaser; that he could not invoke the doctrine of subrogation; and that the beneficiary could not alienate the trust property, but that the mortgage should stand security for so much of the money as went to pay the debts of the estate. *Id.*

24. Estates limited in default of appointment by devise for life are to be considered as vested in tenants in remainder during the continuance of the power of appointment, subject to be divested by the execution of the power.

Grosvenor v. Bowen (R. I.) 760

25. The devisee for life, having the power of appointment, may release it to the tenants in remainder, or may extinguish it by joining with them in a deed of the property; and such deed will convey the fee. *Id.*

26. The objection that a limitation over is an attempt to take away one of the incidents of ownership does not apply to a remainder after a life estate, even when the life estate is coupled with a power.

Welsh v. Woodbury (Mass.)

256

27. The objection to the uncertainty of the subject of the limitation over never has been applied to a life estate coupled with a power.

Id.

28. Where testator's wife took a life estate coupled with a power, and the limitation over was to his sister, the legacy to his sister passed to her administrator upon her death before death of life tenant.

Id.

29. Testator gave his widow the residue of his estate, to use so much as, in her judgment, she needed; and at her death he gave the remainder to his children. *Held*, that a judgment recovered by administrator *o. t. a.* in the Alabama claims, should pass to widow's use.

Pierce v. Stidworthy (Me.)

498

V. DEMONSTRATIVE.

30. Certain legacies to testator's children, — *Held*, to be demonstrative and not specific, and that by the terms of the will they must be paid in full.

Bradford v. Brinley (Mass.)

869

VI. EXECUTORY; CONDITIONAL; CONTINGENT.

31. An executory devise of real estate cannot be barred by any method of alienation.

Randall v. Joselyn (Vt.)

909

32. Testatrix bequeathed her estate to her son provided he die leaving issue who could inherit from him, and in failure of such issue to her nephew and his heirs. *Held*, this was an executory devise, and that the son took a conditional estate only, subject to be defeated by his death without children or their descendants surviving him.

Id.

33. Where a devise over depends upon a definite failure of issue at the decease of the first devisee, an estate in fee simple with an executory devise is created. Authorities cited. *Id.*

911

34. Under a devise by which testator gave residue of his property in trust to pay income to widow during life, and at her death to pay and convey to his children the trust property in equal proportions, the issue of any deceased child to take their parent's share, testator's children took interests which vested at his death.

Dodd v. Winship (Mass.)

851

35. It was testator's intention by such devise to create a condition subsequent, that if any child died before the widow, leaving issue, such issue should take as substituted legatees. The children took vested estates liable to be divested. They could assign, but assignee would take subject to same contingency.

Id.

36. If trustees negligently allowed a child to appropriate part of fund, it is a breach of trust.

Id.

N. E. R., V. IV.

37. Testator gave the use and income of his property to his wife during life, she to retain possession during widowhood or life. The property was placed in her possession for the family, and for the education and support of a daughter, and in trust for a son, and she was authorized to dispose of real estate, and was constituted trustee for son during life or widowhood, with a provision that after death or marriage the trusteeship might be continued by court of probate, and property divided. *Held*, the widow took all the estate during life, or so long as she remained a widow, in trust to apply income, and a portion of the principal, to the support of the family; and she might be required to give bonds. Expenses in recovering a portion of the estate, and in an amicable action for construction of the will, should be paid from estate.

Simons v. Simons (Conn.)

582

38. A will devised shares of estate to nephews, and provided that if any should die during life of their mother, leaving issue, such issue should be entitled to one share of estate by representation. *Held*, nephews' interests became vested on testator's death, although subject to be divested by contingency of death of either, during mother's life, leaving issue; and that such interests were assignable during mother's life.

Lenz v. Prescott (Mass.)

419

39. Testator devised to his wife, during life, income of investments, with direction that at her death income be equally divided between his sisters and two nieces so long as they remain unmarried, and that, at death of such relatives, whatever remained of such investments to be turned over to a certain church society. *Held*, the wife having died before testator, testator's sister and nieces took income of entire estate; that marriage would only affect rights of one marrying; that devise to church society was not void for uncertainty; and that one third of his estate vests in church society on marriage or death of each such relative.

King v. Grant (Conn.)

812

40. In a cause directing the payment of an annuity to mother of testator's two daughters during life, and to said daughters "so long as both they and their said mother shall all live," it is impossible to supply the words "during their respective lives," where the subsequent clause provides for the contingency of one daughter dying before the mother.

Toole v. Delano (Mass.)

178

41. Where the clause also provides that upon death of one daughter there shall be paid to the children of her body, or child of her body, if but one, and if more than one in equal shares, \$10,000; but that if such daughter shall not leave a child living at her death, testator's brother shall retain said \$10,000 to his own use; and at the time a suit in equity was brought for the sale of certain lands for the payment of the charges and annuities created by the will, the mother had died leaving one of the daughters, a widow aged 51 years, with living issue, and the other daughter

ter unmarried, aged 58 years and 9 months, without issue,—it was directed that \$10,000 should be set aside to be paid to children of widowed daughter at her decease, but that neither she nor her sister should receive the annuity after death of mother, and that a further \$10,000 should be set aside for future children of unmarried daughter should she leave issue, and that sufficient lands should be sold for these purposes. *Id.*

VII. RESIDUARY.

42. In such a case proceeds of sale go to residuary legatee, in absence of any specific provision in relation thereto.

Emery v. Union Soc. (Me.) 538

43. A general legatee is entitled to everything which turns out not to be disposed of. Authorities cited. *Id.* 542

44. Testator may, by terms of bequest, narrow title of residuary legatees so as to exclude lapsed legacies. Authorities cited. *Id.*

VIII. TRUST.

45. A gift for the support of another creates a trust.

Phelps v. Phelps (Mass.) 188

46. A will contained the following: "After deducting the above donations, gifts, and provisions, one half of the income of the remainder of my property I give to my son H, for the support of himself and family,—at his decease to be disposed of to his legal heirs as he shall desire or direct, by will or other ways. The income of the other half of my estate, after deducting as above provided, is to be given to my son J, for the support of himself and son W (the support of the son shall be as the father shall elect). One half of this half of my estate is to be disposed of at the decease of my son J, to his heirs, as he shall direct, etc. The other half of the same, which my son J is to receive the income from, shall go to my grandson W, provided said executors, or a majority of them, at the decease of my son J, shall judge said grandson to be a person of good habits and capable of managing, etc.; if not, it is to go to my legal heirs." *Held:*

(a) That the executors, by the provisions of said will, are vested with the title to the real, and to hold the personal, property subject to the trust.

(b) That the "donations, gifts, and provisions" are not to be deducted as they become due and payable. *Id.*

47. A provision that the grandsons should have a college education, and that the executors should pay each of them annually, while in college, a certain sum,—*Held*, to indicate an intention to give the executors the estate in trust. *Id.*

48. Power to sell all the estate, and invest the proceeds gives estate in trust. *Id.*

49. The executors become trustees during the time it is necessary for them, under the terms of the will, to act in that capacity. *Id.*

50. Power to create a trust for a specified purpose does, in some sort, impair the N. E. R., v. IV.

power to alienate property. Authorities cited.

Barnes v. Dow (Vt.) 721

51. If it appears from the will that it was testator's intent that beneficiary should have nothing that he could dispose of, it will be as effectual to protect the trust as if there was an express clause against alienation. Authorities cited. *Id.*

IX. WIDOW.

52. A will made in a State where a gift to the wife would be in addition to dower unless the contrary was expressed does not acquire a new meaning upon the subsequent removal of testator into a State where testamentary gifts are in lieu of dower, unless shown to be in addition to it.

Stagg v. Atkinson (Mass.) 851

53. A statute compelling a widow to elect between her dower and the provision in a will does not affect lands outside of the State. *Id.*

54. A widow's dower in lands in Minnesota is bound to contribute to the payment of debts secured by mortgage upon Massachusetts lands of her deceased husband, where they were both domiciled in Massachusetts at his death, and where, by the Minnesota statute, such dower is made subject to the payment of such debts as are not paid from the personality. *Id.*

55. Testator's general direction to pay debts does not indicate an intent to charge the interests passed by the will in exoneration of such dower interest, even as to general residuary devisees. *Id.*

X. ADEMPMENT; ASSIGNMENT; AFTER-ACQUIRED PROPERTY.

56. Ademption. A devise is broken by sale of real estate by testator in his lifetime.

Emery v. Union Soc. (Me.) 538

57. The probate court does not take cognizance of assignments, by legatees or distributees, of their interests, and a bill in equity may be maintained to ascertain the validity and construction of such an assignment.

Lenz v. Prescott (Mass.) 419

58. Unless testator clearly manifested his intention that his will shall speak of the day of its execution, all after-acquired real estate will pass under the devise.

Dickerson's Appeal (Conn.) 742

59. Where a will made in 1856, testator dying in 1885, contains a devise of all real estate within specified geographical territory to one, of all else in the world to others, the bequests exhaust all possibilities of ownership, and the will speaks for the testator as of the moment of his death; and the bequests include all the real estate owned by him at his death. *Id.*

XI. INTEREST.

60. Legacies cannot earn interest which will enure to the benefit of the legatees, before the time specified in the will for the payment of the legacies or of their income.

Phelps v. Phelps (Mass.) 183

61. Legacies payable at a certain time do not bear interest until that time arrives. Authorities cited. *Id.* 189

BRIEFS AND NOTES.

Rule for **construction**. (Mass.) 180
Intention of testator. (Conn.) 467, 582; (Me.) 489; (Mass.) 180, 186, 284
Intention to be gathered from will alone. (Me.) 499

Parol evidence to show intention; when admissible. (Me.) 490

Lex loci rei sita governs as to construction of will; existence of will determined as to real estate by *lex loci*. (Mass.) 851

Presumption of law is against partial intestacy. (Conn.) 467; (Me.) 589; (Mass.) 186

In a carefully drawn will the words are looked to for intent. (Conn.) 579

Express devise cannot be controlled by subsequent ambiguous words. (Conn.) 467

Supplying defects by implication. (Mass.) 186

Deduction from legatee's share of amount wrongfully appropriated by prior holder of share. (Mass.) 853

"Relations" is construed to mean statutory next of kin. (Mass.) 44

"Dying without issue." *Notes*, (Conn.) 591

Disinheritance of heirs at law. (Conn.) 584

"Heirs at law" defined. (Mass.) 44, 463

When distribution **per stirpes**, and when **per capita**. (Conn.) 579

Life estates. (Conn.) 584; (Me.) 490 (Mass.) 180, 853; (Vt.) 185

Limitations. (Mass.) 257

Remainder. (Mass.) 463

Life estate; remainders. (Mass.) 186

Tenant for life, rights to custody of property. (Me.) 499

Power to life tenant to appoint or charge estate to or for children may be released. (R. I.) 700

Extinguishment of power of appointment by conveyance of life estate. (R. I.) 760

Vested and contingent interests. (Mass.) 421

Contingent fee in connection with life estate. (Conn.) 584

Vested remainders. (Mass.) 853

Alienation; subject to contingent interests of grandchildren. (Mass.) 853

Devise to wife during life or widowhood. (Conn.) 582

Final vesting of personal property postponed. (Mass.) 258

Executory devise; conditional estate. (Vt.) 909

Demonstrative and specific legacies. (Mass.) 873, 874

Gift of part of a specific fund is specific. (Mass.) 873

Trusts. (Me.) 490

Certainty. (Mass.) 185-187

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No particular form of words is necessary to create trust. (Conn.) 583, 584

Charity defined. (Conn.) 820

Power of sale. (Mass.) 258

Devise of residue of lands to **residuary legatees** does not entitle them to hold it free from incumbrance. (Mass.) 852

Devises and legacies falling for any reason go to residuary fund. (Me.) 589

Ademption. (Me.) 539

Distinctions between real and personal estate in respect to revoked or **lapsed legacies** or devises abolished by statute. (Me.) 539

Provision in lieu of **dower**; election. (Mass.) 851

Election may be implied from actions. (Mass.) 853

After-acquired property. (Conn.) 744

Probate courts not take cognizance of **assignment of interests**. (Mass.) 420

DISCONTINUANCE. See **ROADS AND HIGHWAYS**, III.

DISCOVERY.

1. A bill in **equity** for discovery only is within the jurisdiction of the court.

Post v. Toledo, C. & St. L. R. R. Co. (Mass.) 221

2. A creditor who has obtained judgment in Ohio against a railroad corporation of that State may file a bill in Massachusetts against the officers and the majority of the board of directors of the corporation, who reside in Boston—all the stockholders being nonresidents of Ohio—to compel a **discovery** of the names of **stockholders liable**, under **Ohio Laws**, to contribute toward the payment of plaintiff's judgment, and of the amount of stock held by each, so far as these appear on the books of the corporation. *Id.*

3. A bill will lie **against a corporation and its officers** to compel a discovery from the officers to aid a party in maintaining or defending a suit brought against the corporation alone. Authorities cited. *Id.* 227

BRIEFS AND NOTES.

Definition. (Mass.) 224

Equity jurisdiction. (Mass.) 223

When **granted** as a sort of relief. (Mass.) 223

Rules that discovery may not be had from witness. (Mass.) 223

Not confined to evidence. (Mass.) 223

No objection to aiding a suit against stockholders. (Mass.) 224

DISORDERLY CONDUCT. See **BREACH OF THE PEACE**.

DISORDERLY HOUSES. See **BAWDY AND DISORDERLY HOUSES**.

DISSOLUTION. See **CORPORATIONS**, 10.

DIVORCE. See **HUSBAND AND WIFE**, V.

DOMICILE.

1. So far as the right or liability to be

taxed depends upon domicile, it is an incident of domicile.

Pickering v. City of Cambridge (Mass.) 47

2. A change of domicile to avoid taxation must be actual change of home. A mere intention in the mind to make the change is not sufficient. *Id.*

3. Evidence that plaintiff declined to accept a nomination for the common council of Cambridge, "on the ground that he had no connection with or interest in the affairs of Cambridge," is too remote to show that he afterwards actually abandoned his domicile in Cambridge. *Id.*

4. Declarations of plaintiff in his own favor, to persons not representing either the city of his past or the place of his future domicile, are inadmissible so far as they are statements of a past fact. *Id.*

BRIEFS AND NOTES.

Definition. (Vt.) 373
Once existing continues until another is acquired. (Vt.) 373
Change of; intention. (Mass.) 48

DRAINS AND SEWERS. See EASEMENT, 8, 4; WATERS AND WATERCOURSES, 18-22.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 15.

EASEMENT. See DEED, II. 6, 21.

1. Whoever grants a thing is understood also to grant that without which the grant itself would be of no effect. Authorities cited.

Boody v. Watson (N. H.) 568

2. A reservation in a deed can not create an easement in a stranger.

Murphy v. Lee (Mass.) 202

3. In absence of prescription, one cannot use a natural watercourse through land of another for carriage of house or stable drainage; and same rule applies to use of drain substituted for such watercourse.

Pike v. Wetmore (R. I.) 794

4. In a grant of a right of drainage "in and through" a certain private way, the right of drainage to an outlet beyond the way is not conferred as an incident to easement granted. *Id.*

5. Where owner of land subjects one part of it to accommodations resembling continuous easements, for another's benefit, such accommodations, by conveyance of servient parts, become continuous easements for benefit of other part. Authorities cited. *Id.* 796

6. Abuse of prescriptive right does not create forfeiture of right.

Masonic Temple Assn. v. Harris (Me.) 407

BRIEFS AND NOTES.

When a personal right. (Mass.) 208
Creation by deed. (Mass.) 203
Acquisition. (Mass.) 208
By prescription. (Me.) 407
Encroachment upon quiet enjoyment prevented by injunction. (Me.) 407

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Extinguishment by parol. (R. I.) 740

EJECTMENT. See WATERS AND WATERCOURSES, 8, 4.

ELECTION. See VOTERS AND ELECTIONS.

EMINENT DOMAIN. See CEMETERIES; MUNICIPAL CORPORATIONS, IV.; RAILROAD COMPANIES, 1-3; ROADS AND HIGHWAYS, II.

Upon dismissal of a petition for assessment of damages for land taken by Providence for a park, under Laws 1884, chap. 431, the city is entitled to costs.

Aldrich v. City of Providence (R. I.) 732

BRIEFS AND NOTES.

Right of. (Mass.) 195
Title taken. (Mass.) 195
Evidence as to value of land taken. (Mass.) 326
Costs. (R. I.) 753

EQUITY.

I. IN GENERAL; JURISDICTION; LIMITATIONS.

II. MISTAKE; FRAUD.

III. PARTIES; PLEADING; PRACTICE.

BRIEFS AND NOTES.

See ACCOUNT; CONTRIBUTION; CORPORATIONS, 7; DISCOVERY; INJUNCTION; SET-OFF AND COUNTERCLAIM; SPECIFIC PERFORMANCE.

I. IN GENERAL; JURISDICTION; LIMITATIONS.

1. The jurisdiction which courts of equity exercise as ancillary to that of other courts is not confined to courts of the same State.

Post v. Toledo, C. & St. L. R. R. Co. (Mass.) 221

2. Equity has jurisdiction, although there is pending in the county court, on appeal from the probate court, a cause between the same parties and involving the same accounting.

Barnes v. Dow (Vt.) 717

3. A bill may be maintained where the same is a reasonably necessary process and convenient procedure for speedily and economically establishing plaintiff's rights.

Tasker v. Lord (N. H.) 157

4. Equity will protect a person acting under its process in the execution of a decree or decretal order, against suits at law, and will compel parties to apply to it for relief. Authorities cited.

Lyman v. Central Vt. R. R. Co. (Vt.) 730

5. Courts of equity act in analogy to Statute of Limitations. Authorities cited.

Hollister v. York (Vt.) 306

II. MISTAKE; FRAUD.

6. Accident defined.

Kopper v. Dyer (Vt.) 309

7. Equity has jurisdiction to correct mis-

takes in policies of insurance. Authorities cited.

Palmer v. Hartford F. Ins. Co. (Conn.) 474

8. Equity may reform a contract where there has been an omission of a material stipulation by mistake. Authorities cited. *Id.* 478

9. Where one has acted in ignorance of facts merely, equity will not afford relief, where actual knowledge could have been obtained by diligence and inquiry. Authorities cited.

Durkee v. Durkee (Vt.) 184

10. A bill charging that the debt for which complainants recovered judgment was contracted by defendant under an assurance on her part that she would pay it out of her dower right, and that she fraudulently refrains from having her dower assigned so that complainants shall not levy their execution upon it, does not charge such fraud as gives jurisdiction in equity.

Mason v. Gray (R. I.) 597

11. Mere inaction, where there is no legal duty to act, is not cognizable as fraud in equity, whatever motives may influence the nonacting party. *Id.*

III. PARTIES; PLEADING; PRACTICE.

12. It is not indispensable that all parties should have an interest in all matters contained in the suit.

Lens v. Prescott (Mass.) 419

13. It is sufficient if each party has an interest in some matters in suit, and that they are connected with the others. *Id.*

14. When plaintiff has a demand growing out of an assignment by which every defendant is affected, and their various interests are so blended that it would be impossible to separate the investigation of them with convenience, they should all be joined as defendants. *Id.*

15. Even if one party is a necessary party to some portion only of case, the bill is not necessarily multifarious. *Id.*

16. Where, to prevent a multiplicity of suits, and that rights of all parties may be settled, and that all persons interested in subject-matter may be bound by decree, a bill affords the only appropriate remedy, it can not be held multifarious. *Id.*

17. A bill seeking relief of one kind against one defendant and another against the others, is multifarious.

Tullar v. Baxter (Vt.) 180

18. This objection must be raised before final hearing. *Id.*

19. New parties cannot be brought into a case by cross-bill.

Kopper v. Dyer (Vt.) 868

20. A cross-bill will be dismissed where some of defendants succeed, although it was taken *pro confesso* as to others, if they all are jointly interested. *Id.*

21. A jurisdictional question should be raised by plea or motion; it cannot be raised before master.

Smith v. Rock (Vt.) 863

22. An answer, as evidence, is to be weighed like other evidence.

McLane v. Johnson (Vt.) 611

23. A demurrer incorporated into an answer is not available. *Id.*

24. A declaration in trespass may be filed as an amendment to a bill in equity.

Tasker v. Lord (N. H.) 157

25. An application to amend an answer is not available when made to master.

Smith v. Rock (Vt.) 868

26. After defendant has appeared, and the bill has been taken as confessed for want of an answer, he still has a right to be heard upon the form of the decree, and to appeal therefrom.

Blanchard v. Cooke (Mass.) 68

27. The court will not entertain an objection first taken at final hearing, if it can make a decree disposing of the case on its merits. Authorities cited.

Tullar v. Baxter (Vt.) 183

28. Even if a trial by jury be claimed and allowed, the court might so mould the issues and direct the course of the trial as to avoid many of the difficulties attending a trial at common law. Authorities cited.

Pierce v. Equitable L. Assur. Soc. (Mass.) 881

29. When the master's finding is equivocal as to the allowance of interest, the orator will not be allowed more than claimed by his appeal, nor will he be allowed to amend.

Robinson v. Missisquoi R. R. Co. (Vt.) 891

30. As the orator put his bill upon false ground, defendant is entitled to his costs.

Kopper v. Dyer (Vt.) 868

BRIEFS AND NOTES.

Remedy at law. (Mass.) 420, 642; (N. H.) 888; (Vt.) 184, 864

May vary, qualify, restrain, and model remedy. (Me.) 705

Doctrine of marshaling assets. (R. I.) 106

Account. (Conn.) 479

Balance; decree. (Vt.) 129

Fraud, accident, or mistake; relief. (Vt.) 869, 721; (Mass.) 219, 835

Mistake; mutuality; reformation of contract. (Conn.) 471; (Mass.) 852

Fraud; diligence in asking relief. (Vt.) 376

Fraud; pleading. (R. I.) 597

Laches. (Conn.) 472

Limitation of actions. (Conn.) 593

Parties. (Conn.) 478; (Me.) 779; (Mass.) 420; (Vt.) 612

Pleading; multifariousness. (Mass.) 420; (Vt.) 180

Preventing multiplicity of suits. (N. H.) 153

Relief under prayer for general relief. (Mass.) 642

Cross-bill; parties. (Vt.) 869

ERROR. See APPEAL AND ERROR.

ESTATES OF DECEDENT. See DESCENT AND DISTRIBUTION; DEVISE AND LEGACY; EXECUTORS AND ADMINISTRATORS; WILL.

ESTOPPEL. See CONTRACT, 15; COVENANT, 8; INTOXICATING LIQUORS, 26; POLICE AND POLICE DEPARTMENTS, 8; REVIEW, 2.

A party availing himself of estoppel by conduct must show affirmatively that he has acted in reliance upon the fact being otherwise than it is claimed.

Wells v. Austin (Vt.) 799

BRIEFS AND NOTES.

Doctrine of; applies to a State. (Conn.) 843

By deed. (Conn.) 842; (Me.) 150

In pais, defined. (Me.) 407

Matter in pais need not be pleaded. (Mass.) 887

By conduct. (Conn.) 589; (Vt.) 799

By acts. (Me.) 501; (Vt.) 875

By admissions. (Mass.) 685, 686

By silence. (Mass.) 839; (Me.) 407

More silent acquiescence does not amount to waiver. (Me.) 502

Party making no objection to jurisdiction of court until adjudication is estopped from subsequently objecting to its decision. (R. I.) 758

By acts of employees. (Vt.) 895

EVIDENCE.

I. PRESUMPTION.

II. PAROL.

III. DECLARATIONS; ADMISSIONS.

IV. COMPETENCY; RES INTER ALIOS.

V. OPINIONS; EXPERTS.

BRIEFS AND NOTES.

See DEED, 1, 2; DEPOSITIONS; DOMICILE, 8, 4; FRAUDS, STATUTE OF, 6; HUSBAND AND WIFE, 7, 8, 14-17; NUISANCE, 6, 7; RECEIPT, 8; REPLEVIN; WATERS AND WATERCOURSES, 26; WITNESS.

I. PRESUMPTION.

1. One is presumed to know the laws of the country in which he transacts business. Authorities cited.

Jones v. Surprise (N. H.) 294

2. A person's death may be presumed from his not being heard from for seven years. Authorities cited.

Boody v. Watson (N. H.) 568

3. Where an answer offered in evidence carries with it the presumption that it was made under defendant's instruction, his testimony that he had never seen the answer and did not know its contents, without denying that he had given instructions for it, will not overcome the presumption which authorizes its introduction in evidence.

Johnson v. Russell (Mass.) 217

II. PAROL.

4. Parol evidence is inadmissible to contradict or vary the terms of any written instrument. Authorities cited.

Wood v. Moriarty (R. I.) 269

5. Parol evidence of conversations between

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parties previous to execution of deed is never admissible to contradict the deed.

Smith v. Fitzgerald (Vt.) 515

6. Nor are the acts or declarations of parties before or after its execution admissible to show their understanding of the deed. *Id.*

7. The effect of a deed cannot be controlled by oral evidence. Authorities cited.

Knapp v. Bailey (Me.) 150

8. Where a deed conveys the right to erect a dam, as to the location of which, as described in the deed, there is no dispute, evidence to prove a different location is inadmissible.

Gage v. Barnes (N. H.) 391

9. Where a deed or mortgage conditioned for future support is ambiguous, and refers to a former agreement, parol evidence is admissible to prove where the support is to be furnished.

Young v. Young (Vt.) 907

10. When an instrument is a deed, it is permissible to prove some other consideration than that which is expressed, provided it does not alter the effect of the instrument.

Wood v. Moriarty (R. I.) 269

11. Parol evidence is admissible to prove an additional consideration in an instrument under seal. *Id.*

12. Parol evidence is admissible to explain an accountable receipt for money, and to prove the basis of the accountability, and when and to whom the accounting is to be had.

McLans v. Johnson (Vt.) 611

13. Parol evidence is admitted to prove or disprove resulting trusts.

Moore v. Stinson (Mass.) 654

14. Trusts concerning land, except such as may arise or result by implication of law, shall not be created or declared unless by an instrument in writing signed by the party making or declaring the same, or by his attorney. *Id.*

15. Extraneous evidence is admissible to prove every material fact known to parties when writings were executed. Authorities cited.

Hinckley v. Hinckley (Me.) 537

III. DECLARATIONS; ADMISSIONS.

16. The admission of declarations of the party favorable to himself, as part of *res gestae*, should be confined to very narrow limits; and the rule should be more rigidly enforced since parties have been permitted to testify.

Pickering v. City of Cambridge (Mass.) 47

17. Memoranda in day-book of one deceased, and in his handwriting, are not admissible in favor of his estate.

Barnes v. Dow (Vt.) 717

18. Admissions by the grantor of a trust deed, subsequent to the deed, are not competent as against the trustee, by the fact that such grantor is one of the *cestuis que trust*.

Warren v. Carey (Mass.) 987

19. Where a grantor is allowed to prove a fact by another, he may do so by himself. Authorities cited.

Knapp v. Bailey (Me.) 150

20. Declarations of deceased grantor as to his title are not made admissible in grantee's favor by fact that his declarations on a prior occasion in disparagement of his title were given in evidence against grantee.

Royal v. Chandler (Me.) 408

21. Though it may be competent to show by written admissions of devisee that he took property in trust, such proof can not affect title of third party purchasing without notice of any trust.

Bromley v. Gardner (Me.) 489

22. The court, in its discretion, can admit the declaration of an agent before the agency is shown.

Chamberlain v. Fuller (Vt.) 614

23. The declarations of an agent are not admissible against a principal, unless made at the very time he is doing an act that he was authorized to do, and concerning the act that he is then doing.

Baldwin v. Doubleday (Vt.) 124

IV. COMPETENCY; RES INTER ALIOS.

24. Where evidence was offered for a purpose for which it was competent, and was excluded for reasons that applied equally to an offer for another purpose, the plaintiff is not bound, when he reaches the other part of his case, to again tender the evidence which was rejected.

Johnson v. Russell (Mass.) 217

25. Evidence to prove agreement between attorneys in a former suit, to affect the defendant in the pending suit, is properly rejected where it is not sufficiently definite and certain to show any admission by the defendant's attorney.

Id.

26. A judgment offered, being *res inter alios*, is properly excluded.

Id.

V. OPINIONS; EXPERTS.

27. Testimony of a conductor, who had previously been a brakeman, that in his opinion a train ought to have been stopped quicker than it was.—*Held*, admissible in an action on a life insurance policy.

Freeman v. Travelers Ins. Co. (Mass.) 621

28. To prove that a substance takes away the pain of filling teeth, evidence by those upon whom it has been used is admissible, although they are not experts.

Reese v. Dennett (Mass.) 428

BRIEFS AND NOTES.

Judicial notice taken of customs of banks and banking. (Conn.) 788

No presumption of law that self-destruction arises from insanity. (Vt.) 859

Presumption of knowledge of date of instrument signed. (Me.) 155

Presumption of knowledge of contents and meaning of written instrument. (Mass.) 240

Presumption of knowledge conclusive, in absence of fraud. (Mass.) 240

Written notice to party to pay money, provable by parol, with proof of notice to produce written notice. (Me.) 788

Judicial record. (Me.) 664

Judgment. (Mass.) 850

Pleadings are not admissions. (Mass.) 218

Pleadings in another case. (Mass.) 217

Res inter alios acta. (Mass.) 456

Parol; not admissible to alter or contradict written instrument. (Conn.) 471; (Vt.) 515

To vary written contract. (Mass.) 680, 686

To establish resulting trusts. (Mass.) 655

Latent ambiguity in written contract. (Mass.) 832

Collateral facts. (Mass.) 41, 484

Collateral circumstances may designate place of performance of contract. (Vt.) 908

To explain meaning of written agreement. (Mass.) 832

To explain receipt. (Vt.) 612

To show deed absolute intended as mortgage. (Mass.) 680, 685

To show that bill of sale was intended only as collateral security. (Mass.) 680

To show meaning of written instrument. (Me.) 490

Parol; to identify subject-matter. (Mass.) 635

To apply description in deed. (Mass.) 662

To supply omissions. (Conn.) 736

To show consideration. (R. I.) 269

Want of consideration may be proved. (Conn.) 80

Parties' own declarations admissible when part of *res gesta*. (Me.) 788

Declarations by grantor of deed subsequent to deed. (Mass.) 867

Admissibility of evidence of grantor to impeach title conveyed by deed. (Me.) 148

Past facts. (Mass.) 48

Of agent. (Me.) 487

Of agent must be *res gesta*. (Vt.) 125

Dying declarations. (Conn.) 737

Expert; qualification; knowledge is preliminary question for courts. (Mass.) 628

Discretion of court. (Me.) 694

Insanity. (Vt.) 359

When *animus* is in question, evidence of transaction with other parties admissible. (Mass.) 48

Weight of, is for jury. (Me.) 412

EXCEPTIONS. See APPEAL AND ERROR.

1. A petition to prove exceptions is exclusively within the jurisdiction of the full court; and a party has the right to have the full court revise the findings of the commissioner appointed to aid the court.

Kaiser v. Alexander (Mass.) 637

2. The following verification to a petition to prove exceptions is insufficient: "Then personally appeared the above-named A. (petitioner's attorney), and made oath that the facts set forth in the foregoing petition * * * are true, to the best of my knowledge and belief;" but the respondent having waived the right to

object thereto, the report will not be set aside by reason thereof. *Id.*

8. Respondent may have the material evidence taken by the commissioner reported to the full court. *Id.*

4. A statement that a witness for defense was allowed to give certain testimony, which was "without contradiction," is not equivalent to a statement that the court found his testimony to be true.

Birch v. Hutchings (Mass.) 635

5. Exceptions to the whole charge and rulings of the judge, there being no requests for rulings, and no specifications of any exceptions to the charge, are irregular and improper.

Dwyer v. Fuller (Mass.) 388

6. An exception to admissibility of evidence on one point does not ordinarily raise question of nonsuit for want of evidence on another.

Willey v. Portsmouth (N. H.) 296

7. It is not enough for a bill to state that evidence was admitted under objections.

Noyes v. Smith (Me.) 788

8. If exceptions are not stated, it must be inferred, as against excepting party, that they were correct.

Khron v. Brock (Mass.) 424

9. It must appear that evidence was admitted to injury of excepting party.

Noyes v. Smith (Me.) 788

10. The excepting party must affirmatively show he has been aggrieved.

Spinney v. Bowman (Me.) 699

11. Whether a verdict is against the evidence is a question of fact.

Little v. Upham (N. H.) 295

BRIEFS AND NOTES.

Sufficiency of statement of case to show erroneous ruling. (Me.) 142

Objections to testimony must be specific. (Me.) 790

General objection to instructions is nugatory. (Mass.) 839

Court will look at whole case. (Me.) 790

Excepting party must be prejudiced by rulings. (Me.) 142

Excepting party must show injury to himself. (Me.) 788

Only testimony in bill considered. (Me.) 142

Findings of fact. (N. H.) 299

Findings of fact; evidence. (Me.) 282

Verdict not set aside for erroneous ruling not called to attention of presiding judge. (Mass.) 839

EXECUTION.

1. Right to take real estate upon levy of execution can be exercised only upon real estate of living debtor.

Flynn v. Morgan (Conn.) 815

2. Execution returned too early is legal as against special bail, unless he has been injured thereby.

Brewster v. Cowen (Conn.) 829

3. The rule at common law, that the sheriff

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who begins the service of an execution during his term of office shall finish it, though his term of office expires before he can do so, has not been modified by R. I. Pub. Stat. chap. 28, § 1, nor chap. 201, § 29.

Doliver v. Collingwood (R. I.) 104

4. When a deputy sheriff had in his custody, at the time of the qualification of the succeeding sheriff, goods on which he had previously levied an execution, his subsequent retention of the goods was legal. *Id.*

5. Land was sold as one lot. It was in fact divided by stone walls into six lots. Held, immaterial, the land being correctly described, and under one ownership.

Houlard v. Pettley (R. I.) 927

6. The sale, after proper advertisement, took place at the sheriff's office some twenty miles distant from the land. Held, immaterial; the time and place being in the discretion of the officer. *Id.*

7. To satisfy the execution, a strip was sold from the side of the lot, but so that portions sold and unsold abutted on the highway. Held, the mode of sale was proper. *Id.*

8. The debtor claimed the sale to be unfair because of an understanding that the land was redeemable on paying the debt and costs, provided a fair price was obtained. Held, he had no cause for complaint, it not appearing that the understanding was detrimental to him. *Id.*

10. Generally, when a sale is set aside for inadequacy, etc., it will be on the principle of redemption, allowing the deed to stand as security for all money advanced. Authorities cited. *Id.*

BRIEFS AND NOTES.

Levy upon real estate of decedent. (Conn.) 814, 815

Levy; return. (Conn.) 814

Liability of sheriff, upon demand, to pay over what received. (R. I.) 105

Right of sheriff to finish services of execution after term of office expired. (R. I.) 105

EXECUTORS AND ADMINISTRATORS.

I. APPOINTMENT; WHO CAN BE.

II. IN GENERAL; LIABILITY.

III. CLAIMS; ACTIONS.

IV. SALE.

V. ACCOUNT.

VI. BOND.

BRIEFS AND NOTES.

See APPEAL AND ERROR, III.; DEVISE AND LEGACY; SET-OFF AND COUNTERCLAIM 6-9; WILL; WITNESS, 3-6.

I. APPOINTMENT; WHO CAN BE.

1. Nonresidence is not an insuperable objection to the appointment of an executor. *Hammond v. Wood* (R. I.) 913

2. In Rhode Island a married woman can not be an executrix in a case where a bond is required, as she is incapable of giving such bond. *Id.*

8. The bond of a third party can not be accepted in lieu of the bond of the executrix. *Id.*

II. IN GENERAL; LIABILITY.

4. Mortgages are assets in administrator's hands, to be administered as personal estate. The title remains in him till redeemed, sold, or distributed.

Hemmenway v. Lynde (Me.) 414

5. A note given by an administrator to take up a note given by intestate in his lifetime binds him personally.

White v. Thompson (Me.) 187

6. An indorser upon such a note, who is compelled to pay it, becomes the creditor of the administrator. *Id.*

7. A statute giving a creditor a remedy in equity, when he had failed to seasonably present and prosecute his claim, affords no remedy to such an indorser. *Id.*

8. An allowance by the probate court for the support of the widow and children of decedent out of the estate, during the settlement thereof, is not attachable by a creditor of the widow.

Barnum v. Boughton (Conn.) 94

III. CLAIMS; ACTIONS.

9. A deceased wife's administrator may amend his claim against estate of her deceased husband, so as to present a claim for money received by husband under an express trust, instead of a loan as first presented.

Comstock's Appeal (Conn.) 592

10. An action may be maintained against an administrator, on a claim against the estate, if commenced within two years and six months after notice of the appointment of administrator.

Gould v. Whitmore (Ma.) 670

11. Such action is continued at cost of plaintiff, if he did not, within two years after notice of appointment, and thirty days before commencement of action, present claim to administrator, and demand payment. *Id.*

12. A tender of payment, during time of continuance of action, will bar the same, and the defendant will recover costs. *Id.*

13. A bill in equity by the administrator *d. b. n. c. t. a.* against a former executor, alleging that defendant sold real estate under a power in the will, and refuses to account, can not be maintained.

Ammidown v. Kinsey (Mass.) 641

14. In a bill in equity to obtain title to real estate from an administrator, which it was alleged his decedent held in trust, heirs of deceased should be joined as defendants.

Wiley v. Davis (Me.) 779

15. In such case complainant can not testify to facts alleged when administrator does not. *Id.*

16. Owner of unsatisfied judgment against administrator can not obtain lien against land belonging to decedent's estate.

Flynn v. Morgan (Conn.) 818

N. E. R., V. IV.

IV. SALE.

17. If a decedent dies seized, the power given by statute to administrator can not be defeated by any subsequent disseisin.

Knowles v. Blodgett (R. I.) 87

18. A disseisin by execution sale of interest of heir, does not defeat the administrator's statutory power to sell. *Id.*

19. A deed by an executor in pursuance of a sale to pay debts is effectual to convey the real estate sold. *Id.*

V. ACCOUNT.

20. In proceedings in the probate court, upon the allowance of an account of an executor, the court can not give directions for future actions of executor. Authorities cited.

Swasey v. Jaques (Mass.) 44

21. An executor's account can be rendered only in probate court, and the supreme court has jurisdiction only as the supreme court of probate on appeal.

Ammidown v. Kinsey (Mass.) 641

22. Great latitude is allowed in reopening and correcting errors in accounts of executors, etc.

Dodd v. Winship (Mass.) 851

23. A probate court may reopen an account, even to the extent of rehearing and revising a matter in dispute previously heard and determined by probate court; and, upon appeal, by this court. Authorities cited.

Gale v. Nickerson (Mass.) 838

VI. BOND.

24. The common-law bond of an administrator must be sued in name of obligee.

Waterman v. Dockray (Me.) 278

25. But it is available for the enforcement of all legal obligations assumed by makers. *Id.*

26. The writ in a suit on such bond may be amended by inserting name of prosecutor. *Id.*

27. The obligee (judge of probate) is a party to such action in trust for all interested. *Id.*

28. An action may be maintained on bond of an administrator of an insolvent estate, who fails to settle an account within six months after the return of the commissioners. The damages in such an action are nominal if no actual injury is proved.

Webb v. Gross (Me.) 668

29. The rule that there has been no breach of the bond until administrator has been cited to account does not apply to insolvent estates. *Id.*

BRIEFS AND NOTES.

Nonresidence as an objection to appointment of executor. (R. I.) 918

Married woman as executrix. (R. I.) 918

Rule as to granting administration, as to next of kin. (Mass.) 44

Assets; mortgages. (Me.) 414

Agreement between administrator and widow, that amount allowed for support be diverted to other use, is void. (Conn.) 96

Allowance for support of widow and children during settlement of estate; attachment. (Conn.) 94, 95

Liability for decedent's debts. (Me.) 187

Decedent's real estate is assets in administrator's hands for payments of debts. (Conn.) 814

Liability of executor of deceased partner making sale of firm property. (Mass.) 46

Claims against estate; presentation; amendment. (Conn.) 592, 593

Time of presenting. (Me.) 670

Action. (Conn.) 814, 815

Statute of Limitations. (Me.) 187

Actions by and against; parties. (Me.) 779; (Vt.) 507

Duty of executor to account. (Mass.) 642

Bond; action on, for refusal to pay legacy. (Mass.) 422

Limitation of actions on. (Me.) 278

Insolvent estate; action on administrator's bond for failure to account. (Me.) 668

EXEMPTION. See ATTACHMENT, 1, 2; TAXES, I.

EXPERT EVIDENCE. See EVIDENCE, V.; MASTER AND SERVANT, 23, 24; MUNICIPAL CORPORATIONS, 28.

EXPRESS COMPANIES. See CARRIERS, 1-4.

FALSE IMPRISONMENT. See MALICIOUS PROSECUTION.

1. An action for false imprisonment may include damages for what occurred after process began to be used wrongfully upon plaintiff for purpose of collecting defendant's debt, with defendant's participation, by his direction or under his influence.

Wood v. Bailey (Mass.) 246

2. In an action for false imprisonment, in executing an order of arrest upon a charge of illegal appropriation of money as treasurer of a corporation, against sureties upon treasurer's bond, it is improper to introduce in evidence an offer by one surety, made on another trial in defending a suit upon the treasurer's bond, to prove that a majority of the directors of the corporation approved the appropriation of the money made by the treasurer, for the purpose of showing that said defendant knew of the want of foundation for the prosecution instituted by himself and the other sureties. *Id.*

3. An officer omitting to give an impounded beast reasonable food and water, becomes responsible in damages for abuse of process. Authorities cited. *Id.* 251

4. Or who stays too long in a store where he has attached goods, or keeps a keeper too long in possession of property, or who places in a dwelling-house an unfit person as keeper against owner's remonstrance. *Id.*

N. E. R., V. IV.

BRIEFS AND NOTES.

Defined. (Mass.) 250

When action for, lies. (Mass.) 210, 249

Action for abuse of legal process. (Mass.) 248

FEES. See JUSTICE OF THE PEACE, 3.

FINES. See INTOXICATING LIQUORS, VI.

FIRE INSURANCE. See INSURANCE, I.

FIRES. See RAILROAD COMPANIES, 9-11.

FISH AND FISHERIES.

1. An inhabitant of a town may land upon shore within such town, below high-water mark, and within 100 rods of high-water mark, not passing above said mark, for purpose of fishing.

Packard v. Ryder (Mass.) 245

2. There is a public right to take shell-fish along the shore below high-water mark, and within one hundred rods of the upland, until the flats are enclosed by the proprietor. Authorities cited. *Id.* 246

3. When the writ alleges the illegal possession of a certain number of lobsters, the verdict may be for the penalties for any less number.

Thompson v. Smith (Me.) 140

4. Where the statute prohibits the catching of young lobsters under 9 inches long, complainant is not bound to prove that the lobsters were actually young. *Id.*

5. If the measurement of the lobster at the time of the catching is 9 inches or more in length, the statute is not violated. *Id.*

BRIEFS AND NOTES.

Public right of fishing in tidal waters. (Mass.) 245

Fishing for shellfish. (Mass.) 246

Prescriptive right to fish from land of another. (Mass.) 246

FORECLOSURE. See MORTGAGE, V.

FORFEITURE. See EASEMENT, 6; INTOXICATING LIQUORS, III.

FORGERY.

An indictment charging respondent with having forged an instrument whereby one person is bound to another is bad for repugnancy; for a forged instrument can bind nobody. Authorities cited.

State v. Haven (Vt.) 619

FRAUD AND FRAUDULENT CONVEYANCE. See ARREST; BANKRUPTCY, 4; CORPORATIONS, 7; EASEMENT; EQUITY, II.; GUARDIAN AND WARD, 2; INSOLVENCY; LIMITATION OF ACTIONS, 16, 17; REPLEVIN.

1. The inference which a jury may properly draw, that a person intends the natural and probable consequence of his act, is only one element of proof to establish the fact of actual

intent. This intent is essential, and must be found as a fact. Authorities cited.

Sartwell v. North (Mass.) 54

2. That one party has been guilty of a material fraud is not necessarily purged of its effect if the **representation is made good before acted upon** by other party.

Reese v. Dennett (Mass.) 428

3. Any fraud intended by grantor upon creditors will not avoid the deed, if **grantee is innocent.** Authorities cited.

Gibson v. Bennett (Me.) 418

BRIEFS AND NOTES.

Fraud renders all **contracts voidable ab initio.** (Mass.) 810

False representations are not actionable unless damage results to plaintiff. (Mass.) 485

Fraudulent representations; intent; effect. (Vt.) 615

Proof of statement of what would be a promise will not sustain action on false representation. (Mass.) 484

Fraud upon creditors; intent. (N. H.) 165

Burden of proof. (Me.) 412

Consideration. (Me.) 412

Presumption. (Mass.) 240

FRAUDS, STATUTE OF. See ASSUMPSIT, 6; PRINCIPAL AND AGENT, 1.

1. A real-estate broker who has made a parol contract of **sale of realty** cannot, after his principal has contracted to sell the land to another purchaser, and has so informed the broker, make such a **memorandum** as will take the case out of the Statute of Frauds.

Elliot v. Barrett (Mass.) 177

2. A memorandum in writing, signed by defendant's agent, as follows: "Rec'd of D \$100 to bind sale of estate on C Street, owned by H \$350 cash, \$850 in mortgage at 6 per cent.;" and dated at Stoneham, is sufficient to satisfy the statute, if there be only one "estate on C Street owned by H," in Stoneham.

Doherty v. Hill (Mass.) 830

3. **Parol evidence** cannot be given to identify the estate, and thereby make the memorandum sufficient. *Id.*

4. A **letter from the owner to the agent is not admissible to identify the estate.** *Id.*

5. Nor can the **memorandum** be helped out by **evidence** that the estate intended was the only one which buyer knew of as belonging to seller. *Id.*

6. A **draft of a deed of premises** is admissible in an action for breach of contract to convey, in connection with proof that it was offered to defendant for execution, to show a breach, but not to **aid the memorandum.** *Id.*

7. An **offer in writing, afterwards accepted orally,** satisfies the statute. Authorities cited. *Id.* 352

8. A **promise by one to a debtor, to pay a** *X. M. R., V. IV.*

debt to a third person, need not be in writing.

Wood v. Moriarty (R. I.) 269

9. The **liability** of the promisor is **direct** and substitutional, and is not within the statute. *Id.*

10. The plaintiffs, who had been furnishing materials for a factory, refused to supply more upon the proprietor's credit. Certain parties who were interested in the factory by reason of loans to the proprietor told the plaintiffs to keep on furnishing materials, and that they would see that they had their pay for the same. *Held,* this was an **original undertaking** on the part of the promisors.

Greene v. Burton (Vt.) 906

BRIEFS AND NOTES.

Parol sale of land. (Mass.) 176

Sufficiency of written agreement. (Mass.) 332

Promise to pay debt of another. (R. I.) 269

Promise to pay for materials furnished to another. (Vt.) 904, 906

Memorandum taking case out of statute. (Mass.) 178

GAMING.

1. When **lender intends** the money shall be used in gambling, and it is **so used,** he cannot recover it.

Tyler v. Carlsle (Me.) 409

2. **Mere knowledge** of borrower's purpose will **not prevent recovery,** if lender did not participate in illegal act. *Id.*

3. Even if he does so participate, he may recover if **money is demanded before actually used.** *Id.*

4. If **defendant was in charge of room** for purpose of its being used as a gambling-room, it was enough to make him **guilty** of the offense, even though the room was not actually so used while he was in charge of it.

State v. Marchant (R. I.) 601

5. Under R. I. Pub. Stat. chap. 246, § 5, an **indictment** which charges that defendant, on July 4, did keep a room, and suffered it to be kept, to be used for gambling, the words "**then and there**" are unnecessary. *Id.*

6. A motion in **arrest of judgment** cannot be sustained if either count of the indictment is good. *Id.*

BRIEFS AND NOTES.

Speculating in stocks upon margins is void. (Me.) 410

Knowledge of vendor that borrower intends to use money for gambling purposes; effect. (Me.) 410

GARNISHMENT. See ASSIGNMENT.

GIFT.

1. **8 deposited money** in bank in daughter's name, **intending a present gift** to her, subject to the right in himself and his wife to take the income during their lives. The **daughter was informed** of the arrangement,

and assented to it, but the deposit book was never delivered to her. *Held*, a good gift of the deposit, subject to the life interest specified.

Smith v. Ossipee Valley Ten Cent Sav. Bank (N. H.) 521

2. If A deposits money in B's name, without his knowledge, intending it as a gift, it is not perfected, as assent of both parties is necessary. Authorities cited. *Id.* 523

3. The burden is upon plaintiff to prove a perfected gift to her, from her husband, of money.

Walker v. Welch (Mass.) 854

4. It is not enough that he deposited the money in the savings bank in his name as her trustee. *Id.*

5. Where there is no proof of any decisive act or declaration of intention of husband to make a gift to his wife, and the bank book was never delivered to her, the evidence fails to sustain a gift. *Id.*

BRIEFS AND NOTES.

Intention; evidence. (Mass.) 232

Intention; delivery. (N. H.) 521

Manual delivery of bank-book. (Mass.) 855

GUARANTY. See INDEMNITY.

1. A guaranty on a note as follows: "I guarantee the within note good till paid," is a conditional guaranty of collection only.

Cowles v. Peck (Conn.) 889

2. A complaint on such guaranty must show that the holder of the note used diligence in collection, or that the note was not collectible. *Id.*

3. A complaint on a guaranty must disclose the consideration for the guaranty. *Id.*

4. In a bond to plaintiff bank, obligors agreed to save the bank harmless from all loss by reason of drafts or overdraft and indebtedness by a certain railroad company, a depositor in said bank. *Held*, obligor was liable for an indebtedness to the bank on account of accommodation paper made by a third party for the use of the company, and discounted for it by the bank, under such circumstances that the money received thereon was a loan by the bank to the company.

Aetna Nat. Bank v. Hollister (Conn.) 788

BRIEFS AND NOTES.

Conditional or absolute; as to bills and notes. (Conn.) 840

Contracts construed strictly against guarantor. (Conn.) 738

Complaint must disclose legal consideration. (Conn.) 840

GUARDIAN AND WARD. See INSANE PERSONS.

1. Under Acts 1885, chap. 110, conservators may lease premises of ward, and may recover possession at expiration of lease.

Palmer v. Cheseboro (Conn.) 809

2. A settlement by a guardian with his N. E. R., V. IV.

ward after her arrival at age, duly allowed and recorded in probate court, will not, after guardian's death, be opened, unless fraud or mistake is clearly proved.

Durrell v. Gibson (Me.) 278

8. Where judge of probate allows petitioner a certain sum in correction of errors, the burden is on her, on appeal from decree, to prove guardian's estate should have been charged with a greater sum. *Id.*

BRIEFS AND NOTES.

Guardian's bond; amendment of declaration in action on. (Me.) 278

HEALTH.

1. Until Congress provides a suitable system of quarantine, State quarantine laws are valid.

Train v. Boston Disinfecting Co. (Mass.) 437

2. The board of health may make regulations necessary for the health of the inhabitants, extending to all persons, goods, and effects arriving in vessels. *Id.*

3. The board may determine that certain articles shall always be subjected to disinfection before they are delivered to importers. *Id.*

4. The Legislature having provided that all expenses under quarantine laws shall be paid by the owner, it is not competent, as a defense to this claim, to show goods did not require disinfection. *Id.*

5. The board may make a reasonable contract for the disinfection of goods; and the owner's promise to pay therefor is one implied by law, even against his protestation. *Id.*

6. Such a contract implies a lien in favor of contractor for disinfection. *Id.*

BRIEFS AND NOTES.

Power of board of health to impose cost of disinfection. (Mass.) 439

HIGHWAYS. See ROADS AND HIGHWAYS.

HOMESTEAD.

To acquire a homestead, premises must be used or kept for a family home. There must be a present use, or a keeping for that purpose, with a present right to use them.

Keyes v. Bump's Admr. (Vt.) 513

HORSE RAILWAYS. See STREET RAILWAYS.

HOUSES OF ILL FAME. See BAWDY AND DISORDERLY HOUSES.

HUSBAND AND WIFE.

I. MARRIAGE.

II. WIFE; SEPARATE ESTATE.

III. COMMUNITY PROPERTY; TRANSACTIONS BETWEEN.

IV. ACTIONS.

V. DIVORCE.

BRIEFS AND NOTES.

See EXECUTORS AND ADMINISTRATORS, 2; TROVER AND CONVERSION, 8.

I. MARRIAGE.

1. **Marriage is a good consideration for a deed.**
Gibson v. Bennett (Me.) 412

II. WIFE; SEPARATE ESTATE.

2. A married woman is capable of entering into a valid contract of insurance on her own life for her own benefit, by means of her own separate estate.

McQuitty v. Cont. L. Ins. Co. (R. I.) 791

3. The promise of a married woman to pay for necessaries furnished her upon credit of her separate estate is a sufficient consideration for a new promise to pay for them, made after husband's death.

Sherwin v. Sanders (Vt.) 358

4. Where money belonging to a wife's separate estate had gone into husband's hands, her administrator may recover it from her husband's estate.

Comstock's Appeal (Conn.) 592

5. Under Act 1849, in such case, the money was received by the husband as statutory trustee, against which the Statute of Limitations would not run.

Id.

6. Where money is left to the wife as her separate estate, to be under her sole control, free from the control of her husband, the Act of 1849, providing that a wife's personal property shall vest in husband in trust, does not apply.

Id.

7. In an action by a wife to recover for her property taken by her husband's creditor, declarations of husband, after the taking, that he was the owner, are not admissible to rebut declarations made before the taking and against his interest, which had been received in favor of the wife.

Hackett v. Amsden (Vt.) 124

8. Testimony was not admissible to prove that a witness "had never heard" that the property was claimed to be the wife's.

Id.

III. COMMUNITY PROPERTY; TRANSACTIONS BETWEEN.

9. A wife owned a two fifths, and her husband a three fifths, undivided interest in a farm, and in their old age they conveyed by joint deed certain portions of the land, and the proceeds were appropriated for their mutual benefit and support. Held, that, on the death of both, their heirs took only the respective share that each owned in the remainder.

Breece v. Walker (Vt.) 715

10. If a married woman lends her money to her husband upon his promise to repay in chattels, and he does so by direct delivery, she gets good title which will avail against his assignee for creditors.

Barrows v. Keene (R. I.) 271

11. A transfer of property, by husband to wife, without intervention of a third person, is good in equity.

Id.

IV. ACTIONS.

12. A husband may sue alone or jointly

with his wife in trespass for injuries to her realty during coverture, where action will survive to either upon death of other.

Smith v. Fitzgerald (Vt.) 515

13. In real actions for recovery of wife's land, husband and wife must join. Authorities cited. *Id.* 516

V. DIVORCE.

14. Declarations of husband's agent, when persuading wife to return, are admissible, upon question of condonation, as showing circumstances inducing her return.

Thompson v. Thompson (Me.) 487

15. Cross-examination of libelee in relation to cruelty not set out in libel is admissible as tending to prove cruelty charged. *Id.*

16. Evidence of failure to provide medicine is admissible under allegation of failure to support. *Id.*

17. Declarations of a petitioner for divorce, as to domicile, unaccompanied by acts, are worthless as evidence.

Gourlay v. Gourlay (R. I.) 918

18. A motion for a new trial, heard by a single justice, cannot be granted.

Thompson v. Thompson (Me.) 487

19. A divorced wife may sue her husband for support of their minor children after decree of divorce on her libel, when no decree as to alimony or custody of children is made.

Gilley v. Gilley (Me.) 494

BRIEFS AND NOTES.

Husband receiving capital of wife's separate property is *prima facie* trustee for her. (Vt.) 715

Wife's separate estate; rights and liability. (Conn.) 593

Wife may take out policy on own life. (Me.) 791, 792

Authority of wife to make promissory note. (R. I.) 791

Actions by; joint and several. (Vt.) 515

Action at law by husband against wife on contract. (Me.) 501

Divorce; cruelty; evidence. (Me.) 497

Condonation. (Me.) 488

Custody and support of children. (Me.) 494

Right of wife to maintain action against husband for personal services performed for him before marriage. (Me.) 495

ICE. See WATERS AND WATERCOURSES, 11-14.

INCEST.

1. An indictment need not aver respondent had knowledge of the relationship between himself and the *particeps criminis*.

State v. Wyman (Vt.) 126

2. The word "brother," in the statute against incest, includes brother of the half-blood. *Id.*

BRIEFS AND NOTES.

Indictment need not aver knowledge of relationship. (Vt.) 126
 Half-brother, within statute. (Vt.) 126

INDEMNITY. See GUARANTY, 4.

1. Where an express contract of indemnity is **not under seal**, and contains nothing more than the law would imply, it is optional to declare in general *indebitatus assumpsit* for money paid, or upon special contract. *Davis v. Smith* (Me.) 663

2. Where one stands in position of indemnitor to another, who is liable over to a third party, his **liability** may be fixed and determined in the action brought against such third party, by **notice** of the pendency of such **action**, and an opportunity afforded him to defend it. Authorities cited. *Id.* 666

3. Plaintiff agreed to indemnify a town if it would release goods attached in a suit upon a collector's bond, and permit him to satisfy an execution which he held against one defendant in that suit by levy upon the goods so released. The town, having obtained judgment, levied its execution, by advice of counsel, on homestead of one defendant, disregarding a demand that a homestead be set out therein, whereby the whole levy failed. After this levy the selectmen gave up the tax lists and warrants, before held as security, to be collected for benefit of collector's sureties. *Held*, plaintiff was not entitled to an **injunction** to restrain a suit at law to enforce the indemnity agreement. *Spaulding v. Town of Northumberland* (N. H.) 165

BRIEFS AND NOTES.

Breach of contract; form of action. (Me.) 664

INDICTMENT. See BAWDY AND DISORDERLY HOUSES, 2, 3; BREACH OF THE PEACE, 1, 2; CONSPIRACY, 2-5; CRIMINAL LAW, II.; FORGERY; GAMING, 6, 7; INCEST, 1; INTOXICATING LIQUORS, 14, 17; JUSTICES OF THE PEACE, 2; LOTTERY; OFFICE AND OFFICER, 19; SCHOOLS AND SCHOOL DISTRICTS, 20; WATERS AND WATERCOURSES, 15, 21.

INFANTS. See ALIEN AND NATURALIZATION; GUARDIAN AND WARD; LIMITATION OF ACTIONS, 14; PARENT AND CHILD.

INJUNCTION. See DEED, 12; INDEMNITY, 3; NUISANCE, 4; TRADEMARK; WATERS AND WATERCOURSES, 22.

1. A bill is demurrable which asks that defendant be enjoined from further prosecuting his suit after he has obtained a verdict against a corporation, where the suit was brought in attachment, which was dissolved by plaintiff's giving a bond under the statute. *George Woods Co. v. Storer* (Mass.) 219

2. The fact that plaintiffs have a defense to a suit upon the bond, or can establish a set-off in such a suit, gives them no right to prevent the defendant from obtaining a judgment. *N. E. R., V. IV.*

against the corporation in the action in which the bond was given. *Id.*

3. Nor would the facts stated entitle plaintiffs to a **contingent injunction** to prevent defendant from commencing an action against them, if he should acquire the right. *Id.*

4. A **trespasser** will be enjoined from cutting growing trees on only woodlot owned by orator, when it works a permanent injury to land.

Smith v. Rock (Vt.) 363

BRIEFS AND NOTES.

Trespass. (Me.) 407, 408; (Vt.) 364

INNKEEPER. See CONTRACT, 14.

INSANE PERSONS. See WILLS, 3-5.

1. **Contracts**, except for necessities, by person under guardianship, are void, under Rev. Stat. chap. 67, § 7.

Bradbury v. Place (Me.) 789

2. The holder of a note, taking it after it was dishonored, cannot recover from maker when he knew payee was of unsound mind, though he did not know he was under **guardianship**, the maker having paid amount of note to guardian. *Id.*

BRIEFS AND NOTES.

Suicide as an indication of insanity. (Vt.) 359

Presumption of continuance of insanity. (Vt.) 129

No presumption of law that self-destruction arises from insanity. (Vt.) 359

Contracts by, void except for necessities. (Me.) 789

INSOLVENCY.

I. WHAT PASSES; PREFERENCES.

II. DISCHARGE; EFFECT.

III. CLAIMS; PLEADING.

IV. ASSIGNEE.

BRIEFS AND NOTES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; ATTORNEY AND CLIENT, 1; BANKRUPTCY; CARRIERS, 8; CONSTITUTIONAL LAW; EXECUTORS AND ADMINISTRATORS, 28, 29; MORTGAGE, 55, 58.

I. WHAT PASSES; PREFERENCES.

1. The words "by law exempt from attachment," in Pub. Stat. chap. 154, § 44, mean only such **property** as is by statute exempted from attachment shall not pass by assignment in insolvency.

Barton v. White (Mass.) 181

2. The assignee is entitled to the aid of **equity** to require a debtor to make and execute such instruments and do such other acts as are necessary to perfect such transfer. *Id.*

3. **Patents** pass to the assignee. *Id.*

4. **Knowledge** of insolvency which avoids a preference is knowledge which

the creditor has when he receives the preference from his debtor.

Goldnoorthy v. Roger Williams Nat. Bank (R. I.) 920

5. The creditor must have knowledge of such facts as sustain a reasonable belief that his debtor is insolvent, in order that the preference may be invalidated as fraudulent. *Id.*

6. R. I. Pub. Stat. chap. 237, § 21, merely gives creditors reasonable time in which to test preferences. *Id.*

7. The entry of a voluntary appearance, by attorney of insolvent debtor, without his knowledge, in a pending action, curing the insufficient service of the writ, amounts in law to procuring his property to be seized on execution, within Pub. Stat. chap. 157, § 96.

Sartwell v. North (Mass.) 51

8. The knowledge of a creditor's attorney in receiving the preference is imputable to the creditor. Authorities cited. *Id.* 54

II. DISCHARGE; EFFECT.

9. Prior to 1885, the statute required a merchant to keep "a cash book and other proper books of account," after the enactment of the insolvent law, to entitle him to a discharge. *Jones v. First Nat. Bank* (Me.) 144

10. The presumption is conclusive that the intent is to defraud, when the insolvent swears falsely in a material matter before the court of insolvency. *Id.*

11. A discharge upon complying with conditions pertaining to composition proceedings, is not valid if any material statement in the affidavit or schedule is known by insolvent to be false.

Thaxter v. Johnson (Me.) 669

12. Such a discharge is no bar to an action by any creditor, within two years thereafter, to recover balance of his claim. *Id.*

13. Objections to insolvent's discharge must be filed on day of the hearing of petition for discharge.

Dow v. Young (Me.) 508

14. The continuance of an action until termination of insolvency proceedings, when defendant is in insolvency, is a matter of discretion with the court.

Casco Nat. Bank v. Shaw (Me.) 678

III. CLAIMS; PLEADING.

15. No appeal lies from decision of judge as to priority of liens.

Barnard's Assignee v. Haskins (Vt.) 360

16. An appeal from commissioners carries up the whole subject of the appeal upon the single issue raised before the commissioner, viz., whether the claim ought to be allowed against the estate.

Tolle's Appeal (Conn.) 482

17. If the claim as presented to commissioners does not show with sufficient definiteness what it is, the other party can move for a bill of particulars; but such bill does not become itself the ground of any new or different pleadings. *Id.*

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18. The case standing upon an issue of fact, either party desiring that it be placed on jury docket should make his application at first term of court. *Id.*

19. An issue of fact raised upon formal pleadings is not such a new issue as to revive the right to put case on jury docket. *Id.*

IV. ASSIGNEE.

20. The assignee should be made a party to a pending suit to enforce a contract right to chattels, in which his assignor was defendant, even after a decree *pro confesso* against original defendant.

Blanchard v. Cooke (Mass.) 68

21. A decree against the insolvent in such case would not be conclusive upon assignee. *Id.*

22. The effect of admitting the assignee is to suspend the decree *pro confesso* against the insolvent. *Id.*

BRIEFS AND NOTES.

Fraudulent preferences; debtor contributing to seizure of property. (Mass.) 53

Discharge; fraud of insolvent. (Me.) 145

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Specifications in opposition to, must be definite. (Me.) 145

Statutory requirement that merchant keep cash-book, etc., to entitle him to. (Me.) 144, 145

Effect of pending actions. (Mass.) 71

Invalidation of, by giving of security for the pre-existing debt. (Me.) 669

Schedule; form and requisites. (Me.) 676

Appeal from commissioners; jury trial. (Conn.) 483

Title of assignee. (Mass.) 182; (Vt.) 615

Legal title remains in insolvent until assignment made. (Me.) 669

INSTRUCTIONS. See TRIAL, 7-11.

INSURANCE.

I. FIRE.

II. LIFE.

BRIEFS AND NOTES.

See BENEFIT SOCIETIES; CORPORATIONS, 10; TAXES, 9, 10.

I. FIRE.

1. A policy may be reformed although insured has held it, until after a loss, in silence and in ignorance, from omission to read policy or careless reading, of necessity for reformation.

Palmer v. Hartford F. Ins. Co. (Conn.) 470

2. Where a company agrees to renew an insurance upon same terms as policy previously issued, and a variant condition is by mistake inserted in policy without insured's knowledge,—in an action to reform the policy the court will not hear the claim of the company that it is entitled to benefit of such condition. *Id.*

8. In such promise of renewal there is a legal justification for insured's omission to examine new policy. *Id.*

4. Equity has jurisdiction to correct mistakes in policies of insurance. Authorities cited. *Id.* 474

II. LIFE.

5. A married woman is capable of entering into a valid contract of insurance for her own life, by means of her separate estate; and such contract is not rendered void by the fact that notes made by her, which would not bind her personally, were received in part payment of premiums.

McQuitty v. Cont. L. Ins. Co. (R. I.) 791

6. A married woman, capable of taking an original policy, is also capable of exchanging it, under a provision therein for conversion into a so-called "paid up" policy. *Id.*

7. A paid-up policy is forfeited by reason of nonpayment of interest on outstanding premium notes. *Id.*

8. In an action on a policy of insurance against death by accident, the burden is on defendant to show insured had not used all due diligence for his personal safety.

Freeman v. Travelers Ins. Co. (Mass.) 621

9. Contributory negligence on insured's part is not a defense. *Id.*

10. Although the policy only insures against bodily injuries effected by the means described, "within the intent and meaning of this contract and the conditions hereunto annexed," this does not change the nature of the conditions; they still take effect as conditions. *Id.*

11. Insurer should allege and prove the want of compliance with any particular condition on which it relies. *Id.*

12. A mutual aid association may waive a condition in its policy, that the same shall be void if untrue answers are given in application.

Ball v. Granite State Mut. Aid Assn. (N. H.) 289

13. It will be such a waiver if, with knowledge that applicant is diseased, the association accepts the premium, although the applicant stated that he had no disease of the throat or lungs, when, as he knew, his throat and lungs were affected. *Id.*

14. By continuing to receive dues and assessments, with such knowledge, the association is estopped to set up the condition in its policy or the warranty of the member as to the truth of his answers. *Id.*

15. An endowment policy made payable to the mother of assured, under an understanding to that effect existing between the mother and son, can not be surrendered without the consent of the mother.

Pingrey v. Nat. L. Ins. Co. (Mass.) 229

16. The beneficiary of a tontine policy, issued by a stock company, is not bound by the action of the company's officers in fixing the amount of the profits, etc., apportionable to the policy.

Pierce v. Equitable L. Assur. Soc. (Mass.) 876
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17. A bill for accounting as to a tontine policy, filed after the expiration of the tontine period, on a policy still in force, is maintainable under the statute giving jurisdiction in equity upon accounts not conveniently and properly adjustable in an action at law. *Id.*

18. Such bill is properly brought against the insurance company alone. *Id.*

19. And can be entertained by the courts of other States than that of the company's domicile. *Id.*

20. The objection that the company, having its legal existence in another State, should not be held to answer to such bill filed in this State,—Held, to have been waived by a general answer. *Id.*

BRIEFS AND NOTES.

Mutual companies; dissolution. (Ma.)	411
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Life; nature of policy. (Mass.)	280
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Married woman may take out. (R. I.)	791, 798
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INTOXICATING LIQUORS.

- I. RECOVERY OF PRICE.
- II. LICENSE.
- III. FORFEITURE.
- IV. KEEPING WITH INTENT TO SELL.
- V. SALE.
- VI. BONDS; FINES.

BRIEFS AND NOTES.

See CARRIERS, 1, 3, 4.

I. RECOVERY OF PRICE.

1. One who solicits orders for spirituous liquors in this State, to be delivered at a place without this State, knowing that, if so delivered, the same will be transported to this State and sold in violation of the laws thereof, can not recover the price of such liquors in

this State, although the sale may be lawful in the State where it takes place.

Jones v. Surprise (N. H.) 292

2. When an indictment can be sustained for illegal sale of liquors, the price can not be recovered. Authorities cited. *Id.* 294

II. LICENSE.

3. The authority granted by license to sell liquor arises upon the issuing of the written license, and not upon the vote granting it, or the completion of the instrument by the signatures of the mayor and the city clerk. *Commonwealth v. Welch* (Mass.) 197

4. A license shall not be issued until the statutory conditions have been performed. *Id.*

5. Where the license was not issued until after the act complained of, it is no protection in a prosecution for selling liquors without a license. *Id.*

III. FORFEITURE.

6. A statute provided for seizure of liquors and their condemnation by the district court. A jury trial could only be had on appeal, which was to be taken immediately on judgment of forfeiture, and accompanied by a recognizance in the sum of \$300 to prosecute the appeal, and, during its pendency, not to violate the Act. *Held*, the statute was not unconstitutional because no time was given to perfect the recognizance; that the amount of the recognizance was a matter of legislative discretion; that the condition of the recognizance not to violate the Act pending the appeal was in violation of a constitutional guaranty of trial by jury, but was separable from the rest of the recognizance and could be regarded as a nullity.

Re Liquors of McSoley (R. I.) 925

7. An allegation of prior conviction, in complaint for search and seizure, alleging that respondent had been convicted of unlawfully keeping intoxicating liquors with intent that same should be sold in violation of law, is sufficient.

State v. Howley (Me.) 397

IV. KEEPING WITH INTENT TO SELL.

8. Under Pub. Laws, chap. 596, § 1, the keeping of prohibited liquors for sale, to be used as a beverage, is inimical to the statute only when the keeper intends not only to sell, but also to deliver as well as sell, within this State.

State v. Murphy (R. I.) 755

9. To keep prohibited liquors to be used as a beverage within this State is to keep them for sale in violation of said § 1, whenever the keeper intends to sell them in the mode of sale which includes delivery, and such a keeping is punishable under § 9 of the Act. *Id.*

10. A complaint, under Pub. Laws, chap. 596, which charges that defendant, "without lawful authority," kept, etc., prohibited liquors, "with intent to sell the same in this State to be used as a beverage, against the statute," etc.,—is good. *Id.*

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V. SALE.

11. The sale of intoxicating wines is prohibited by Gen. Laws, chap. 109, § 18.

Jones v. Surprise (N. H.) 292

12. Proof that defendant was present, having entire control and superintendence of house, however brief the time, will sustain an indictment for keeping and maintaining a house as a liquor nuisance, although he was only the clerk or servant of the householder. Authorities cited.

Village of St. Johnsbury v. Thompson (Vt.) 518

13. A wife was convicted as a common seller, on proof that in husband's absence she had delivered and taken pay for liquors that he had previously bargained and sold. Authorities cited.

State v. Goss (Vt.) 519

14. The offense of selling liquor in violation of Pub. Laws, chap. 596, § 8, the punishment for which is a fine and imprisonment, is not an "infamous crime" within the Constitutional provision that no person shall be held to answer for an infamous crime unless on indictment by grand jury.

State v. Nolan (R. I.) 753

15. Jurisdiction of offenses, under said § 8, is, by implication, conferred upon the district courts by said chap. 596. *Id.*

16. A complaint, under Pub. Laws, chap. 596, § 8, charging that defendant did "offer to sell, sell, and suffer to be sold," is not bad for duplicity. *Id.*

17. Under an indictment for illegal sale of liquor, respondent is entitled to a specification of offenses; but the character of the specification is a matter of discretion of trial court.

State v. Wooley (Vt.) 714

18. It was not error to allow a witness to testify, who was unknown to the State's attorney when the specification was made, and so not named in it. *Id.*

19. When a town agent is indicted for making illegal sales of liquor, evidence that he knowingly sold to men of intemperate habits is admissible; and that he avoided selling to them when unlawfully engaged in traffic of liquor prior to his appointment. *Id.*

VI. BONDS; FINES.

20. Act May 9, 1888, § 5, provides that upon proof of conviction of licensee of violation of any of the provisions of part 6 of said Act, and no appeal is pending, judgment shall be rendered in favor of the treasurer of the county for the entire amount of the bond, with costs. Under this statute it is clear that the conviction of principal constitutes a breach of the bond.

Welch v. McKane (Conn.) 741

21. The statute does not violate the constitutional guaranty of due process of law. *Id.*

22. The parties entered into a contract obligation, in view of provisions of statute by which both principal and surety in the bond are made liable upon the conviction of the principal, provided there is no appeal. *Id.*

23. All **fin**es, under the Liquor Law, for its violation, are **payable to the State**.

State v. Village of St. Johnsbury (Vt.) 894

24. When such fines are paid by a justice of the peace to the treasurer of a village, they are **recoverable in an action of general assumpsit** in the name of the State. *Id.*

25. And this, although the **prosecution** resulting in the payment of the fines was **conducted by the village authorities** and at its expense. *Id.*

26. The **State is not estopped by the conduct of its officers** in not objecting to such payments, although the State's attorney and State auditor knew of them. *Id.*

27. The **village can not be allowed anything for disbursements** in respect to legal services and expenses, or for taxable costs. *Id.*

28. The **State is also entitled to recover the sum paid by respondent who appealed and forfeited his bonds**. *Id.*

BRIEFS AND NOTES.

Time **license** takes effect. (Mass.) 197

Burden of proof is upon one relying upon license as justification. (Mass.) 197

Violation of license; rendition of judgment in suit on bond, under Act of May 9, 1888. (Conn.) 741, 742

Sale; soliciting for orders. (N. H.) 298

Jurisdiction of justices of the peace over offense of illegal sale of liquor, etc. (R. I.) 755

Liquor **fin**es payable to State. (Vt.) 895

ISLANDS. See **WATERS AND WATER-COURSES**, 28-32.

JOINT TENANTS AND TENANTS IN COMMON.

1. A mortgaged corporate stock to B and C. **Held**, the effect of **foreclosure** was to **vest the stock in B and C as tenants in common**.

Clarke v. Robinson (R. I.) 922

2. A **tenant in common having the exclusive occupation** of the whole or part of the common estate **must account** therefor.

Army v. Daniels (R. I.) 915

3. Where he has the income or profit of more than his share, he must **account for the excess**. *Id.*

4. The use of less than his share cannot be **offset** against the excessive use by his cotenant. *Id.*

5. The Statute of **Limitations** begins to run from the time a tenant in common denies the right of his cotenant. Authorities cited. *Id.*

6. **Tenants in common must join in trespass or trover** for the taking or conversion of a chattel. Authorities cited.

Clapp v. Pawtucket Inst. for Savings (R. I.) 98

7. **So must they join in assumpsit** for money had and received, where there has been a conversion and a tort is waived. *Id.*

BRIEFS AND NOTES.

Actions by. (Vt.) 128

N. E. R., V. IV.

When statute runs as between tenants in common. (R. I.) 916

JUDGMENT. See BASTARDY; EXECUTORS AND ADMINISTRATORS, 16.

1. Where, upon a finding in favor of plaintiff, judgment was postponed to await the disposition of another action, and after such disposition defendant indorsed upon plaintiff's motion for judgment the words, "It is agreed that the motion may be filed and allowed," such indorsement will not render judgment thereafter rendered a judgment **by consent**, from which the defendant cannot appeal.

Emery v. Seavey (Mass.) 216

2. A judgment is **conclusive against a person who was responsible over to defendant**, if he had **notice** of the action and an opportunity to defend.

Davis v. Smith (Me.) 663

3. The **notice** may be **implied when he had knowledge of the suit and participated in its defense**. *Id.*

4. The docket entries are the only proper **evidence of a judgment** when the record has not been fully extended. *Id.*

5. Proceedings of inferior tribunals may be **impeached collaterally when the law has not provided a mode in which their proceedings can be revised**. Authorities cited.

Boody v. Watson (N. H.) 506

6. A domestic judgment can not be **impeached collaterally** upon grounds which would have been open on writ of error or review. Authorities cited.

Poley v. City of Haverhill (Mass.) 206

7. Courts, for sufficient cause, may **set aside or modify** their judgments and amend their records. Authorities cited.

Eastman v. City of Concord (N. H.) 162

8. A court has authority to **vacate** a judgment rendered by it, for **fraud or mistake**.

Keith v. McCaffrey (Mass.) 645

9. A judgment entered upon a default suffered by mistake may be **vacated** for mistake. *Id.*

10. It is not necessary that the mistake should be of the court or in the mere rendering or entering of the judgment. *Id.*

11. Owner of unsatisfied judgment against administrator cannot obtain **lien** against land belonging to decedent's estate.

Flynn v. Morgan (Conn.) 813

12. Payment of a joint judgment by one defendant **extinguishes** it, and an appeal therefrom cannot thereafter be taken by another defendant.

Sager v. Moy (R. I.) 602

13. When beneficial owner of judgment brings a **suit upon it in a name not of legal owner**, the court may allow him to **substitute the name of the legal owner**.

Lewis v. Austin (Mass.) 206

14. It is no objection that there is no person in being of the name in which the **suit** is brought. *Id.*

15. A **remittitur** avails only after **verdict and before judgment**, not after judgment.

Clarke v. Robinson (R. I.) 922

BRIEFS AND NOTES.

Definition. (R. I.)	109
By consent. (Mass.)	216
By default; time of entry. (Mass.)	645
Res judicata, when a bar. (Me.)	664;
(Mass.) 218, 264, 384, 352; (N. H.) 524; (R. I.)	758
Decree of probate court; conclusiveness. (Vt.)	185
Judgment for installments of interest not bar subsequent action for principal. (Mass.)	319
Collateral impeachment. (Mass.)	264
Of decree of probate court. (R. I.)	758
Foreign; conclusiveness. (Conn.)	588
When motion in arrest lies. (Mass.)	326
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Admissibility in evidence. (Mass.)	350

JUDICIAL SALE. See EXEMPTION.

JURISDICTION. See COURTS, 4-9; EQUIT, I.

JUSTICES OF THE PEACE.

1. Under a statute giving trial justices concurrent jurisdiction with the supreme judicial court, the magistrate would have no authority to bind respondent over to court.

Thompson v. Smith (Me.) 140

2. Such proceedings do not bar action of debt under a statute providing that such penalties might be recovered by indictment or action of debt. *Id.*

3. A trial justice can not be allowed eighty cents for the trial of an issue in a criminal case under Rev. Stat. chap. 116, § 2.

Knowlton v. Comrs. of Waldo Co. (Me.) 146

BRIEFS AND NOTES.

Judgment; rendition; validity; conclusiveness. (Conn.) 587

LACHES. See REVIEW, 2.

BRIEFS AND NOTES.

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In taking advantage of right of subrogation will forfeit it. (Mass.)	626

LANDLORD AND TENANT. See GUARDIAN AND WARD, 1; STREET RAILWAYS, 4; USE AND OCCUPATION; WHARVES.

1. A lease of the first floor in a building includes the outside of the front wall as part of the premises demised.

Lowell v. Strahan (Mass.) 650

2. "Floor" means a section of the building between horizontal planes. *Id.*

3. Such lease grants an interest in such walls, viz., the right to use and enjoy as leased premises for the purposes of business. That

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right is exclusive, and landlord has no right to lease or let such walls. *Id.*

4. An agreement by tenant to allow sign of a stranger, in consideration of an annual payment by him, to remain upon outside wall, is not a breach of covenant not to underlet; such agreement is a license only. *Id.*

5. The tenant is not liable to landlord for moneys received for license to place sign upon wall. *Id.*

6. The land under a building will not pass as parcel of premises in lease of basement of building, the upper stories of which were let to other tenants. Authorities cited. *Id.* 652

7. The letting of a defined portion of a room in a factory with steam power for working machines is a demise. Authorities cited. *Id.* 654

8. Permission to place machines in a room in a factory, and to erect them with steam power furnished by owner of factory, creates a license and not a demise. Authorities cited. *Id.*

9. The relation of landlord and tenant is not affected by the fact that a lease for a year was not made until after expiration of part of year.

Palmer v. Cheseboro (Conn.) 809

10. A tenant's possession does not change its character by the owner's giving a deed to another.

Doyle v. Mellen (R. I.) 272

11. If two tenants in common make a lease of their tenement to another for a term of years, rendering to them a certain yearly rent during the term, if the rent be behind, the tenants shall have their action of debt against lessee. Authorities cited.

Clapp v. Pawtucket Inst. for Savings (R. I.) 98

12. A landlord is liable for injury received by falling into a defective coal-hole in the sidewalk in front of the house, where the premises are in possession of a tenant at will, without agreement on the latter's part to repair the premises.

Delay v. Savage (Mass.) 863

13. When property, not a nuisance when demised, becomes so only by act of tenant while in possession, owner is not liable. Authorities cited.

Joice v. Martin (R. I.) 797

14. But where owner leases premises which are a nuisance, and receives rent, he is liable for injuries resulting therefrom. *Id.*

Delay v. Savage (Mass.) 866

15. That the tenant may also be liable is not a defense to the landlord. *Id.*

16. But he is not liable where he lets the premises by lease in which tenant covenants to keep them in repair. *Id.*

Joyce v. Martin (R. I.) 797

BRIEFS AND NOTES.

Covenant not to underlet construed strictly. (Mass.) 652

Destruction of building terminates lease of room therein. (Mass.) 651

Interest of tenant in outside walls. (Mass.) 651

Liability of lessor for damages for injuries caused by defects in leased premises. *Note.* 796; (R. L.) 796; (Mass.) 280, 864

LEASE. See SALE, 1.

LEGACY. See DEVISE AND LEGACY.

LIBEL AND SLANDER.

1. **Words relating to the quality of articles made, furnished, or sold by a person, though false and malicious, are not actionable without special damage, unless they attach to the individual.**

Dooling v. Budget Pub. Co. (Mass.) 50

2. Where defendant charged that a caterer, on a single occasion, provided a very poor dinner, vile cigars, and bad wine, however strong the denunciatory language, it is not actionable without proof of special damage. *Id.*

BRIEFS AND NOTES.

Libel defined. (Mass.) 51

Court is to define what constitutes libel; jury to say whether particular publication comes within definition. (Mass.) 51

Words actionable; words tending to prejudice of anyone in his office, profession, trade, or business. (Mass.) 50, 51

Special damage. (Mass.) 50, 51

LICENSE. See INTOXICATING LIQUORS, II.; LANDLORD AND TENANT, 4; MUNICIPAL CORPORATIONS, III.; WATERS AND WATERCOURSES, 26.

A tax upon sale of an article is in legal effect a tax upon the article itself. Authorities cited.

State v. Pratt (Vt.) 857

LIEN. See ATTACHMENT, 16; JUDGMENT, 11; RAILROAD COMPANIES, 1, 2.

1. **Mechanics.** A materialman's lien on buildings and lot can only be enforced by suit against contracting party.

Furnham v. Davis (Me.) 404

2. Where portion of material is furnished on promise of one person, and remainder on promise of another, the lien for the first portion cannot be enforced by suit against latter person. *Id.*

3. When a lien arising from one contract has been dissolved, it can not be restored by tacking on a new lien arising under a new contract. Authorities cited. *Id.* 405

4. A sealed written contract to erect a building for another,—payments to be in notes, two of which builder actually accepted,—is a waiver of mechanics' lien.

Ellenwood v. Burgess (Mass.) 458

5. Where such contract was made with one who had no interest in land, the law will not imply that real owner contracted to pay builder, although such contract was made in pursuance of a fraudulent scheme between the owner and the one who contracted with builder. *Id.*

6. No lien attaches for materials furnished, unless furnishing party gives written notice to owner of property that he intends to claim such lien. *Id.*

7. Where charges for labor and materials are so mingled, the contract being entire, that they cannot be determined respectively, there is no lien for either. *Id.*

8. No debt could be found due on the sealed contract after rescission thereof; nor could a lien be established for the amount which the land had been enhanced in value. *Id.*

9. When, under a contract, no lien exists, its rescission cannot create one against innocent third parties intervening, while it was still in force. *Id.*

10. A builder was to erect a house just as he chose, and the landowner was to pay him a certain sum, and the builder was to pay the remainder and have the privilege of occupying the house with his family and the landowner. Plaintiff furnished materials to the builder and filed a certificate of mechanics' lien based on a contract between plaintiff and the builder, and not mentioning the landowner. *Held*, the builder must be regarded as the original contractor; that the plaintiff was a subcontractor; and that the landowner was not bound as a principal.

Kinney v. Blackmer (Conn.) 834

11. A laborer wrote his name at the top of a bill for labor on a building, and made oath to it. *Held*, not a sufficient compliance with a statute requiring claim should be subscribed by claimant, as well as sworn to, before filing for record.

Stratton v. Shoenbar (Me.) 769

12. A copy of the record of a lien claim was certified by the town clerk as from a certain volume of the books of mortgages, etc. *Held*, sufficient evidence of recording of claim in compliance with statutory provision that it should be recorded by town clerk in book kept for that purpose.

Billings v. Martin (Me.) 769

13. When a statute giving a lien provides for its enforcement in the same manner as another lien is enforced, the repeal of remedy in latter case will not affect remedy applicable to the former.

Collins v. Blake (Me.) 277

BRIEFS AND NOTES.

Statutory liens are stricti juris. (Mass.) 844

Mechanics'; statutory conditions for existence of. (Mass.) 455

Mere fact of work generally does not give rise to lien, if done without authority. (Mass.) 441

Notice to owner. (Me.) 404

Subcontractor; notice. (Mass.) 864

Place of record. (Me.) 769

Judgment in personam. (Me.) 404

LIFE ESTATE. See DEED, 19, 20; DEVISE AND LEGACY, IV.

LIFE INSURANCE. See **BENEFIT SOCIETIES; INSURANCE, II.**

LIMITATION OF ACTIONS.

- I. IN GENERAL; PERSONAL ACTIONS.
- II. ADVERSE POSSESSION.
- III. EXCEPTIONS.
- IV. REMOVAL OF BAR.
- V. PLEADING.
- BRIEFS AND NOTES.

See **ACCOUNT, 3, 4; ASSUMPSIT, 10; BILLS AND NOTES, 20; EQUITTY, 1; HUSBAND AND WIFE, 5, 6; JOINT TENANTS AND TENANTS IN COMMON, 5; PAYMENT, 2; RAILROAD COMPANIES, 1; SET-OFF AND COUNTERCLAIM, 10; TROVER AND CONVERSION, 5; TRUSTS, 20; WATERS AND WATERCOURSES, 28.**

I. IN GENERAL; PERSONAL ACTIONS.

1. In cases where the Legislature has not fixed a precise rule of limitation, rights may be acquired and barred by a prescription of such length of time as is prescribed by statutory rule in analogous cases. Authorities cited.

Boody v. Watson (N. H.) 568

2. When a duty is at the proper time asked to be done, and improperly refused to be done, the right to compel it to be done is not destroyed by lapse of time within which, in the first place, the duty ought to have been done. Authorities cited. *Id.* 569

3. Defendant, having purchased in good faith plaintiff's personal property of one who had its possession, but no right to sell it, used it as his own for more than six years, claiming title thereto. *Held*, that it was a conversion, but that the Statute of Limitations commenced to run at time of sale, and was a bar to an action of trover.

Merrill v. Bullard (Vt.) 111

4. Title to personality may be lost or gained by six years' possession. Authorities cited. *Id.*

II. ADVERSE POSSESSION.

5. Possession by grantee of mortgagor will not be adverse to mortgagee. *Doyle v. Mellen* (R. I.) 272

6. A possession, to work an ouster of owner, must be open, notorious, hostile, and continuous.

Wells v. Austin (Vt.) 799

7. Where there is no color of title, the fragmentary possession of a wild lot, arising from the paying of taxes and the cutting of a few trees here and there, and at different times, is not sufficient. *Id.*

8. A certain survey, *q. v.*,—*Held*, not to show color of title. *Id.*

9. The location and natural features of land will obviously determine in a large degree characteristics of the possession of which it is susceptible. Authorities cited. *Id.* 802

10. If it be near or remote from a mill or

farm, and at customary intervals is invaded for wood or lumber, this stamps the impress of ownership upon possession. *Id.*

11. A roving possession from one part of the tract to another is insufficient. Authorities cited. *Id.*

12. The claim of adverse possession must be made out by plain and satisfactory proof. The burden is on him who sets up an ouster. Authorities cited. *Id.*

III. EXCEPTIONS.

13. Where a disability exists when right of action accrues, the Statute does not run during its continuance. Authorities cited.

Frost v. Eastern R. R. (N. H.) 528

14. A right of personal action accruing to an infant is not barred by the statute until two years after disability removed. *Id.* 527

15. An action does not appear, "on the face of the papers," to be barred by the general limitation of six years, when some of items in account annexed to writ are alleged to be for term fees within six years of the date of the writ.

Gould v. Whitmore (Me.) 670

16. Statutory limitations of time are suspended when causes of action are fraudulently concealed, when courts are closed, and remedies of action or appeal are stayed by war. Authorities cited.

Boody v. Watson (N. H.) 569

17. An action will not lie for fraudulently preventing one from bringing a suit until barred by statute, unless the cause of action concealed was in fact a good cause of action.

Reynolds v. Hennessy (R. I.) 599

IV. REMOVAL OF BAR.

18. To take a case out of the statute by part payment, the payment must be made on the debt for which the action is brought, and as part payment of a greater debt.

Campbell v. Collingwood (R. I.) 101

19. A payment of interest or part of mortgage by one of parties interested in an equity of redemption, repels the presumption of payment, and takes case out of statute.

Hollister v. York (Vt.) 865

20. A part payment must amount to an admission that more is due. Authorities cited.

Campbell v. Collingwood (R. I.) 108

21. When one is bound morally to pay a debt, though not legally, a subsequent promise to pay will give a right of action. Authorities cited.

Sherwin v. Sanders (Vt.) 858

22. Items in mutual accounts, within six years before action brought, constitute no evidence of a promise to pay a balance, so as to take the case out of statute.

Gage v. Dudley (N. H.) 581

23. A mere understanding that any funds should be applied on the balance of indebtedness, in the absence of any actual application, has not the effect of a promise to pay such balances. *Id.*

24. An acknowledgment must contain an unqualified admission of a previous subsisting debt, which the party is liable and willing to pay. Authorities cited. *Id.* 538

25. A new promise or acknowledgment must be in writing, signed by party chargeable. Authorities cited. *Id.*

26. Whether a new promise sufficient to take the case out of the statute was made, is a question of fact, and not revisable on exceptions.

Campbell v. Collingwood (R. I.) 101

V. PLEADING.

27. The statute must be pleaded. *Sawyer v. City of Boston* (Mass.) 824

28. The defense of the statute is matter of avoidance, because it admits a cause of action once to have existed. Authorities cited. *Id.* 828

BRIEFS AND NOTES.

In equity. (Conn.) 592

Mortgages. (N. H.) 289

Adverse possession. (Vt.) 799

Must be actual, open, and visible. (Me.) 149

Personal actions. (N. H.) 268

When statute begins to run. (R. I.) 101; (Vt.) 111

When statute runs as between tenants in common. (R. I.) 916

So long as relation of mortgagor and mortgagee exists, Statute of Limitations does not run. (Vt.) 865

Exceptions; trusts. (Conn.) 594; (Mass.) 626

Decedent's estates. (Me.) 278

Infants. (N. H.) 527

Mutual account. (Me.) 671; (R. I.) 916; (N. H.) 532

Removal of bar of statute by new promise. (N. H.) 532

Admission; part payment. (R. I.) 192; (Vt.) 507

Pleading; statute must be pleaded. (N. H.) 299; (Mass.) 827

LIQUORS. See INTOXICATING LIQUORS.

LIVERY-STABLE KEEPERS.

1. Livery-stable keeper is liable for damage to a horse boarding in a stable, caused by an employee's negligence in the performance of his duties.

Eaton v. Lancaster (Me.) 772

2. Whether a nightwatchman in the stable is guilty of negligence within the scope of his employment in permitting partially intoxicated men, with pipes and matches, to go into the hayloft after midnight, to pass the remainder of the night, is a question for the jury. *Id.*

BRIEFS AND NOTES.

Liable for negligence of employees. (Me.) 778

N. E. R., V. IV.

LOCAL IMPROVEMENTS. See MUNICIPAL CORPORATIONS, V.

LOGS AND LUMBER. See SALE, 5, 6.

Oratrix sold timber on one acre of land, "more or less, within bounds of hemlock timber."—*Held*, the sale included the timber of only one acre; the words "more or less" did not enlarge the quantity before described. *Smith v. Rock* (Vt.) 863

LOTTERY.

A prisoner was charged in one count with both offering for sale and selling half of a lottery ticket; the count was held to charge but one offense, on ground that sale includes offer to sell. Authorities cited.

State v. Haven (Vt.) 619

MALICIOUS PROSECUTION.

1. An action for malicious prosecution cannot be maintained before the termination of the prosecution.

Wood v. Bailey (Mass.) 246

2. Where a nolle prosequi is entered by procurement of party prosecuted, such party can not maintain an action for malicious prosecution.

Langford v. Boston & A. R. R. Co. (Mass.) 200

3. Where, by procurement of defendant's attorney, the district attorney entered a nolle prosequi on defendant's appeal to the superior court, an action for malicious prosecution could not be maintained. *Id.*

BRIEFS AND NOTES.

Probable cause; want of. (Mass.) 211, 212, 261

Suit for; maintainable upon defective complaints and indictments. (Mass.) 210

MANDAMUS. See POLICE AND POLICE DEPARTMENTS.

1. Title to office, as against one actually in possession under color of law, can not be tried by mandamus.

French v. Cowan (Me.) 639

2. Mandamus will not issue upon petition of a private citizen to compel a public officer to act in a public manner.

Mitchell v. Boardman (Me.) 764

3. As, to compel a police-court judge to issue a warrant of search and seizure, upon a proper complaint. *Id.*

4. Mandamus will not issue when the thing commanded by it would be an idle and useless ceremony. *Id.*

5. Mandamus is only used to compel persons to act where it is their plain duty to act without its agency. Authorities cited. *Dis. Op.*

Boody v. Watson (N. H.) 573

6. Generally the petition must be dismissed if, at any time before writ granted, it appears plaintiff is not entitled to it. Authorities cited. *Dis. Op. Id.* 578

7. Mandamus can not issue to an officer if, pending suit, he has resigned his office; if his authority to act has been taken away by

repeal of law, or has expired by limitation of law; if it will expire before act sought to be enforced, can be performed; if act has in the meanwhile been done, or to restore to office one who before final judgment has become disqualified to hold it. Authorities cited. Dis. Op. *Id.*

8. The general principles of **pleading** prevail, so far as nature of proceeding admits of their application. Authorities cited. Dis. Op. *Id.*

BRIEFS AND NOTES.

When granted; effect. *Note,* 577

Only granted where there is a clear legal right to be enforced or a duty which ought to be performed. (Me.) 688; (N. H.) 556

Not granted where there are other adequate legal remedies, or where it would be inoperative. (N. H.) 556

To compel levy of **taxes.** *Note,* 577; (N. H.) 555

Not issue upon petition of private citizen to compel **public officer** to act in public matter. (Me.) 764, 765

Lies to **inferior tribunals.** (Me.) 688

Forms of writ when issued to subordinate court. (Me.) 765

MARRIAGE. See HUSBAND AND WIFE, I.

MARRIED WOMAN. See HUSBAND AND WIFE.

MASTER AND SERVANT. See LIVERY-STABLE KEEPER.

1. An order for an **assignment of wages** already earned, otherwise valid, is not rendered invalid by an understanding that employer is to retain the amount due him from assignor for house rent and fuel furnished prior to the date of the order or assignment. *McCormick v. Towns* (N. H.) 164

2. Whether a **master** has exercised reasonable **care** in employing competent servants, in providing suitable machines, and has exercised a reasonable supervision over his servants in the performance of delegated duties, is usually a **question for the jury.** *Rice v. King Philip Mills* (Mass.) 59

3. The question of due care is ordinarily for the jury, but it is for the court to determine whether the proof is sufficient to authorize the jury to find due care. *Wormell v. Maine Cent. R. R. Co.* (Me.) 693

4. A master is bound to due care in furnishing **suitable machines** and in keeping them in proper **repair.** Authorities cited. *Id.* 696

Rice v. King Philip Mills (Mass.) 59

5. If the **machinery** is of an **ordinary character**, such as can, with reasonable care, be used without danger, except such as may be reasonably incident to the business, it is all the law requires. Authorities cited. *Wormell v. Maine Cent. R. R. Co.* (Me.) 696

6. The **nature of the defect**, the **length of time** it has existed, and the means taken to remedy it, are important facts in determining N. E. R., V. IV.

what the master ought to have reasonably known and done.

Rice v. King Philip Mills (Mass.) 59

7. If the master knew, or ought to have known, that a machine in use was out of repair, and dangerous, it was his **duty** to see that it was put in proper repair, or to **warn** those using it **of the danger** if they were ignorant of it. Authorities cited. *Id.* 63

8. A servant receiving **injuries** in performance of duties **outside of regular employment**, cannot recover if there is a want of due care on his part. *Wormell v. Maine Cent. R. R. Co.* (Me.) 693

9. A **servant** is under the same obligations to **provide for his own safety** as a master is to provide it for him. *Id.*

10. The mere fact of relationship of master and servant, without a neglect of duty, does not impose upon master a **guaranty of servant's safety.** Authorities cited. *Id.* 696

11. A servant cannot recover for the voluntary **assumption of known risks.** Authorities cited.

Gaffney v. N. Y. & N. E. R. R. Co. (R. I.) 85

Halt v. Nay (Mass.) 175

12. A **servant** of sufficient age and intelligence to understand the nature of the risks to which he is exposed **takes** upon himself the natural, ordinary, and apparent risks incident to the employment. Authorities cited.

Wormell v. Maine Cent. R. R. Co. (Me.) 696

13. A master is not liable to his servant simply because he used a **dangerous machine**; but is liable if he employed a **servant** to use it in **ignorance of the danger.** *Gilbert v. Guild* (Mass.) 648

14. Want of due care by the servant, or **knowledge of danger**, if the machine was dangerous, will **prevent a recovery.** *Id.*

15. If a servant undertakes the work knowing the danger, the **master** is not liable, although he might have prevented the **danger by guarding against it.** *Id.*

Wormell v. Maine Cent. R. R. Co. (Me.) 693

16. If the servant did not know of the danger, proof that the master **could have guarded against it** would be **no defense.** *Gilbert v. Guild* (Mass.) 648

17. A **brakeman** knowing of a lumber pile near the track, **voluntarily jumping** upon a train moving by the pile, and injured, cannot recover. *Gaffney v. New York & N. E. R. R. Co.* (R. I.) 83

18. He cannot recover because the piling of the lumber was an act of a **fellow-servant.** *Id.*

19. A servant employed on a slubber machine in a cotton-mill, whose duty it was to see that the machine was kept running, to take off the full bobbins and put on others, to notify the overseer if she knew that there was anything wrong about the machine, and to see that it was kept clean, and the person whose business it was to keep the machine in repair, are fellow servants. *Rice v. King Philip Mills* (Mass.) 59

20. If a **servant** knows that his fore-

man is careless and fails to notify his master thereof, but continues in the service, he can not recover for an injury resulting from such carelessness.

Hatt v. Nay (Mass.) 173

21. In an action for injury received on a pile-driver, through alleged negligence of a foreman, evidence is admissible of the reputation of the foreman for skill and competency. *Id.*

22. Special acts of negligence at other times are not admissible. *Id.*

23. Questions to experts as to whether guard should have been used on a certain machine are immaterial.

Gilbert v. Guild (Mass.) 648

24. The question whether the danger was obvious to the common mind, is addressed to the common knowledge of the jury, and not to an expert. *Id.*

BRIEFS AND NOTES.

Assignment of wages by employer to creditor by admitting service of trustee writ. (N. H.) 395

Duty of master to furnish safe machinery. (Me.) 694, 695; (Mass.) 62, 174, 648; (R. I.) 88

Defective machinery. (N. H.) 297

Duty of master to warn servant of dangers. (Me.) 694

Expert evidence as to whether guard should be used on machines. (Mass.) 649

Assumption of risks by servant. (Me.) 693; (Mass.) 62, 174, 649; (R. I.) 88

Fellow servants. (Mass.) 62, 174

Who are; illustrations. (Me.) 693, 695; (R. I.) 84

Respondent superior. (Mass.) 888

Liability of master for torts of servant. (Me.) 785; (Mass.) 888; (N. H.) 296, 297

MAXIMS.

1. The law does not promote in one form that which it prohibits in another. Authorities cited.

Jones v. Surprise (N. H.) 295

2. The maxim that a man must use his property so as not to incommode his neighbor, only applies to neighbors who do not interfere with or enter upon it. Authorities cited.

Frost v. Eastern R. R. (N. H.) 528

3. Actus curiæ neminem gravabit.

Boody v. Watson (N. H.) 570

4. Actus legis nemini facit injuriam. *Id.*

5. De minimis non curat lex. *Id.* 577

6. Expressio unius est exclusio alterius.

Dow v. Young (Me.) 504

7. Omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium.

Willard v. Pike (Vt.) 605

8. Stare decisis.

Allen v. Danielson (R. I.) 108

BRIEFS AND NOTES.

Everybody is bound to know the law and what it authorizes. (Me.) 277

N. E. R., V. IV.

Accessorium non ducit, sed sequitur, suum principale. (Me.) 414

De minimis non curat lex. (Me.) 661

Expressio unius est exclusio alterius. (Mass.) 194

Inignorantia legis neminem excusat. (Mass.) 233

Nemo est hæres viventis. (Mass.) 463

Qui facit per alium, etc. (Mass.) 53

Qui sentit onus debet sentire commodum. (Conn.) 848

Res ipsa loquitur. (Mass.) 260, 268

Respondet superior. (Mass.) 888

Verba chartarum fortius accipiuntur contra proferentem. (Mass.) 636

MECHANICS' LIEN. See LIEN.

MILITARY SETTLEMENT. See POOR AND POOR LAWS, 1-3.

MILLS AND DAMS.

1. Where owner of water-rights conveyed right to take water from dam to mill site below, except a single use in a certain time, which, by reference, was fully defined in reserving clause in deed, the reference in the exception to language in the reservation made it a part of the exception.

Gage v. Barnes (N. H.) 391

2. The principle that when several enjoy a common benefit, all must contribute ratably to expenses, does not apply where deeds establish the rights of each of several millowners, and define their liabilities as to contribution in maintaining a common reservoir dam.

Tullar v. Baxter (Vt.) 130

3. Nor will contribution be decreed against one whose mill privilege is not used. *Id.*

4. Where millowners, derive titles from a common grantor, having an interest in a reservoir dam, and for many years give a practical construction to their deeds,—in that some have contributed towards the maintenance of the dam and others have not,—the court will consider such construction in defining the deeds. *Id.*

5. One, representing a majority interest, authorized to determine as to repairs of the dam, is under the duty of deciding fairly, and conducting work prudently. *Id.*

6. When one delivers logs at a custom sawmill to be sawed at an agreed price, the owner of the mill becomes a bailee, and is bound to prove, in case of their loss, that it was without his fault.

Gleason v. Estate of Beers (Vt.) 713

7. The question of bailor's contributory negligence is not raised, when it is not found that he intermeddled with the logs after delivery in mill-yard. *Id.*

8. Defendant's intestate contracted to saw lumber at a stated price. Held, that the estate should not be allowed more than the agreed price. *Id.*

BRIEFS AND NOTES.

Mill privilege defined. (Mass.) 233

Common duty of millowners to maintain dam. (Vt.) 180

Compelling company after erecting dam to erect fishway. (Conn.) 89

Overflowage; liability for damages. (Mass.) 843

Remedy for damages suffered by lawful erection of dam. (Mass.) 342

MINES AND MINING. See DEED, 10.

MISDEMEANORS. See CRIMINAL LAW, I.

MISTAKE. See EQUITY, II.

MONEY HAD AND RECEIVED.
See ASSUMPSIT, 1-5.

MORTGAGE.

I. DEED ABSOLUTE.

II. CONSIDERATION; DESCRIPTION; INTEREST.

III. IN GENERAL; PARTIES.

IV. REDEMPTION.

V. FORECLOSURE.

VI. ACCOUNT.

VII. POWER OF SALE; TRUST DEEDS.

VIII. CHATTEL.

BRIEFS AND NOTES.

See EXECUTORS AND ADMINISTRATORS, 4; BILLS AND NOTES, 20; DEVISE AND LEGACY, 21-28; TROVER AND CONVERSION, 9; WILL, 11, 12.

I. DEED ABSOLUTE.

1. A deed absolute on its face may be construed to be a mortgage.
Knapp v. Bailey (Me.) 147

2. The grantor is a competent witness to show that his title was only that of an equitable mortgage. *Id.*

3. Where the intention is clear that an absolute deed is taken as a security for a debt, it is, in equity, a mortgage. Authorities cited. *Id.* 150

4. Whether a deed is an equitable mortgage belongs to equitable jurisdiction to determine. Authorities cited.

Bailey v. Knapp (Me.) 280

5. A deed of release and an instrument of reconveyance,—*Held*, to constitute a mortgage.

Gunn's Appeal (Conn.) 810

II. CONSIDERATION; DESCRIPTION; INTEREST.

6. As between parties and their representatives, the consideration named in a mortgage does not determine the amount of a mortgage given for both present and future indebtedness; nor is record of mortgage notice of the amount due, or a limitation of amount secured.

Keyes v. Bump's Admr. (Vt.) 518

7. A mortgage given to secure future advances, the limit of which is not defined therein, is good for the amount of advances made. Authorities cited. *Id.* 515

N. E. R., V. IV.

8. The real consideration of mortgages may be shown although different from that expressed in instrument. Authorities cited. *Id.*

9. A settlement of boundaries of land included in a mortgage, made under circumstances which amount to a legal fraud on mortgagor's part, is not binding on mortgage.

Elliot v. Gilchrist (N. H.) 285

10. A mortgage of a "tract of land known as the M lot, bounded * * * easterly by land of W." under the circumstances of this case, conveys the land up to W's line, although a portion of it was known as the S lot. *Id.*

11. In a mortgage to secure grantors, both in sickness and in health, good and proper food, medicine, clothing, care, etc., during their lives, together with a stipulation that one grantor is to occupy a certain room during life, it follows that the provisions are to be furnished in the house in which grantor was to occupy a room.

Dudley v. Dudley (Mass.) 41

12. Where, by an agreement in a mortgage, grantee is to release any portion of the land, on being paid at the rate of 50 cents per foot; and the plaintiff has offered to pay the amount thus fixed for the release, and the defendant has refused to execute a release except upon the payment of a larger sum; and no interest was stipulated for in the agreement, and it is apparent that none was intended to be paid by the owners of the several lots,—a ruling on the hearing that the interest did not begin to run until the decree fixing the amount to be paid, was affirmed.

Clark v. Fontain (Mass.) 175

III. IN GENERAL; PARTIES.

13. A mortgagee can not be disseised by mortgagor; being a tenant at will, his possession is not adverse. Authorities cited.

Doyle v. Mellon (R. I.) 273

14. As between mortgagor and mortgagee, the mortgage vests the legal title and seisin of estate in mortgagee immediately upon delivery of mortgage. Authorities cited.

Jones v. Smith (Me.) 690

15. Payment of mortgage debt after condition broken will not divest mortgagee of legal title. Authorities cited. *Id.*

16. A payment of interest or part of principal renews mortgage. Authorities cited.

Hollister v. York (Vt.) 366

17. Trespass cannot be maintained against mortgagee in possession for acts done after mortgagor paid sum due, and before mortgagee had executed the release and surrendered premises.

Jones v. Smith (Me.) 689

18. Trespass *quare clausum* will not lie in favor of mortgagor against mortgagee for entering peaceably upon mortgaged premises and digging up and carrying away and converting to his own use portions of the soil; nor for removing fixtures belonging to real estate. Authorities cited. *Id.* 690

19. Where the undertaking on mortgagee's

part is to account to mortgagors and their heirs and assigns for the surplus money, it is an undertaking to pay the mortgagors jointly, and an action to recover the surplus must be joint.

Clapp v. Pawtucket Inst. for Savings (R.I.) 97

30. An attachment under State laws is invalid against mortgagees of a vessel by mortgage duly registered under Federal shipping laws.

Howe v. Tefft (R. I.)

108

31. The omission of the court to charge defendant as garnishee having possession of the vessel,—*Held*, not to affect his right to set up the attachment, if valid, by way of justification in replevin for the vessel, brought by the mortgagees.

Id.

IV. REDEMPTION.

32. Where a party had promised mortgagor the money to redeem, but failed to meet him at appointed time, and mortgagor was thereby delayed until after banking hours and prevented from sending money to clerk of court within time limited by decree,—*Held*, it was an accident, and mortgagor was entitled to redeem.

Kopper v. Dyer (Vt.)

368

33. In such case mortgagor will be reinstated, but on terms that he satisfy the equitable rights of the other party.

Id.

34. The bill was defective in that it was framed on theory that orator's personal check deposited with clerk was a payment of it; and that it did not contain an offer, or an averment of willingness, to redeem; but an amendment was allowed.

Id.

35. Whenever mortgagor is driven to the necessity of filing a bill against mortgagee, it must be one to redeem. Authorities cited.

Id.

871

36. Where, upon mortgagor's demand, mortgagee renders a false account of amount due on mortgage, mortgagor may commence suit to redeem without tendering amount due.

Meaher v. Howes (Me.)

776

37. On a bill to redeem, without first tendering amount due, plaintiff must aver and prove that he has been prevented from making tender by defendant's default. Authorities cited.

Id.

777

38. Reasonable notice of legal proceedings, and a reasonable time for redeeming land from a mortgage, may be determined by a statutory rule in analogous cases. Authorities cited.

Boody v. Watson (N. H.)

568

V. FORECLOSURE.

39. A power of sale and the intervention of trustees do not necessarily take from the court the power to decree a strict foreclosure.

Shepard v. Richardson (Mass.)

305

40. The right to foreclose means the power to cut off a right to redeem given by equity, when, under a condition of the mortgage, the mortgagee's estate has become absolute at law.

Id.

N. E. R., V. IV.

81. If mortgagee's estate never becomes absolute, there never can be a foreclosure.

Id.

82. It is not essential that a limitation to the time for redemption be expressly fixed, though in some cases it has been held that this omission has left mortgagee without foundation for foreclosure.

Id.

83. Where certain holders of bonds brought a bill against a company, and trustees in possession under a deed of trust, claiming that the entry by trustees and their possession for three years had been, in effect, a foreclosure as provided by statute in case of mortgages,—*Held*, the whole tenor of the deed is inconsistent with a right on the part of the trustees to foreclose by entry and lapse of time.

Id.

84. Where mortgagor still has right to redeem, mortgagee cannot foreclose. Authorities cited.

Id.

306

85. A mortgagee's decision to sell or foreclose is governed by his own interest alone. Authorities cited.

Id.

86. A mortgaged corporate stock to B and C. *Held*, the effect of foreclosure was to vest the stock in B and C as tenants in common.

Clarke v. Robinson (R. I.)

923

87. An arrangement between persons interested in real estate subject to a mortgage, that at foreclosure one should take title, and after making sale divide the surplus, implies that such one should have power, in his discretion, to make a sale, convey good title to purchaser, and collect purchase money.

Cook v. Young (Mass.)

444

88. The person so taking title at foreclosure did not take subject to a resulting trust.

Id.

89. One purchasing *pendente lite* is bound by the decree, and need not be made a party.

Kopper v. Dyer (Vt.)

568

VI. ACCOUNT.

40. In a suit to foreclose a mortgage made by Connecticut Central R. R. Co. to State treasurer, as trustee, the New York & N. E. R. Co., which owned all the mortgage bonds, and at whose request suit was brought, and who had had for some time exclusive possession of mortgaged property under a lease providing that net income should be applied to payment of interest coupons, was made co-defendant,—*Held*, the mortgage was, in effect, a contract between mortgagor and holders of bonds; that the lease has an intimate connection with subject-matter of suit, and is not an independent contract from the mortgage, and that it is the duty of the New York & N. E. R. R. Co. to account.

Chamberlain v. Connecticut C. R. R. Co. (Conn.)

437

41. A mortgagee in possession will be subject to the duty of applying the rents and profits in discharge of the debt, and rendering an account of their receipt and application.

Id.

42. An equitable mortgagee is as liable to account as a legal mortgagee.

Id.

43. If the possession and use of mortgaged premises by the owner of the mortgage debt, without any agreement at all respecting the matter, imperatively demands an **accounting** and the **application of rents and profits** to the **payment of the debt**, the duty can be no less on the party who has agreed to do that very thing. *Id.*

44. When **payor** of a mortgage note, in accounting, is **allowed to prove** an oral **agreement** made at the time of execution of note,—in effect, that payor protested that he did not owe it, and that payee promised that if on settlement it was not found all right, he would make it so,—such agreement is as operative as though a part of the note itself, and compels payee to show consideration *alunde*.
Hathaway v. Hagan (Vt.) 128

45. Where the master reports an **overpayment** of mortgage, defendant, under an answer, is not entitled to affirmative relief; but the case, on motion, will be remanded, that a cross-bill may be filed. *Id.*

VII. POWER OF SALE; TRUST DEEDS.

46. A provision in a power of sale in a mortgage that twenty days' **notice of sale** should be given in some newspaper, means a continuous notice for twenty days; and a notice in a daily newspaper on seven days only, at intervals during twenty days preceding sale, is not sufficient.

Washington v. Bassett (R. I.) 750

47. It seems that, if mortgagor had, in good faith, selected a **weekly paper**, the **insertion of the notice** in each issue of the paper for the designated period would have fulfilled the requirement. *Id.*

48. It is only when **donee** of a power of sale in a mortgage is guilty of some **fraud** in executing the power, that he can actually execute it and at the same time violate his duty.
Reynolds v. Hennessy (R. I.) 598

49. **Donee** is under no obligation, so long as he acts within terms of power, to give any **notice**, other than general notice prescribed in the power, of **what he intends to do**. *Id.*

50. Assuming that donee could not convey the premises absolutely, without receiving the amount bid for them, or so much thereof as owner of equity of redemption was entitled to, such conveyance by him would be effectual only to transfer mortgagee's interest, the mortgagor still remaining the owner of **equity of redemption**. *Id.*

51. **Power reserved to grantors in a mortgage to release any restrictions** in the former's deeds against erecting any edifice for obstruction of light within eleven feet of the north side of a portion of the buildings,—said mortgage also containing the power of sale authorizing mortgagee to sell premises absolutely and in fee simple,—is **extinguished by a sale for breach of condition**.
Petition of Bull (R. I.) 748

52. The **purchaser** of mortgaged estate is entitled to have it with the **rights and easements** appurtenant to it as they existed when power of sale was given. *Id.*

N. E. R., V. IV.

53. Orator was trustee under mortgage deed, executed by S to secure his bonds. There was a provision in deed by which **mortgagor could sell portion** of premises, and orator could **quitclaim** such portion, provided the full value thereof was used in purchasing or retiring the bonds, and the security for the remainder of the bonds "shall not, in the judgment of said trustee, become impaired." S having sold a portion of the premises, and some of **bondholders objecting** to a conveyance, the orator brought this bill for advice "as to whether or not the occasion is a proper one for the exercise of the power; * * * and if so, upon what terms and provisions." The court below decreed a conveyance, "unless the said trustee * * * shall decide that the **security** for the remainder of said bonds will have become **impaired**," etc. *Held*, error, in that trustee was virtually decreed to convey without any exercise of its judgment, and the **decree** went beyond the prayer of the bill.

Rutland Trust Co. v. Sheldon (Vt.) 711

VIII. CHATTEL.

54. A chattel mortgage is not void because it permits **mortgagor to remain in possession** and sell the goods in the ordinary course of business.

Blanchard v. Cooke (Mass.) 68

55. An assignee in insolvency is not one of the "parties" within the meaning of the statutes providing that unless a chattel mortgage is **recorded or the property delivered** to the mortgagee "the mortgage shall not be valid against any person other than the parties thereto," etc. *Id.*

56. The limitation of time within which a chattel mortgage must be **recorded** does not **apply to the time the property must be delivered to mortgagee**, if the mortgage is unrecorded. *Id.*

57. It is sufficient if the **property is delivered** to and retained by the mortgagee **before the rights of third parties have attached**. *Id.*

58. In the case of informal instruments giving a right to chattels, **possession** rightfully obtained **vests title** in transferee, as **against third persons**, including an **assignee in insolvency**. *Id.*

59. If **after-acquired property** is taken by mortgagee into possession before intervention of rights of third parties, he holds it under a valid lien by the operation of the provision of the mortgage in regard to it. Authorities cited. *Id.* 78

60. Where a chattel mortgage provides that **if the goods be attached on mesne process, mortgagee may sell** the goods, it is immaterial that the **attachment was illegal and void**.
Crocker v. Atwood (Mass.) 628

61. The taking and sale of property on an illegal attachment is a **conversion of it**. *Id.*

62. A **collusive attachment** in a fictitious suit, to deprive mortgagee of property, is void as to him. *Id.*

63. That mortgagee was defedant in the action in which the property was attached does not limit his remedy to an action for malicious prosecution; that the suit was malicious, or the attachment invalid, cannot deprive him of his right to the property. *Id.*

64. It is only under Pub. Stat. chap. 161, §§ 74, 79, *et seq.*, that mortgaged personal property can be attached or taken on execution as property of mortgagor.

Simmons v. Woods (Mass.) 218

65. Where a trustee, summoned because his name appeared as mortgagee in record, answered that he never saw the mortgage, and it was never delivered to him, and he never paid any consideration for it, nothing remained but to discharge the trustee. *Id.*

66. Such discharge did not dissolve the attachment so that it cannot be set up against the debtor and purchaser from him. *Id.*

67. Where the record shows the trustee has no interest in the matter, his discharge, in whatever form effected, will be presumed to be for that reason. *Id.*

BRIEFS AND NOTES.

Consideration. (Mass.) 214

Description of land; boundaries. (N. H.) 286

Recording a paper does not operate as delivery or acceptance. (Mass.) 214

Delivery and acceptance are essential. (Mass.) 214

Mistake in recording in wrong book. (Me.) 769

Deed absolute as. (Me.) 149, 154, 280; (Mass.) 307

Parol evidence to show. (Mass.) 630, 655

As between an equitable mortgage and a sale with an agreement to reconvey, the former is favored. (Me.) 536

After-acquired property. (Mass.) 70, 71

Assumption of. (Conn.) 810

Parties; mortgagee may employ auctioneer to make sale. (Mass.) 453

Between mortgagor and mortgagee there is no right to emblements. (Me.) 639

Mortgagee has no right of action after payment. (Me.) 639

Payment of debt after condition broken not divests mortgagee of legal title. (Me.) 639

Redemption. (Mass.) 307

In bill to redeem, tender must be made. (Vt.) 369

When tender rendered unnecessary by acts of mortgagee. (Me.) 776, 777

Interest. (Mass.) 176

Foreclosure. (N. H.) 157; (Mass.) 307

Action for money had and received is proper proceeding to recover surplus. (R. I.) 97

Duty of mortgagee to account for rents and profits. (Conn.) 478

N. E. R., V. IV.

Power of sale; exhausted by single sale. (Mass.) 307

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MUNICIPAL CORPORATIONS.

I. DIVISION LINE BETWEEN TOWNS.

II. TOWN MEETINGS; DEBTS.

III. LICENSES.

IV. PROPERTY RIGHTS; WATERWORKS; EMINENT DOMAIN.

V. STREETS; LOCAL IMPROVEMENTS; ASSESSMENTS.

VI. DEFECTIVE WAYS.

VII. OFFICERS; LIABILITY FOR ACTS OF.

VIII. PARTICULAR CHARTERS.

BRIEFS AND NOTES.

See INTOXICATING LIQUORS, 24, 25, 27; NUISANCE; ROADS AND HIGHWAYS; SCHOOLS AND SCHOOL DISTRICTS; WATERS AND WATERCOURSES, 24.

I. DIVISION LINE BETWEEN TOWNS.

1. In a proceeding to establish the dividing line between towns, costs are not allowed to either side.

Inhab. of Monmouth v. Inhab. of Leeds (Me.) 152

2. The court has such control over the proceeding as to prevent a report being final, unless satisfied of its freedom from fraud. *Id.*

II. TOWN MEETINGS; DEBTS.

3. The warrant for an annual town meeting contained the following articles: "To see if the town will choose the selectmen to be surveyors of highways." "To choose all necessary town officers. The following are chosen by ballot: selectmen, assessors, overseers of the poor. * * * All of said votes to be on one ballot." At the beginning of the meeting it was voted "to ballot for five selectmen, who shall also be assessors, overseers of the poor, and highway surveyors." *Held*, the articles were sufficient to support such vote; that no voter could vote for distinct board of assessors, overseers of the poor, and surveyors; and that while ballots containing other names for assessor, overseer, or surveyor, than those given for selectmen were irregular, they could be rectified by rejecting as surplusage the portion relating to such offices and the portion thereof containing names for selectmen should be counted as votes for selectmen.

Attorney-General v. Wentworth (Mass.) 333

4. An article in a warrant, to see if a town will appropriate money to a particular object, authorizes a vote to raise as well as appropriate it. Authorities cited. *Id.* 333

5. An annual town meeting need not be precisely one year from preceding meeting. Authorities cited.

Willard v. Pike (Vt.) 337

6. To recover on a town note given by selectmen for borrowed money, it must appear the money borrowed went into town treasury, or had been applied to a legal liability.

ity of the town, and that the town had ratified selectmen's action.

Brown v. Inhab. of Winterport (Me.) 491

7. An article in a warrant calling a town meeting to see if the town would vote to pay certain notes given by a majority of the selectmen, describing each by giving its date, amount, and to whom payable, is sufficiently explicit. *Id.*

8. Where the officers and members of a town meeting, without formal action, adjourn to the open air for convenience, and there vote, the action is valid. *Id.*

9. A vote of ratification can not be rescinded at a subsequent meeting. *Id.*

III. LICENSES.

10. The charter of an incorporated village, authorizing it to "regulate" its victualing houses, repeals by implication the general law on that subject.

Village of St. Johnsbury v. Thompson (Vt.) 509

11. By-laws authorized by charter have the same effect, within municipal limits, as a special law of the Legislature. *Id.*

12. Under such charter a by-law conferring power to license victualing shops, and providing a penalty for keeping such shops without a license, is a reasonable regulation, and not contrary to common right. *Id.*

13. One controlling the business of a victualing shop in wife's name, but without her personal attention, is a keeper within a by-law prohibiting the keeping of such shop without a license, and is liable for the penalty. *Id.*

14. An indictment for keeping an unlicensed victualing house need not allege that it was kept open for business.

State v. Kane (R. I.) 600

15. Nor that defendant was the keeper or proprietor. *Id.*

16. An ordinance prohibiting cartmen from transacting business without a license is a proper regulation of the business. Authorities cited.

Village of St. Johnsbury v. Thompson (Vt.) 511

IV. PROPERTY RIGHTS: WATERWORKS; EMINENT DOMAIN.

17. The power given to Boston and West Roxbury to "take or purchase lands," is to be exercised by the city and town severally, and the title to the land should be the title in fee simple.

Page v. O'Toole (Mass.) 195

18. Under a contract for supply of water, which a town authorized selectmen to make with a water company for a term of years, the debt is an annual one, payable out of money raised by taxation.

Smith v. Town of Dedham (Mass.) 55

19. The charter of Dedham Water Company does not confer any power upon the town of Dedham similar to that conferred by Pub. Stat. chap. 110, relating to "aqueduct corporations." *Id.*

N. E. R., V. IV.

20. Under Stat. 1878, chap. 242, authorizing town of Arlington to take lands for waterworks, a description of the land taken must be filed in registry of deeds.

Kentson v. Town of Arlington (Mass.) 840

21. The right to maintain a dam, under such Act, in such a way as to flow other lands, unless dammed against, is an easement over or interest in such land, and is land. *Id.*

22. The requirement of the Act that a description shall be filed applies to lands flowed; and if not complied with, the flowing is a trespass for which the owner is not confined to his remedy under the statute. *Id.*

23. The taking and filing a description of a dam, capable of flowing adjoining land, is not the taking or describing such adjoining land. *Id.*

24. If plaintiff's land was flowed by the dam as soon as the dam was taken, and such flowing amounted to a taking of plaintiff's land, that fact would not enlarge the description of the dam, or make it a description of the land flowed. *Id.*

25. Where the town took and described "all the water-rights and other privileges and appurtenances" of the land on which the dam stood, it was not a taking or description of a right to flow beyond such prescriptive rights. *Id.*

26. In a proceeding for damages for taking land by a city, for a park, evidence of sales of lots situated like petitioner's was not incompetent merely because they were smaller than petitioners'. *Id.*

Sawyer v. City of Boston (Mass.) 824

27. Compulsory sales of lands are not evidence of value of other lands. *Id.*

28. An expert in real estate is no more competent than anyone else to determine just what effect, measured in money, the dislike of litigation may have had on a given person's mind. *Id.*

29. Interest was properly allowed on value of land at time taken. *Id.*

30. The petitioner is not bound to allege that he is in time. *Id.*

V. STREETS; LOCAL IMPROVEMENTS; ASSESSMENTS.

31. In a proceeding under Rev. Laws, § 2969, the county court cannot assess one town to pay any part of expenses of building highway in another town.

Parker v. East Montpelier (Vt.) 808

32. A decree ordering aid from one town in maintenance of a highway in another town, may be vacated on proof of necessity for a considerable portion of way for ordinary use, to an inhabitant of such other town.

Town of Wardboro v. Town of Jamaica (Vt.) 365

33. The court refused to consider whether petitionee had a vested right in an assessment, as it did not appear that any assessment was then due. *Id.*

34. Towns required to contribute to the construction of bridges in another town, un-

der Comp. Stat. chap. 53, § 1, may be required to contribute towards repairing, under Gen. Laws, chap. 72, § 4, and the county commissioners may also fix the ratable contribution.

Town of Campton v. Towns of Plymouth & Haverhill (N. H.) 160

35. Under Pub. Stat. chap. 49, specific repairs upon a highway or townway are to be ordered by person authorized to lay out same, and the damages to a landowner are to be estimated by the same person.

Sullivan v. City of Fall River (Mass.) 632

36. If damages are not given in the order directing repairs, or in the return made upon it, the party aggrieved may apply for a jury. *Id.*

37. Under Pub. Stat. chap. 52, the land owner must file a petition within one year from completion of work, and an adjudication must be made within thirty days after filing petition; and if petitioner is aggrieved by estimate of damages, he may, within one year, apply for a jury. *Id.*

38. When a change is made in grade of a street, by an authority competent to fix the grade, and nature and extent of change is specifically declared in, and made part of, record of proceedings, the repairs are specific, under Pub. Stat. chap. 49. *Id.*

39. But if the repairs are ordered by an authority not competent to fix the grade, or if made or ordered by an authority competent to fix the grade, and the order does not determine specifically the nature and extent of the change, but the way is repaired either by an actual change of grade or otherwise, under an authority competent to direct the repair of ways, the damages to property are recoverable, under Pub. Stat. chap. 52. *Id.*

40. A petition for damages sustained by execution of order of mayor and aldermen of Fall River, that granite curbing be laid on north side of street in that city, is not rightfully brought under Pub. Stat. chap. 49; and it cannot be maintained under Pub. Stat. chap. 52, without the presentation of a petition to mayor and aldermen. *Id.*

41. The common council of Bridgeport have power to make a valid assessment for benefits accruing from the pavement of a street; and the vote of the council to adopt the apportionment recommended by a committee, constitutes an order or decree fixing amount assessed.

Bartram v. City of Bridgeport (Conn.) 485

42. In an action to recover a betterment tax paid under protest, neither of previous orders can be impeached for the reason that the notice was defective. *Certiorari* is the only method for a party to avail himself of such a defect.

Foley v. City of Haverhill (Mass.) 263

43. If it does not appear that any benefits have in fact been estimated except the special benefit accruing to the estate beyond the general advantage, no illegal element will be assumed to have entered into the computation. *Id.*

44. If the point is fairly open, still the court

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will not construe the grading as excluded from the declared purpose to proceed under the Betterment Act in the taking, and, at the same time, construe the benefit derived from it, if distinguishable from that derived from the widening, as included in the betterment assessed, although not mentioned. *Id.*

45. Where there is nothing to show that the assessment took grading into account, an instruction will not be given that any assessment upon plaintiff's land of a share of expenses of grading is void, even if this be the correct rule. *Id.*

46. That the records do not show the actual expense of widening would not be ground even for *certiorari*, where it is admitted that the actual expense was over \$30,000, and the total assessment \$10,258.53; still less where the record discloses a liability for \$22,907.40 for land damages fixed by lapse of time. *Id.*

47. Haverhill charter (Stat. 1869, chap. 61, § 24) does not contemplate action by board of aldermen and common council in joint convention. *Id.*

48. Changing the grade of a street by one acting under municipal authority and in good faith is not a trespass against the landowner. Authorities cited.

Briggs v. Lewiston & A. Horse R. R. Co. (Me.) 549

VI. DEFECTIVE WAYS.

49. Rev. Laws, § 8111, and Acts 1882, No. 18, have not changed the liability of towns for damages happening on bridges.

Willard v. Town of Sherburne (Vt.) 123

50. In an action for an injury caused by insufficiency of a bridge, while the plaintiff was walking on it at night, under a notice stating: "My back and spine were injured and made lame, * * * including neck, and my back was badly strained and made stiff, so much so that I have not been able to raise or move my head since the injury; * * * and I have suffered, and still am suffering, great pain in my head, brain, jaw, back, spine, neck," etc., evidence of an injury to the neck was held admissible. *Id.*

51. Where plaintiff employed an alderman to deliver to the city authorities a notice of the time, place, and cause of a personal injury from a defect in a sidewalk, the fact that the board of aldermen first acted upon the notice, and that then it was delivered to the city clerk, did not affect the sufficiency of the notice.

Wormwood v. City of Waltham (Mass.) 194

52. A boy seven years of age, passing with his father and youngest sister over a bridge in Lowell, across the Merrimac River, stepped aside for an instant to clasp in play a post in the highway, and almost in his path, but slipped through a hole in the bridge and was drowned. It appeared that the city had reasonable notice of the defect in the bridge. *Held*, there was no error in refusing to rule, in an action by the father to recover damages, that there was no evidence of due care on part of plaintiff or his intestate.

Gullins v. City of Lowell (Mass.)

236

58. A boy using the highway solely for the purpose of **playing** can **not recover** from city for an injury from defect in way. Authorities cited. *Id.* 239

54. A child cannot recover who, while sitting playing upon the sidewalk, is injured by **act of a third person**. Authorities cited. *Id.*

55. One cannot recover by breaking of an **insufficient railing**, occasioned by **leaning against** it when lounging upon the sidewalk. Authorities cited. *Id.*

56. In an action for injury to a horse from defect in way, **defendant may show** a shying and **bolting habit of horse** for more than a year prior to the accident.

Basley v. Inhab. of Belfast (Me.) 768

VII. OFFICERS; LIABILITY FOR ACTS OF.

57. By Special Stat. 1880, chap. 293, the **terms of office of the city marshal of Lewiston** were made to consist of consecutive periods of two years each,—each commencing when the preceding period ends. Haskell, J., dissents.

French v. Cowan (Me.) 682

58. A town is **not liable** for acts of its officers in digging a ditch which created a nuisance, when the **acts were not done in execution of a corporate duty** imposed by law upon the town.

Seele v. Inhab. of Deering (Me.) 550

59. A town is **not liable** for the unauthorized and **illegal acts** of its officers, even when acting within the scope of their duties. Authorities cited. *Id.* 551

60. But it may **become so** when the acts complained of were illegal, but done under direct authority previously conferred or subsequently ratified. *Id.*

VIII. PARTICULAR CHARTERS.

61. **Boston**. Power given to city and to town of West Roxbury to "take or purchase lands."

Page v. O'Toole (Mass.) 195

62. Municipal court; original criminal jurisdiction.

Commonwealth v. Murray (Mass.) 55

63. **Bridgeport**. Assessment for benefits accruing from pavement of streets.

Bartram v. City of Bridgeport (Conn.) 485

64. **Fall River**. Repair of streets; damages.

Sullivan v. City of Fall River (Mass.) 682

65. **Lewiston**. Term of office of city marshal.

French v. Cowan (Me.) 682

66. **Portland**. City marshal *de jure* entitled to salary while office filled by officer *de facto*.

Andrews v. City of Portland (Me.) 780

67. **Providence**. Property in waters within borders.

Bassett v. Franklin (R. I.) 762

68. Upon dismissal of petition for damages for land taken for park; city entitled to costs.

Aldrich v. City of Providence (R. I.) 752

69. Plurality of electors may elect member of city council.

Re Plurality Elections (R. I.) 108

70. **St. Johnsbury**. Regulating victualing houses.

Village of St. Johnsbury v. Thompson (Vt.) 509

71. **Wallingford**. Section of charter authorizing borough to construct sewers and provide for outflow of drainage has no reference to surface waters.

Bronson v. Borough of Wallingford (Conn.) 467

72. **West Roxbury**. Power given to town and to Boston to "take or purchase lands."

Page v. O'Toole (Mass.) 195

BRIEFS AND NOTES.

Ordinances; ordinary powers of towns may be exercised by ordinary votes. (Mass.) 57

Ordinances or by-laws cannot enlarge, diminish, or vary corporate powers. (Me.) 683

By-laws must be consistent with charter. (Vt.) 509

Delegation of authority by common council. (Conn.) 435

Acts *ultra vires*. (N. H.) 524

Acts *ultra vires* cannot be ratified. (Me.) 492

Town meeting; notice. (Me.) 491

Incurring debts; payment. (Mass.) 56

Right of towns to grant or raise money. (Me.) 491, 492

Vote of town authorizing contract is purely executory. (Mass.) 57

Rescission of vote ratifying acts of agent. (Me.) 492

Right to license must be conferred by charter. (Vt.) 509

Ordinance regulating or restricting trade. (Vt.) 509

Regulating victualing houses. (Vt.) 509

Creating private nuisance; *prima facie* liable for continuance. (Me.) 550

Surveyor of highway is not under control of town by which chosen. (N. H.) 297

Ratification of acts of agent. (Me.) 491

Eminent domain; delegation of authority. (Conn.) 485

Damages; evidence as to land taken. (Mass.) 826, 827

Streets; uses to which can be put. (Me.) 547

Repairs; damages. (Mass.) 684

Change of grade; notice. (Mass.) 265

Assessing one town to pay expenses of highway in another town. (Vt.) 808

Liability for defective ways. (Conn.) 468; (N. H.) 297

Notice. (Vt.) 123

Notice; service. (Mass.) 195

Defective bridges; hole; accident occurring at night-time. (Mass.) 238

Due diligence of traveler to avoid accident. (Mass.) 287

Injury to horse; evidence as to shying and bolting of horse. (Ma.)	768
Measure of damages. (Me.)	768
Particular charters. Antrim; tax for building schoolhouse. (N. H.)	898
Arlington; waterworks. (Mass.)	841
Boston; board of health. (Mass.)	489
Original criminal jurisdiction of municipal court. (Mass.)	55
Waterworks. (Mass.)	842
Bridgeport; local assessments. (Conn.)	485
Dedham; water supply. (Mass.)	57
Lewiston; term of office of city marshal. (Me.)	682, 688
Providence; property in waters. (R. I.)	762
Wallingford; liability for surface water. (Conn.)	469

NATIONAL BANKS. See BANKS AND BANKING.

NATURALIZATION. See ALIEN AND NATURALIZATION.

NAVIGABLE RIVERS. See WATERS AND WATERCOURSES.

NEGLIGENCE. See BAILMENT; CARRIERS, 9; LANDLORD AND TENANT, 12, 16; LIVERY-STABLE KEEPER; MASTER AND SERVANT; MILLS AND DAMS, 6, 7; RECEIVER; STREET RAILWAYS, 6; TELEGRAPH COMPANIES; WHARVES.

1. Legislation is not necessarily invalid if one using extra-hazardous instrumentalities, which put in jeopardy a neighbor's property, is made to pay the losses thereby occasioned, even though negligence cannot be proved.

Grisell v. Housatonic R. R. Co. (Conn.) 85

2. The question of due care is ordinarily for the jury, but it is for the court to determine whether the proof is sufficient to authorize the jury to find due care.

Wormell v. Maine Cent. R. R. Co. (Me.) 692

8. It is the duty of owner of a building to keep it in such safe condition that travelers on highway shall not suffer injury.

Khron v. Brock (Mass.) 424

4. If the work of a contractor to repair a building is completed, the owner will be responsible for injuries thereafter resulting from imperfect construction or dangerous condition of work. *Id.*

5. Plaintiff occupying apartments accessible only through a door opening on the sidewalk, the building being the property of defendant, stepped upon the cover of a coal-hole in the sidewalk, which gave away, and she fell into the hole, and was injured.—*Held*, it was improper to take the case from the jury.

Delory v. Canny (Mass.) 258

6. Plaintiff was tenant of second, and defendant of first, story of building through hoistway in which the plaintiff fell. In an action for damages, the court instructed the jury that plaintiff had no rights in hoistway except to use it for purpose of a hoistway; that, if he used it for storage, and went there

for purpose of removing articles stored, defendants were under no legal obligation to him as to the care of the hoistway. This instruction, upon exceptions, was declared to limit the plaintiff's rights too strictly.

Kent v. Todd (Mass.)

254

7. Plaintiff having set up an agreement which, as he contended, gave him a right to expect to find the bar in place when the trap door was open, a charge was regarded as misleading which submitted the question as to use of hoistway to the jury. *Id.*

8. A mere scintilla of evidence is not sufficient. Authorities cited.

Wormell v. Maine Cent. R. R. Co. (Me.) 697

9. The finding of a jury upon the question of negligence, in case of a lack of proper appliances to check a mill elevator in the event of an accident, will not be disturbed, when there was some evidence in support of it, and jury, by a view, had an opportunity to examine the elevator in question, as well as to hear and see the witnesses.

Lavigne v. Lewiston Mills Co. (Me.) 672

10. A landowner is under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant does not raise a duty.

Frost v. Eastern R. R. (N. H.) 537

11. A trespasser ordinarily assumes all risk of danger from condition of premises, and to recover must show that an injury was wantonly inflicted, or that owner, being present, might have prevented the injury by the exercise of reasonable care after discovering the danger. Authorities cited. *Id.*

12. Where certain duties exist, infants may require greater care than adults. Authorities cited. *Id.*

13. The owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. Authorities cited. *Id.*

BRIEFS AND NOTES.

Definition. (Me.) 778

Proximate cause. (Me.) 773, 774

Defective premises; liability of landlord. (Mass.) 254, 260

Duty of landowner to keep premises safe; to trespasser. (N. H.) 537

Liability of owner for defective premises; for injury resulting from imperfect repairs by contractor, after contractor's work completed. (Mass.) 425

Concurrent negligence of two persons resulting in injury to third person, either or both are liable. (N. H.) 537

Question for court and jury. (Mass.) 62, 175

Question for jury. (Mass.) 260, 425; (N. H.) 537

Presumption from mere proof of occurrence of accident. (Mass.) 267

Burden of proof. (Mass.) 268

To prove plaintiff free from negligence. (Vt.) 712

Contributory; effect. (Mass.) 622, 638
Where defendant guilty of gross negligence. 596
(N. H.) 287

Infants. (Mass.) 287
Right of action for damages for death
against street railways. (Mass.) 321, 324

NEGOTIABLE INSTRUMENTS. See
BILLS AND NOTES.

NEW TRIAL. See **HUSBAND AND WIFE**, 18.

1. Where the instructions were not all the case required, and might have misled the jury, a new trial will be granted.

Inhabs. of Deerfield v. Connecticut R. R. Co. (Mass.) 189

2. A new trial will not be granted where the evidence does not strongly preponderate against the verdict, though the court might have found the other way upon the same evidence.

Nash v. Somes (Me.) 770

3. A new trial will be granted where the damages are excessive, unless the plaintiff remits the excess.

Snow v. Weeks (Me.) 146

4. But will not be granted where it does not appear that the verdict is unreasonable.

Fogg v. Stinson (Me.) 146

5. A new trial will not be granted because a bystander expressed an opinion in presence of one juror, when there was no misconduct on juror's part, and no injurious effect was produced by the remark.

Cassell v. Fitcher (Me.) 768

6. New trial will not be granted because foreman of jury, or officer in charge, kept them out till 2 o'clock in the morning, and did not inform the other jurors at 11 o'clock—three hours earlier—of direction of presiding justice to permit jury to separate if they had not agreed at that hour.

Spinney v. Bowman (Me.) 699

7. A new trial will not be granted for the purpose of enabling a party to recover nominal damages on a mere technical right.

Ely v. Parsons (Conn.) 828

8. Motion for new trial in divorce case heard by single justice cannot be granted.

Thompson v. Thompson (Me.) 487

9. In trespass, the matter in controversy was a boundary line; parties agreed to try case on their deeds, and plaintiff summoned no witnesses. Defendant introduced evidence of an agreed boundary. Plaintiff, being surprised, moved for a continuance, which was denied, and trial postponed until next day, when his witnesses testified. His counsel had but a short time for examining witnesses before calling them, and "was convinced that one of them did not testify as fully as he should have done." On petition for a new trial.—*Held*: (a) These facts do not show that a further hearing would be equitable. (b) A motion for more time should have been made.

Couillard v. Seaver (N. H.) 580

10. The justice of Superior Court for N. E. R., v. IV.

County of Aroostook may grant a new trial when case demands it.
Brown v. Moore (Me.) 280

BRIEFS AND NOTES.

Power to set aside verdict does not exist unless so expressed in *totidem verbis*. (Me.) 280

Verdict; prejudice of jury. (Me.) 413

Setting aside verdict on ground that against evidence. (Me.) 778

Verdict set aside on ground of excessive damages. (Me.) 695, 768, 778

Surprise. (N. H.) 580

NONRESIDENT. See **ATTACHMENT**, 12, 13; **EXECUTORS AND ADMINISTRATORS**, 1.

NONSUIT.

1. An exception to admissibility of evidence on one point does not ordinarily raise question of nonsuit for want of evidence on another.

Willey v. Portsmouth (N. H.) 296

2. The motion raises a question whether there was evidence upon which the jury could properly find a verdict for plaintiff. Authorities cited.

Frost v. Eastern R. R. (N. H.) 528

NOTES. See **BILLS AND NOTES**.

NOTICE. See **BILLS AND NOTES**, II.; **LIEN**, 6; **VENDOR AND PURCHASER**, 4-7.

NUISANCE. See **WATERS AND WATER-COURSES**, 16.

1. The law will not interfere where the defendant's business is lawful and the use of his own property is reasonable.

Hurlbut v. McKens (Conn.) 81

2. What constitutes nuisance in one locality may not in another. *Id.*

3. Where the using of defendant's property impairs the health of plaintiff's family and the value of his property, it constitutes a nuisance. *Id.*

4. Where the action, in addition to damages for nuisance, seeks injunction, a finding covering matters material to both issues will not cause a reversal of the case. *Id.*

5. A cooking-stove may be so located and used as to make it a nuisance to the adjacent proprietor. Authorities cited. *Id.* 83

6. In an action for damages for the continuance of a nuisance in the use of machinery for generating electricity, in which the defense was a license from the city, and in which plaintiff sought to recover for acts done in excess of the license,—*Held*, that a judgment for damages for the continuance of such nuisance, recovered by plaintiff against defendant before the license was granted, was not admissible in evidence.

Quinn v. Lowell Electric Light Corp. (Mass.) 349

7. Testimony of extent of jarring, trembling, and shaking caused by such machinery after time laid in the declaration, and after defendant's occupancy ceased, as compared with

what it had been during such time, is inadmissible in such action. - *Id.*

8. Where anything is declared a nuisance by legislation, it is not competent for a party to show that it is not in fact so.

Train v. Boston Disinfecting Co. (Mass.) 487

9. While a board of health will not be liable in tort for removing, without notice or hearing, an alleged nuisance, if no nuisance actually existed, the expense attendant upon action of board cannot be recovered from owner of property. Authorities cited. *Id.* 442

10. The trustees of an incorporated village, under its charter and by-laws authorizing the abatement of a nuisance, but requiring them first to give notice and an order to the owner to remove it, can not justify their acts in removing a fence, under a notice to remove it, when the court below found that it was not the fence nor the lot, but the use of the lot, sheltered by the fence, that created the nuisance.

Verder v. Ellsworth (Vt.) 619

BRIEFS AND NOTES.

- Corruption of river, etc. (Me.) 550
- Endangering health of plaintiff and family. (Conn.) 89
- Injuring property or its comfortable enjoyment. (Conn.) 89
- Depreciation of property in value. (Conn.) 82
- Abatement; notice. (Vt.) 619
- Continuing; damages. (Conn.) 89

OBSTRUCTIONS. See **ROADS AND HIGHWAYS**, III. 25.

OFFICE AND OFFICER.

- I. ELIGIBILITY; ELECTION; TITLE.
- II. OFFICERS DE FACTO.
- III. LIABILITY; NEGLIGENCE.
- BRIEFS AND NOTES.

See **FALSE IMPRISONMENT**; **MANDAMUS**, 2, 8, 7; **MUNICIPAL CORPORATIONS**, VII.; **QUO WARRANTO**; **TROVER AND CONVERSION**, 6-8.

I. ELIGIBILITY; ELECTION; TITLE.

1. The offices of justice of a district court and deputy sheriff are incompatible, and cannot both be held by the same person at the same time.

State v. Goff (R. I.) 100

2. One holding former office, accepting later, vacates former. *Id.*

3. Incompatibility of office does not depend upon the incident of the offices. Authorities cited. *Id.*

4. Offices of member of Legislature and clerk of court of special sessions may be held by same person, even though attendance upon the one office partly prevented the performance of the duties of the other. Authorities cited. *Id.*

5. After election of tax assessor by aldermen, board can not next day, at adjourned N. E. R., V. IV.

meeting, reconsider election and elect another.

State v. Phillips (Me.) 770

6. A person elected to office of register of probate, made vacant during term, holds for full term. Authorities cited.

French v. Cowan (Me.) 688

7. Title to office is only triable on *quo warranto*; bill in equity is not appropriate remedy.

Hinckley v. Breen (Conn.) 806

8. The title to an office, as against one actually in possession under color of law, can not be tried by *mandamus*. The proper remedy is by *quo warranto*.

French v. Cowan (Me.) 682

9. By *quo warranto* the intruder is ejected; by *mandamus* a legal officer put in his place. Authorities cited. *Id.* 686

10. A suit for an injunction to restrain defendant from acting as school district committee should be brought by the district; but a suit by individuals, having no personal interest except as right to office is involved, cannot be maintained.

Hinckley v. Breen (Conn.) 806

II. OFFICERS DE FACTO.

11. An officer *de facto* is not entitled to the salary attached to the office.

Andrews v. City of Portland (Me.) 789

12. The city marshal *de jure* of Portland, being willing to perform his duties, but prevented by city authorities, is entitled to the salary while office is filled by officer *de facto*. *Id.*

13. Payment of salary to officer *de facto* is no defense to action by marshal. *Id.*

14. The city can not deduct money earned by marshal during the time he was prevented from performing duties. *Id.*

15. There can not be a *de facto* officer without a *de jure* office. Authorities cited. *Willard v. Pike* (Vt.) 607

16. Acts of an officer *de facto* are void as to himself, unless he is also officer *de jure*; but where they are for benefit of strangers, or the public, they are good. Authorities cited. *Andrews v. City of Portland* (Me.) 788

III. LIABILITY; NEGLIGENCE.

17. Public officer is responsible for wrongful acts of subagent acting under authority. *Ely v. Parsons* (Conn.) 833

18. Selectmen directing private individual to cut trees and make road passable is liable to landowner for damages for unnecessary cutting. *Id.*

19. An indictment charging the prudential committee of a school district with willfully neglecting to give the district clerk the warrant for a district meeting with the affidavit of posting indorsed thereon, as required by Gen. Laws, chap. 87, § 5, is bad if it does not allege that the warrant was duly issued and a copy or copies seasonably posted.

State v. Corbett (N. H.) 324

20. As to officers having prescribed **statutory duties** which they have to **authenticate by attestation** or certificate, proof of officer's handwriting, and that person is officer he purports to be, is not required in first instance. Authorities cited. *Id.* 605

21. It is a general **presumption** of law that a man, acting in a public capacity, was properly appointed and is duly **authorized to perform duties** prescribed for such official. *Id.*

BRIEFS AND NOTES.

Vacancy; term of appointee. (Me.) 684
Term of office of successor of removed officer. (Me.) 682
Officer *de facto*. (Me.) 683
Officer *de jure* entitled to salary while office filled by officer *de facto*. (Me.) 780, 781
Liability of public officer committing trespass upon private property. (Conn.) 825
Liability of officer for misconduct of subaltern or agent. (Conn.) 826

OPINION. See EVIDENCE, V.

PARENT AND CHILD. See DESCENT AND DISTRIBUTION, 1-5; POOR AND POOR LAWS, 4, 6, 8.

1. A father is not legally bound by an agreement in his deed to a son, that if any controversy arise between them about father's support it should be settled by an arbitrator mutually agreed upon.

Dugan v. Thomas (Me.) 281

2. During father's life the mother is not bound to support minors. Authorities cited.

Gilley v. Gilley (Me.) 495

3. A father is entitled to minor's services and earnings. Authorities cited. *Id.*

4. A minor voluntarily abandoning his father's house, without latter's fault, carries with him no credit on his father's account, even for necessities. Authorities cited. *Id.*

BRIEFS AND NOTES.

Emancipation must be proved. (Me.) 766

Liability for support of child. (Me.) 494

PAROL EVIDENCE. See EVIDENCE, II.

PARTIES. See ACTION OR SUIT, 3, 4; CORPORATIONS, 13, 18; COVENANT, 1; DEVISE AND LEGACY, 1; EQUITY, III.; EXECUTORS AND ADMINISTRATORS, 14; HUSBAND AND WIFE, 4.

PARTITION.

1. A petition for partition is a proceeding at law.

Bailey v. Knapp (Me.) 280

2. Defendant can not show that plaintiff's title, though by a deed absolute in form, was that of an equitable mortgage, and the debt had been paid. *Id.*

N. E. R., V. IV.

BRIEFS AND NOTES.

Jurisdiction. (Me.) 490
Costs. (Me.) 152

PARTNERSHIP. See BILLS AND NOTES, 21.

1. The plaintiff signed a subscription paper agreeing to pay B and S, to aid a contemplated business of which M was proprietor and in which they were interested by reason of loans to M. The plaintiff also furnished labor and supplies to M, and B told him to charge the same to B and S. Although B and S were not partners, their attitude to the business was apparently a joint relationship. The subscription ran to them jointly, and S assented that plaintiff might pay it with said supplies. *Held*, that the plaintiff was entitled to a judgment against both for the balance, above his subscription.

Smith v. Burton (Vt.) 900

2. On such agreement by B that he and S would see that materials furnished were paid for,—*Held*, S was not bound, as neither had authority to pledge the credit of the other.

Greene v. Burton (Vt.) 906

3. One partner alone can not sue for surplus money remaining in mortgagee's hands, from sale of firm real estate owned by the copartners in shares, under a power contained in a mortgage thereof; but his copartners should join with him.

Clapp v. Paotucket Inst. for Savings (R. I.) 97

4. The creditor of a partnership can not maintain an action for money had and received against one partner, on the ground that the partnership matters have been settled between the members, and in such settlement such partner represented to the other member that he had settled the claim of such creditor, and was allowed for the same in settlement.

Lobby v. Robinson (Me.) 143

5. Nor would it make any difference if the creditor's claim against the firm had become barred by the Statute of Limitations. *Id.*

6. A bill was brought to dissolve a partnership, and a master was appointed, who made a report. Defendants filed a cross-bill, and another report was made by same master; a mandate was agreed on in the supreme court, but on defendant's motion it was withheld to file further proceedings in chancery. An additional bill was filed; decree was reversed *pro forma*, and cause remanded. The bill was answered, an accounting ordered, a report made by a new master, and case came up on appeal. *Held*, the mandate was not conclusive.

Flint v. Johnson (Vt.) 875

7. A surviving partner to whom an account was assigned during lifetime of all the partners, may maintain an action thereon for his own benefit in the name of surviving partners.

Matherson v. Wilkinson (Me.) 139

8. A statute relating to the settlement of the

estate of deceased partners does not apply to such an account. *Id.*

9. On a bill against the executor of a deceased partner, to recover the value of firm property sold by the executor as part of the estate, the surviving partners can only recover their share of the amount which has gone into the hands of the executor as assets of the estate.

Bradley v. Brigham (Mass.) 45

10. A declaration against a surviving partner, as indorser of a note, may be amended the addition of a count against him as an individual indorser.

Lane v. Barron (N. H.) 288

BRIEFS AND NOTES.

Is question of law dependent upon facts; in case of doubt it is a question for the jury. (Vt.) 900

There may be a legal partnership though a partner is guaranteed against loss. (Vt.) 900

Share in profits and loss of business. (Vt.) 900

Evidence of; sharing in profits. (Conn.) 819

Measure of benefit to man from business is measure of his profits. (Conn.) 820

Share received in compensation for services. (Vt.) 900

Services of partners in management of concern. (N. H.) 800

Dissolutions; suits; parties. (Me.) 148

Rights of surviving member. (Me.) 189

Liability of executor of deceased partner making sale of firm property. (Mass.) 46

Right of partner winding up affairs to extra compensation. (N. H.) 800

PATENTS. See INSOLVENCY, 8.

A debtor owning a patent-right which, being intangible, is incapable of seizure on execution, is liable to commitment, under Pub. Stat. chap. 223, § 14, for fraud in detention of his property, if, still retaining the patent-right, he refuses to pay his debt. Authorities cited.

Mason v. Gray (R. I.) 598

BRIEFS AND NOTES.

Novelty; use of old patents. (Mass.) 485

Exemption from attachment. (Mass.) 182

Mode of transfer. (Mass.) 182

PAUPERS. See POOR AND POOR LAWS.

PAYMENT. See ACCORD AND SATISFACTION; BILLS AND NOTES, II.; JUDGMENT, 12; LIMITATION OF ACTIONS, IV.

1. The mere acceptance of a negotiable note for a secured debt will not discharge the debt, although the new note includes a new debt.

Cotton v. Atlas Nat. Bank (Mass.) 859

2. Where one owing an individual and a partnership account makes payments, amounting to more than individual account, without application, the law will apply the balance on the partnership account, which will remove N. E. R., V. IV.

bar of Statute of Limitations, although creditor gave credit for all the payments on the individual account.

Robie v. Brigg's Estate (Vt.) 506

8. Interest paid by mistake on a note, designedly written without interest, is recoverable.

Hathaway v. Hagan (Vt.) 128

4. If there is a want of good faith in making a claim, and there be any undue advantage taken of the other party's situation, and he pays money, it may be recovered. Authorities cited. *Id.* 129

BRIEFS AND NOTES.

Presumption. (Conn.) 811; (Mass.) 861

Acceptance of note for secured debt; effect. (Mass.) 860, 861

Right of application once exercised cannot be changed. (Vt.) 507

Voluntary; not recoverable back. (Mass.) 65

PENALTY. See INTOXICATING LIQUORS, VI.; JUSTICE OF PEACE, 2.

1. A statute providing a penalty for an act prohibits the act. Authorities cited.

Jones v. Surprise (N. H.) 204

2. Where the penalties imposed by Pub. Stat. chap. 57, § 5, are made a part of later Act of 1865, chap. 352, § 8, defendant may be convicted for a first, second, or subsequent offense, as provided for in the prior statutes.

Commonwealth v. Kendall (Mass.) 198

3. Jurisdiction to punish a crime by fine or imprisonment specially provides by law for prosecution of offense; and Pub. Stat. chap. 217, §§ 1, 2, do not give a concurrent remedy to recover fine by indictment or by action of tort.

Commonwealth v. Murray (Mass.) 55

BRIEFS AND NOTES.

Form of action; election. (Me.) 140

Imposition by ministerial officer. (Vt.) 117

PHRASES. See DEFINITIONS.

PLEADING. See ASSUMPSIT, 9, 10; BILLS AND NOTES, 21; CRIMINAL LAW, III.; EQUITY, III.; GUARANTY, 2, 8; INSOLVENCY, III.; LIMITATION OF ACTIONS, V.; MANDAMUS, 8.

1. A mere argumentative denial of a material averment in the declaration admits its truth.

Lyman v. Central Vt. R. R. Co. (Vt.) 736

2. If in trespass for carrying away goods, defendant should plead that the plaintiff never had any goods, that would be argumentatively saying not guilty, so no plea. Authorities cited.

State v. Haven (Vt.) 619

3. Every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse. Authorities cited.

Lyman v. Central Vt. R. R. Co. (Vt.) 739

4. If plaintiff sets forth facts sufficient to give a cause of action, it is for defendant

to show facts which have taken his right away.

Sawyer v. City of Boston (Mass.) 324

5. It is necessary for a party to prove the substantive facts which he is required affirmatively to allege in his pleading.

Freeman v. Travelers Ins. Co. (Mass.) 631

6. The rule of pleading in declaring upon a contract which contains an exception, is if such instrument contain, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something that would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause, which operates as an exception; but if the exception itself be incorporated in general clause, then the party relying on it must, in pleading, state it, together with the exception. *Id.*

7. An election by plaintiff between counts of declaration upon which he will proceed is not final unless it be made to appear of record by striking out the other counts; and the refusal of the court to order the other counts stricken out is no ground for a new trial.

Reese v. Dennett (Mass.) 428

8. Pleas in abatement must be certain to every intent. Authorities cited.

Biddford Sav. Bank v. Mosher (Me.) 403

9. A plea to the jurisdiction is waived when filed with general issue.

Lyman v. Central Vt. R. R. Co. (Vt.) 726

10. Such plea, professing to answer the cause of action as a bar, and concluding with a prayer for judgment if plaintiff ought to have or maintain his action, is defective. *Id.*

11. A plea of the general issue acknowledges jurisdiction. *Id.*

12. A demurrer must be interposed at outset of proceedings, and disposed of, before expense of a trial is had. Authorities cited.

McLane v. Johnson (Vt.) 612

13. If defendant submits to answer bill on its merits, he waives his demurrer. Authorities cited. *Id.*

14. The particulars in which alleged defects in answer consist must be specially pointed out in demurrer thereto.

Train v. Boston Disinfecting Co. (Mass.) 437

15. The question of fact whether justice requires an amendment of a declaration, and the question of fact raised by a motion to set aside a verdict on the ground of excessive damages, are determinable at the trial term.

Gagnow v. Connor (N. H.) 298

16. In a suit seasonably brought, the declaration may be amended after a new action would be barred by Statute of Limitations. *Id.*

BRIEFS AND NOTES.

Construed most strongly against pleader. (Vt.) 505

Waiver. (Vt.) 364

Account annexed is part of declaration. (Me.) 189

N. E. R., V. IV.

Cross-complaint; scope. (Conn.) 480

Plea; evidence admissible under. (N. H.) 299

Dilatory; pleas to jurisdiction. (Me.) 401

Plea in abatement; form and requisites. (Me.) 401

Certainty. (Me.) 139

Demurrer; must assign specifically. (Mass.) 439

Admission. (Me.) 139, 550; (Vt.) 728

General demurrer to declaration containing several counts, one of which is good. (Me.) 550

Amendment. (Me.) 278; (Mass.) 207

Within discretion of court. (Me.) 139

When allowed; time of. (N. H.) 298, 299

Variance. (Mass.) 191, 434

PLEDGE AND COLLATERAL SECURITY. See STOCK TRANSACTIONS.

POLICE AND POLICE DEPARTMENTS.

1. Stat. 1882, chap. 78, amending charter of Boston Police Relief Association, authorizes, but does not require, the corporation to extend its benefits to retired members.

Burbank v. Boston Police Relief Assn. (Mass.) 241

2. A by-law extending the membership to retired members, if they have been members for five years, will not include a member for a shorter period. *Id.*

3. Nor will the action of the treasurer in accepting two assessments from such retired policeman, supposing he had been a member for five years, and the annual report reciting that he was a retired member, estop the association. *Id.*

BRIEFS AND NOTES.

Boston Police Relief Association; membership. (Mass.) 242

POLICE POWER. See CONSTITUTIONAL LAW, 9-12.

POOR AND POOR LAWS.

1. Military settlements. A citizen without legal settlement, who enlisted in service of United States as part of quota of town of P. during late civil war, and was honorably discharged, and who subsequently enlisted as part of quota of Boston, and deserted, and was discharged, did not acquire any legal settlement by his enlistment as part of quota of Boston.

City of Cambridge v. Inhabit. of Paxton (Mass.) 464

2. Nor does Act of 1865, chap. 230, enable him to gain a settlement in town of P. *Id.*

3. The right to a settlement is a valuable privilege, which such Act intended to confer only on faithful soldiers. *Id.*

4. Where a father has abandoned and emancipated his daughter, the furnishing of pauper supplies to daughter with know-

ledge of father will not prevent him from gaining a new settlement.

Inhabs. of Liberty v. Inhabs. of Palermo (Me.) 766

5. By a Maine statute no derivative settlement is acquired or changed by a marriage procured by a municipal officer of the town in which the wife had her settlement.

Inhabs. of Burnham v. Inhabs. of Corinth (Me.) 772

6. The children of such parents have the settlement they would have had if no marriage had taken place. *Id.*

7. The statute is applicable, though not enacted until after marriage and the birth of children. *Id.*

8. A married woman with four children had a settlement in defendant town, and while residing in plaintiff town with her family, was abandoned by her husband, who had no settlement in this State; and plaintiff's overseer granted assistance to her to support her children. In a short time she sold her furniture and went into several towns, but gained no legal residence, and when the order of removal was made, was living in defendant town. *Held*, (1) the aid was rendered to the wife; (2) that her residence continued and she was constructively present when the order of removal was made; (3) and that she was legally removed to town of her settlement. *Rowell, J.*, dissents.

Town of Rockingham v. Town of Springfield (Vt.) 872

BRIEFS AND NOTES.

Settlement; legislative power. (Me.) 772

Settlement of father, where parental relation is destroyed, and pauper supplies furnished daughter. (Me.) 766, 767

Settlement; wife abandoned by husband. (Vt.) 878

Derivative settlements. (Vt.) 878

Military settlements are not acquired by deserters from army. (Mass.) 465

POSTOFFICE.

1. A letter deposited in street letter-box, put up by postoffice department, is as truly mailed as if it were deposited in a letter-box within postoffice building. Authorities cited.

Casco Nat. Bank v. Span (Me.) 678

2. It has been held that delivery to a letter carrier is sufficient. *Id.*

BRIEFS AND NOTES.

Deposit of letter in street letter-box is equivalent to deposit in postoffice. (Me.) 674

POWERS.

1. There is a class of cases holding that where there is a joint power given to three, all must act and all concur; and another class holding that though all must act, the majority may decide. Authorities cited.

Wells v. Austin (Vt.) 801

2. Where powers are given to a person having an interest either present or future in the land, the exercise of them is considered as a species of property advantageous to him; and he may part with or exclude himself from benefit of it. Authorities cited.

Grosvenor v. Bowen (R. I.) 761

8. The act of donee of a power is the act of donor; and if damages ensue from execution of power, donor is regarded as author of them.

Reynolds v. Hennessy (R. I.) 598

BRIEFS AND NOTES.

When a power is given to two or more, all donees must join in execution of it unless contrary is expressed. (R. I.) 748

Extinguishment. (R. I.) 760, 761

PRACTICE. See ACTION OR SUIT; APPEAL; CONTINUANCE AND ADJOURNMENT; EQUITY, III.; EXCEPTIONS; NEW TRIAL; NONSUIT; TRIAL.

PRESUMPTION. See DEVISE AND LEGACY, 8; EVIDENCE, I.; INSOLVENCY, 10.

PRINCIPAL AND AGENT. See STOCK TRANSACTIONS.

1. Agency defined.

Noyes v. Landon (Vt.) 735

2. A, being financially embarrassed, called on B to assist him in his difficulty, and agreed to pay him liberally for his time and expenses. B accordingly purchased A's outstanding draft, and took A's note in payment therefor. *Held*, B was an agent in purchasing draft. *Id.*

3. An agent will not be allowed to make profit for himself in transaction of business of his principal. *Id.*

4. If an agent purchase at a discount an outstanding draft against his principal, the discount enures to latter's benefit. *Id.*

5. If a principal, without knowledge of discount, gives personal notes to agent for full amount of draft, the consideration fails to the amount of discount. *Id.*

6. When such notes are transferred before due, the holder takes them discharged of all equity. *Id.*

7. A real estate broker who has made a parol contract of sale of realty cannot, after his principal has contracted to sell the land to another purchaser, and has so informed the broker, make such a memorandum as will take the case out of the Statute of Frauds.

Elliot v. Barrett (Mass.) 177

BRIEFS AND NOTES.

Authority of agent. (Mass.) 333

Notice to agent, notice to principal. (N. H.) 297

Principal not liable for agent's acts beyond scope of authority. (Me.) 735

Ratification of acts of agent. (Mass.) 240

PRINCIPAL AND SURETY. See SUBROGATION, I.; TRUSTS, III. &

1. A discharge in bankruptcy is not a

bar to the equitable liability between cosureties in contribution when payment was subsequent to the discharge.

Liddell v. Winnell (Vt.) 122

2. In an action by a cosurety for contribution, the share to be recovered is determined by number of solvent cosureties in this State. *Id.*

BRIEFS AND NOTES.

A reservation of rights against sureties must be clear and unambiguous. (Me.) 496

Release of surety by forbearance. (Me.) 497

Subrogation of surety. (Mass.) 626

Contribution not discharged by discharge in bankruptcy. (Vt.) 123

PRIVATE WAYS. See ROADS AND HIGHWAYS, IV.

PROBATE APPEAL. See APPEAL, III.

PROCESS. See WRIT AND PROCESS.

PROMISSORY NOTES. See BILLS AND NOTES.

PROPERTY.

1. The Legislature may determine when that which is otherwise property shall cease to be such if kept against law.

Train v. Boston Disinfecting Co. (Mass.) 437

2. The labor and skill of a workman and the plant of the manufacturer are, in equal sense, property.

State v. Stewart (Vt.) 878

PUBLIC POLICY. See CONTRACT, 9.

QUARANTINE LAWS. See HEALTH.

QUI TAM AND PENAL ACTIONS. See PENALTY.

QUO WARRANTO.

Quo warranto is the proper remedy to try the title to an office, as against one actually in possession under color of law.

French v. Cowan (Me.) 683

RAILROAD COMPANIES. See CARRIERS; MASTER AND SERVANT, 17, 18; REOMIVER; STREET RAILWAYS.

1. The landowner's lien for damages for land taken by a railroad company is not barred by the Statute of Limitations until fifteen years have elapsed, if he has clearly evinced an intention to hold the title until the damage was paid.

Robinson v. Missisquoi R. R. Co. (Vt.) 891

2. An equitable owner of land, becoming the legal owner, has a lien for damages on land taken by a railroad company, enforceable against a company now in possession which succeeded to the rights of the company that first took the land; the measure of damages is the value of the land actually taken.

Sennott v. St. Johnsbury & L. C. R. R. Co. (Vt.) 867

3. Interest is recoverable from time company in control took possession. *Id.*

N. E. R., V. IV.

4. A railroad corporation can not, as against owner of soil, give away hay upon land within its location.

Bailey v. Sweeney (N. H.) 287

5. Gen. Laws, chap. 161, § 8, relating to securing railroad highway crossings, is not repealed by Laws 1888, chap. 101, § 7.

Concord & P. R. R. v. Portsmouth (N. H.) 295

6. The Legislature may provide that a railroad company shall maintain so much of a highway crossing its track at grade as comes within its limits.

Boston & M. R. R. Co. v. County Comrs. (Me.) 657

7. An action cannot be maintained under Rev. Laws, § 8372, which makes railroads liable to day laborers employed by contractors, for labor in constructing their roads, where the work was done and the contract made and to be performed in New York.

Cartwright v. New York & M. R. R. Co. (Vt.) 861

8. If New York has a statute imposing a similar liability on railroads, the action should have been based upon that statute. *Id.*

9. Statute of 1881, chap. 92, § 1, declaring the person or corporation injured may recover from a railroad company damages for any injury done to "a building or other property" by fire communicated by a locomotive engine, is constitutional in its application to a railroad whose charter makes it subject to all general laws the Legislature may thereafter pass.

Grissell v. Housatonic R. R. Co. (Conn.) 85

10. The words "a building or other property" embrace fences, growing trees, and herbage. *Id.*

11. The enforcement of the statute is not dependent on the ability of the railroad company to obtain insurance upon the class of property injured. *Id.*

12. Holders of preferred stock in the Belfast & Moosehead Lake Railroad Company are entitled to a dividend from net profits each year during which they are earned, but not to cumulative dividends. The arrearages of one year are not payable out of the earnings of subsequent years.

Hastings v. Belfast & M. L. R. R. Co. (Me.) 704

13. Directors are not justified in refusing a dividend to preferred stockholders because the corporation can not pay all its funded indebtedness at maturity if dividends be paid. *Id.*

14. The court will compel a corporation to pay dividends on preferred stock when the question becomes one more of right to be determined by the law than of discretion to be determined by the directors. *Id.*

15. Defendant corporation owes \$150,000, to mature in 1890; the common stock is \$380,400, and the preferred \$267,700; the road cost \$1,050,000; the earnings of the road have paid off an indebtedness of \$251,900, which entered into its construction, the reduction commencing in 1871 and terminating in 1885, leaving in the latter year \$22,412.53 cash assets on hand; the expenses of the corporation

are trifling beyond the payment of \$9,000, annually as interest on the bonded debt; the road is under lease until 1931 at \$38,000 per year, the lessee running the road and keeping it in repair and paying all taxes thereon; the corporation has the ability to renew a portion of the debt, or all of it, upon advantageous terms; and the preferred shareholders have been for many years deprived of dividends to enable the corporation to consummate the payment of its debts. *Held*, the preferred stock is entitled to a full annual dividend from the balance of earnings remaining on hand at the expiration of the year 1885. *Id.*

16. Definition of net earnings. *Id.* 708

BRIEFS AND NOTES.

Condemnation proceedings; measure of damages. (Vt.) 367

Landowner's lien for damages for land taken not barred within fifteen years. (Vt.) 893

Location; interest acquired by company; interest of owner. (N. H.) 287, 288

Fires; liability. (Conn.) 86-90

Dividends; preferred stock. (Me.) 705, 706

RECEIPT.

1. A receipt in full on payment of part of debt will discharge the debt, unless impeached for fraud or mistake.

Aborn v. Rathbone (Conn.) 80

2. Such receipt, made to defraud other creditors, will be effectual against creditor by whom it was given as a full discharge. *Id.*

3. Evidence that a receipt had been in possession of plaintiff's mother, and that it had been shown by plaintiff's counsel to defendant's counsel as one of the papers relating to the action, connected plaintiff with the receipt.

Dwyer v. Fuller (Mass.) 338

BRIEFS AND NOTES.

Definition. (Conn.) 80

For part debt; how far a discharge. (Conn.) 80

Admissibility in evidence. (Mass.) 339; (Vt.) 364

RECEIVER.

1. When the same party is receiver of one railroad and lessee of another, and both are operated by him together, an employee can maintain an action at law against him, without leave of equity, to recover for injuries resulting from the negligence of his servants in operating the leased road.

Lyman v. Central Vt. R. R. Co. (Vt.) 726

2. Such action is also maintainable although defendant is receiver instead of lessee of railroad where injury occurred. *Id.*

3. In such cases it is not a question of jurisdiction in courts of law, but only whether equity, on application of receiver, will exercise its own jurisdiction of restraining suits. And if equity interposes, the injunction is *in personam*, directed to the party, but not to the court. *Id.*

N. E. R., V. IV.

4. It is a general rule that before suit is brought against a receiver, leave of the court by which he was appointed must be obtained. Authorities cited. *Id.* 723

5. Equity will, on proper application, protect its own receiver, when the possession which he holds under the order of court is sought to be disturbed. Authorities cited. *Id.* 731

BRIEFS AND NOTES.

Of railroad; action against by employees for injuries received. (Vt.) 723, 729

RECORD. See APPEAL, II.; MORTGAGE, 55, 56.

REDEMPTION. See MORTGAGE, IV.

REFERENCE. See ARBITRATION AND REFERENCE.

RELEASE AND DISCHARGE. See ACCORD AND SATISFACTION; INSOLVENCY, II.; JUDGMENT, 12; PAYMENT, 1; RECEIPT, 1, 2.

RELICION. See WATERS AND WATERCOURSES, 6-10.

RELIGIOUS SOCIETIES. See TAXES, 2, 6.

1. The committee of a society has no authority except that given to it by by-laws; and the authority to employ counsel on the credit of the society is expressly excluded by the clause providing for "expending only such sums of money as the society shall place at its disposal."

Child v. Christian Soc. of Boston (Mass.) 207

2. This prohibition is also a prohibition against incurring debts without action of society. *Id.*

BRIEFS AND NOTES.

By-laws. (Mass.) 206

Agents of; no implied authority. (Mass.) 206

Management of business. (Mass.) 206

REMITTITUR. See JUDGMENT, 15.

REPLEVIN. See APPEAL, 3.

1. In replevin against assignee of an insolvent debtor to recover goods obtained by debtor through fraud, evidence of a demand upon the messenger, or keeper under him, who had possession of the goods awaiting the appointment of an assignee, as bearing upon the rescission of the contract, is sufficient.

Chamberlain v. Fuller (Vt.) 614

2. The evidence tended to show that a debtor entered into a conspiracy with his sureties to get possession of goods without paying for them. He had money, but bought on credit. *Held*, evidence was admissible to prove how he could have purchased for cash; that the plaintiffs told their salesman, in debtor's absence; to sell him goods not exceeding \$500 in value, the acts of the other conspirators; that the conspiracy extended to the fraudulent purchase of goods of other

parties; that the debtor's brother, five or six years before the failure, consulted an attorney as to his financial condition. *Id.*

8. For purpose of showing that debtor's stock of goods was not unreasonably large, evidence was not admissible to prove the stocks of other merchants in the same village. *Id.*

4. It is immaterial whether debtor's son was his agent in giving instructions to the scrivener as to what property should be put into the mortgage deed, as he ratified his acts by signing it, knowing its contents. *Id.*

5. In replevin by seller of goods, against assignee in insolvency of purchaser, it is competent to prove purchaser's reputation for financial ability was poor, as showing it was probable credit was not given him.

Bussell Trimmer Co. v. Cass (Mass.) 199

6. That purchaser was notoriously in bad pecuniary credit would have some bearing upon the question which of two orders for goods was accepted by plaintiff. *Id.*

7. It is a breach of a replevin bond to fail to enter writ in court after it has been duly served.

Jones v. Smith (Me.) 691

8. Defendant in action on replevin bond may show, in mitigation of damages, title in himself to the property replevied. *Id.*

BRIEFS AND NOTES.

By seller of goods against purchaser; evidence of purchaser's bad reputation for financial ability. (Mass.) 199

Nominal damages. (Me.) 691

Bond; conditions. (Vt.) 885

RES INTER ALIOS. See EVIDENCE, IV.

RES JUDICATA. See JUDGMENT, 2-4.

RESULTING TRUSTS. See TRUSTS, II.

RETROSPECTIVE LAWS. See CONSTITUTIONAL LAW, 6, 7; WILL, 12.

REVIEW.

1. A consent decree may be reformed for mistake by bill of review.

Vincent v. Mathews (R. I.) 110

2. And this although mistake has been confined to one party, unless he is estopped by laches. *Id.*

RIPARIAN RIGHTS. See WATERS AND WATERCOURSES.

RIVERS. See WATERS AND WATERCOURSES.

ROADS AND HIGHWAYS.

I. DEDICATION; USER.

II. OPENING.

III. DISCONTINUANCE; OBSTRUCTIONS.

IV. PRIVATE; PRESCRIPTION.

BRIEFS AND NOTES.

See RAILROAD COMPANIES, 5, 6; MUNICIPAL CORPORATIONS, V., VI.; OFFICE AND OFFICER, 18.

N. E. R., V. IV.

I. DEDICATION; USER.

1. Intention to dedicate is a question for the jury.

Ely v. Parsons (Conn.) 888

2. Dedication may be found from long-continued public use and acquiescence, even where land is unenclosed and uncultivated. *Id.*

3. A highway may exist by prescription. *Id.*

II. OPENING.

4. Prior to Act 1886, No. 20, the selectmen or county court had no authority to establish highways at grade across a railroad; but while this case was pending on appeal in the county court, having been remanded from the supreme court, such Act was passed authorizing the laying of highways at grade. *Held*, as the Act gave no original jurisdiction, and as the jurisdiction of the county court was merely appellate, that it had in this case no power to establish such highway, and that proceedings must be commenced *de novo*.

Connecticut & P. R. R. Co. v. St. Johnsbury (Vt.) 897

5. In estimating the land damages of a company when a way is laid across its track, the jury are not to take into account expenses in defending itself against claims for accidents at the crossing.

Boston & M. R. R. Co. v. County Comrs. (Me.) 657

6. The proceedings of county commissioners are not rendered invalid by the fact that an outgoing commissioner acted up to time of adjudication, and his successor acted in completing proceedings to a finality.

Chapman v. County Comrs. (Me.) 406

7. County commissioners are a court which is not dissolved by the outgoing and incoming of members. *Id.*

8. County commissioners' report may be filed on any day after next regular term after hearing. *Id.*

9. On petition for certiorari against county commissioners, respondents' oath is as good as a record to supply mere deficiencies. *Id.*

III. DISCONTINUANCE; OBSTRUCTIONS.

10. The rule that a way shall be discontinued unless opened within six years from the time allowed therefor does not apply to new way laid out over old way.

Held v. Moore (Me.) 898

11. Traveling on the old way is traveling on the new. *Id.*

12. The rule that a fence, continued by side of way for forty years, shall indicate line of road is interrupted by laying new way, and from such time the forty years begin to run. *Id.*

13. Notice to landowner is not prerequisite to exercise by selectmen of right to remove obstructions.

Ely v. Parsons (Conn.) 823

IV. PRIVATE; PRESCRIPTION.

14. A town may acquire by **prescription** a private right of **way** as appurtenant to a **public burial ground** belonging to the town.

Inhab. of Deerfield v. Connecticut R. R. R. Co. (Mass.) 189

15. Such a **way** is not necessarily a **public** way. *Id.*

16. Any **use** of such way in going to and from the cemetery, by inhabitants of town, or persons holding rights in the cemetery derived from the town, and any acts of the town in constructing or repairing the way, are competent evidence to prove that a private right of way had been **acquired by prescription**. *Id.*

17. It is for the **jury** to **determine** whether evidence of the whole use of the way shows that it was used as a **public** or **private** way. *Id.*

18. Where there was evidence that plaintiff had acquired a private way by **prescription**, unless a license put in **evidence** rendered the use permissive, the court properly refused to rule that the plaintiff had not shown such use as would give it a prescriptive right to the way. *Id.*

19. **Selectmen** have no right to **construct** a private way for use of inhabitants of town. *Id.*

20. To acquire a right of way over the land of another by prescription, the user must be **adverse** and acquiesced in by the owner of the land. *Id.*

21. It is not necessary that a **claim of right** be expressly **made**, or that the acquiescence be declared. *Id.*

22. If the **adverse** user is so **open** and notorious that the owner of the land ought to have known of it, his **acquiescence** may be **presumed**. *Id.*

23. **Filing** in town clerk's office an **agreement** made by the owner of land with town agent, granting it a license to construct a way across the land, is **notice** to the town of the agreement. *Id.*

24. If **defendant** **silently** submitted to the plaintiff's use of the way, under belief that it was permissive and in pursuance of the agreement made with plaintiff's agent, this **fact** is **material** upon the question of acquiescence. *Id.*

25. The **remedy** for an **obstruction** is an action by the town. *Id.*

26. **Private** contributions added to a public appropriation for **building** a highway do not **make** the way **private**. Authorities cited.

³¹ *Holt v. Town of Antrim (N. H.)* 894

BRIEFS AND NOTES.

Dedication; intention; question for jury. (Conn.) 825

Unenclosed and uncultivated land. (Conn.) 826

Establishment by **prescription**. (Conn.) 825; (Me.) 658

N. E. R., V. IV.

Laying out. (Me.) 898, 899

Proceedings of commissioners; incoming of new members. (Me.) 406

County court is an appellate tribunal. (Vt.) 896

At grade across railroad. (Vt.) 896

Measure of damages for laying way across railroad tracks. (Me.) 657, 658

Repair; a governmental duty. (Conn.) 468

Discontinuance; new way laid out over old way. (Me.) 898, 899

Title of abutting owner to centre of way. (Me.) 546, 547

Private; establishment by prescription. (Mass.) 191

SALE. See **ANIMALS**; **ASSUMPSIT**, 7; **CARRIERS**, 7, 8; **INTOXICATING LIQUORS**; **LOGS AND LUMBER**; **SPECIFIC PERFORMANCE**; **TAXES**, V.; **VENDOR AND PURCHASER**.

1. When there was a written agreement between G and B that G should lease B a piano, and B should pay for the use thereof \$200 in advance, and \$50 quarterly thereafter, with 7½ per cent interest, until \$500 had been paid, when G agreed to give B a bill of sale, and G was authorized to enter B's dwelling and remove the piano upon failure to make any payment,—*Held*, the lease amounted to a **conditional sale**.

Gorham v. Holden (Me.) 503

2. A contract of sale providing that vendee may sell the goods as a retail dealer, and that the legal title shall remain in vendor until the price is paid, and that vendor shall be the legal owner of a fractional part of all goods in vendee's store which shall bear the same proportion to the unpaid purchase price of the particular goods sold by said vendor as the whole amount of goods should then bear to said unpaid purchase price,—is not a legal mortgage.

Blanchard v. Cooke (Mass.) 68

3. The covenant is inoperative to transfer the title to **after-acquired goods** to plaintiff, as against an attaching creditor or the assignee in insolvency of the defendant, if plaintiff had not first taken possession. *Id.*

4. A sale of personal chattels is not good against creditors unless there has been a **delivery** of the property. Authorities cited. *Id.* 73

5. Vendee accepting and assuming control as owner of hemlock bark sold and delivered is vested with the title at once, although the bark had never been measured; and if it is destroyed by fire he must bear the loss.

Baldwin v. Doubleday (Vt.) 124

6. Plaintiffs sold and delivered to defendant a large quantity of bark, on grounds near the depot. The greater part of it had been loaded on the cars, measured, and shipped, when a fire occurred and destroyed the rest. The jury found that the defendant accepted the whole of it. *Held*, that the acceptance operated to pass the title to the bark in gross. *Id.*

7. Where a vessel is sold to be delivered

at a certain port, the seller should **deliver** at the place indicated by the purchaser.

Lincoln v. Gallagher (Me.) 141

8. If the purchaser refuse to provide such place, **delivery** may be **tendered** at usual anchorage in the harbor. *Id.*

9. The seller is obliged to afford the purchaser an **opportunity to examine** the vessel before acceptance; but not, at his own expense, to place her in a dry dock for that purpose. *Id.*

10. A **bona fide purchaser** from a fraudulent vendee, upon rescission, acquires a good title against defrauded vendor. Authorities cited.

Ellenwood v. Burgess (Mass.) 457

BRIEFS AND NOTES.

Cases where leases of personal property were held **conditional sales**. (Me.) 503

Consideration. (N. H.) 888

Delivery. (Me.) 503; (N. H.) 888; (Vt.) 125

To messenger in insolvency. (Me.) 400

Acceptance. (Me.) 141

When title **passes**. (Vt.) 125

Seller's right of **stoppage in transitu**; insolvency of purchaser. (Me.) 400

Rule as to **bona fide purchasers** from fraudulent vendees before rescission for fraud by vendors. (Mass.) 455

Warranty; what constitutes; question for jury. (Me.) 778

SATISFACTION. See ACCORD AND SATISFACTION.

SCHOOLS AND SCHOOL DISTRICTS. See OFFICE AND OFFICERS, 19.

1. Under statute in force in 1808 (Rev. 1808, p. 582, § 2), school societies could **annex** to district **disconnected territory**.

Scoville v. Mattoon (Conn.) 588

2. The intention and effect of a vote of a school society of a town that F, and whosoever does at this time, or shall at any future time, occupy his house, they, with their respective list, shall be set to the first district, was to annex to said district the farm of F. *Id.*

3. In the absence of record evidence, the acts of the parties would raise a conclusive presumption that the present owner had been legally annexed to said district. *Id.*

4. A balance of a fund of an **abolished school district**, remaining after assessment and remission of equalizing tax authorized by Laws 1885, chap. 48, § 2, is **applied** to the use of those who would have been entitled to the benefit of it if the district had not been abolished; and the school board of the town district may be appointed trustees for disposition of money.

School Dist. No. 16 v. City of Concord (N. H.) 800

5. In action of debt defendant was **designated** in writ as "School District No. 1," as it existed before its division; the dis-

trict retained its old name, and by statute its organization and officers continued for closing up its concerns; one man was clerk of the old and new district; and the question was against which of the two the judgment should be rendered. *Held*, (a) that a copy of the original judgment, where defendant was properly designated only in the declaration as the old district, was admissible; and (b) the **presumption** is that the copy of the writ was served upon clerk as clerk of old district.

Moulthrop's Admr. v. School Dist. (Vt.) 505

6. A school teacher may enforce discipline by reasonable **corporal punishment**.

Heritage v. Dodge (N. H.) 529

7. He is not liable for **error in judgment** when he has acted in good faith and without malice. *Id.*

8. A school district is bound by the **location of a schoolhouse** by county commissioners.

Stickney v. Town of Orford (N. H.) 524

9. And a **vote** to raise **money** for the erection of a **schoolhouse** upon other than designated lot is void.

Brown v. School Dist. (N. H.) 534

10. And a **tax** assessed under such vote will be **abated** on petition of taxpayers of the district.

Stickney v. Town of Orford (N. H.) 524

11. In case of a **tax** for building a **schoolhouse** to be leased to an academy for school purposes, the test of the **public** character of the **use** is a common and equal right, free from unreasonable discrimination,

Holt v. Town of Antrim (N. H.) 892

12. The corporation accepts the **lease** with the legal **construction**, and subject to all implied conditions, necessary to give validity to the tax and the lease. *Id.*

13. School **money** of a town may be applied to payment of **tuition** at an academy in the town not under the town's superintendence. Authorities cited. *Id.* 894

14. **Money borrowed** by a school committee **without authority**, but on credit of the district, and used to supply a temporary need in paying the expenses of the school, may be **treated as if borrowed** of himself, and as a **part of the expenses** for which a tax might legally be assessed under a vote of the district.

Brook v. Bruce (Vt.) 716

15. A committee in assessing a **tax** may **anticipate wants** of district, and assess it at any reasonable time before money is required. *Id.*

16. It is **presumed** that an **appropriation** by school officers for repairs of schoolhouse was **authorized** by the district. *Id.*

17. School-district **officers** must be **elected** at annual meeting on last Tuesday of March, as provided by Rev. Laws, § 519; and a collector cannot justify as a *de facto* officer if elected at any other time.

Willard v. Pike (Vt.) 608

18. Three **districts** were **formed into one** by a vote of the town, under Rev. Laws, § 545, requiring a **two-thirds vote** of each district; and, assuming to be a union district, elected

the defendant its collector at a time required by § 576 for union districts. *Held*, that it was not a union district, and that defendant was not a legal officer and could not justify; but that a district could vote taxes at any meeting properly warned. *Id.*

19. A suit for an injunction to restrain defendant from acting as school district committee should be brought by the district; but a suit by individuals having no personal interest, except as right to office is involved, cannot be maintained.

Hinckley v. Breen (Conn.)

806

20. An indictment against the clerk of a school district for not recording the warrant for an annual meeting of the district, and discharging other duties of his office with respect to such meeting, must show that warrant was issued in compliance with the statute.

State v. Demeritt (N. H.)

165

BRIEFS AND NOTES.

District defined. (Conn.)

589

Annexation to district of disconnected territory. (Conn.)

589

Abolition of districts; equalization of tax. (N. H.)

801

Schoolhouses; building. (N. H.)

398

Location of schoolhouse by county commissioners; conclusiveness. (N. H.)

524

District has no vested rights of property in schoolhouse. (N. H.)

801

SEDUCTION.

Wherever loss of services is technical foundation of action, the loss will be presumed in favor of the father who has not parted with his right to reclaim his minor daughter's services although she is temporarily employed elsewhere. Authorities cited.

Gilley v. Gilley (Me.)

495

SERVICE. See WRIT AND PROCESS.

SET-OFF AND COUNTERCLAIM.

See JOINT TENANTS AND TENANTS IN COMMON, 4.

1. To constitute set-off, demand must be due party in his own right.

Olmstead v. Soult (Conn.)

807

2. To constitute such ownership, the party must have such a right to it as would enable him to bring suit thereon in his own name as plaintiff. *Id.*

3. A chose in action assigned to defendant merely to collect and to account to assignor can not be set off in defendant's favor. *Id.*

4. A party must prove precisely the same facts to prove a set-off as he would if he had brought his action upon the claim. Authorities cited. *Id.*

808

5. The subject-matter of set-off is an original head of equity jurisdiction.

McLean v. Johnson (Vt.)

611

6. Defendant purchased claims allowed against the estate with the money of the estate advanced for that purpose by the orator N, E. R., V. IV.

as administrator. *Held*, that a bill in equity will lie to compel an offset of the claims to the amount of the dividends to become due thereon, and for any balance due the orator. *Id.*

7. The orator is entitled to have the status of these claims fixed by a decree in chancery in advance of any order of the probate court for their judgment. *Id.*

8. At law there could not be an offset of these claims, as the orator's demands accrued to him in his administrative capacity, and it would alter the course of distribution. *Id.*

9. Defendant and one C were interested as sureties on some of the notes so purchased; but it was agreed that the defendant should account for the money advanced. *Held*, that C was not a proper party. *Id.*

10. The Statute of Limitations is not a bar; as, by the agreement, the time has not arrived for the application of the dividends to money advanced, nor the payment of the balance. *Id.*

BRIEFS AND NOTES.

Mutuality of debts. (Conn.) 490, 807; (Mass.)

353

No set-off of unliquidated claims. (Conn.) 490

Right of assignee to set-off. (Conn.) 807

SETTLEMENT. See ACCORD AND SATISFACTION; GUARDIAN AND WARD, 2.

SHIPS AND SHIPPING. See SALE, 7-9.

1. An attachment under State laws is invalid against mortgagees of a vessel by mortgage duly registered under Federal shipping laws.

Howe v. Tefft (R. I.)

108

2. The omission of the court to charge defendant as garnishee having possession of the vessel, — *Held*, not to affect his right to set up the attachment, if valid, by way of justification in replevin for the vessel, brought by the mortgagees. *Id.*

SLANDER. See LIBEL AND SLANDER.

SOCIETIES. See BENEFIT SOCIETIES; RELIGIOUS SOCIETIES.

SPECIAL LAWS. See CONSTITUTIONAL LAW, 3.

SPECIFIC PERFORMANCE.

1. Specific performance of contract for sale of shares in manufacturing corporation will not be decreed where remedy at law is adequate.

Eckstein v. Downing (N. H.)

337

2. Where such remedy is adequate, specific performance will not always be enforced, although defendant might, at his election, be entitled to that remedy. *Id.*

3. Whether there is an adequate remedy at law depends upon fact of purchasability in market of stock contracted for. Authorities cited. *Id.*

339

4. Specific performance of contracts in regard to personal property is decreed

only when vendor stands in need of specific relief which equity alone can give. Authorities cited. *Id.* 891

5. A decree for specific performance rests in court's discretion. Authorities cited. *Id.*

6. The orator brought his bill for specific performance of a contract, by which it was claimed defendant agreed to adopt him as his heir at law, and that thereby he was fraudulently induced to work several years for him; and, failing to prove both the contract and the fraud, it was held he could not recover for his services on the ground that he acted in ignorance of the facts.

Durkee v. Durkee (Vt.) 188

7. Nor can the orator recover on the claims arising out of the lease of the farm, as he had an ample remedy at law. *Id.*

BRIEFS AND NOTES.

Remedy at law. (N. H.) 887, 888

Retention of case to save expense of further litigation. (Vt.) 184

Of contract for sale of stock. (N. H.) 888, 889

Mutuality of contract. (N. H.) 888

Party seeking must show offer to perform his part. (Vt.) 613

STATE AND STATE OFFICERS.

See INTOXICATING LIQUORS, 28-28.

STATUTES.

I. CONSTRUCTION.

II. REPEAL.

BRIEFS AND NOTES.

See CONSTITUTIONAL LAW.

I. CONSTRUCTION.

1. Construction is governed by legislative definitions. Authorities cited.

Jones v. Surprise (N. H.) 294

2. The legal construction of statutes is the ascertainment of fact of legislative purpose from competent evidence. Authorities cited.

Boody v. Watson (N. H.) 569

3. In the construction of statutes, the statute in force and relating to the same matter, before the passage of the Act, is to be considered, to reach the intent of Legislature.

French v. Cowan (Me.) 683

4. In construing statutes applicable to corporations, courts will attach no slight weight to uniform practice under them, if this practice is continued for a considerable period of time. Authorities cited. *Id.* 687

5. When a statute creates a right and declares when it may be exercised, it cannot be exercised at any other time.

Dow v. Young (Me.) 508

6. When new remedies are given by statute, to enable one more effectually to enforce rights, and are intended for his benefit, the provisions therefor are to be construed as cumulative rather than restrictive. Authorities cited.

Train v. Boston Disinfecting Co. (Mass.) 448

N. B. R., V. IV.

II. REPEAL.

7. Where a prior Act or part of an Act is incorporated in a subsequent Act, it is as if the words of the first Act had been repeated in the second, so that the repeal of the first will not take away the effect of the words so repeated in the second.

Commonwealth v. Kendall (Mass.) 198

8. When a statute giving a lien provides for its enforcement in the same manner as another lien is enforced, the repeal of remedy in latter case will not affect remedy applicable to the former.

Collins v. Blake (Me.) 277

9. The charter of an incorporated village, authorizing it to "regulate" its victualing houses, repeals by implication the general law on that subject.

Village of St. Johnsbury v. Thompson (Vt.) 509

10. General legislation upon a particular subject must give way to latter inconsistent special legislation on same subject. Authorities cited. *Id.* 510

11. Provisions of different statutes, conflicting with each other, can not stand together. Authorities cited. *Id.*

BRIEFS AND NOTES.

Construction. (Me.) 410

Intention of Legislature. (Me.) 683

With reference to provisions of common law. (Me.) 154

Word "may" construed as imperative. (Mass.) 194

Not construed as altering common law further than words import. (Mass.) 212

In derogation of common law, strictly construed. (Me.) 280; (Mass.) 212, 246, 445

Penal; strictly construed. (N. H.) 293

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By implication. (Mass.) 823

Amending statute does not repeal it. (Mass.) 193

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES AND CONSTITUTIONS CITED, CONSTRUED, ETC.

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STOCK. See BANKS AND BANKING; CORPORATIONS, 1, 8; RAILROAD COMPANIES, 12-16.

STOCK TRANSACTIONS.

Plaintiff purchased 100 shares of stock through defendant. Defendant ordered the broker to buy 100 shares more, and deposited the first-purchased shares as security, understanding himself as acting under instructions from plaintiff. Defendant delivered plaintiff an order acknowledging her as owner of the stock, and directing the broker to deliver the stock to her if called for at any time. Plaintiff ordered defendant to sell her stock, and the 100 shares regarded as hers by defendant were sold at a loss. Plaintiff having sued defendant for alleged conversion of the 100 shares, in having deposited them as collateral security upon the second purchase,—*Held*, that, if plaintiff made no objection to defendant's purchase of the second 100 shares, or to the use of the first 100 shares as security, she **ratified** defendant's action and could not recover.

Metcalf v. Williams (Mass.) 239

BRIEFS AND NOTES.

Measure of damages for conversion of stock pledged. (Mass.) 240

STOPPAGE IN TRANSITU. See CARRIERS, 5-8.

STREAMS. See WATERS AND WATER-COURSES.

STREET RAILWAYS.

1. The construction and operation of a street railroad is **not a new use of street.**

Briggs v. Lewiston & A. Horse R. R. Co. (Me.) 546

2. The use is criterion by which a street railway is judged. *Id.*

3. A street railway, **changing grade** of street by authority of city council, is **not liable** in trespass to landowner. *Id.*

4. Where, by the terms of a lease by a street-railroad company of a part of its track to another company, the lessor was not exonerated from liability, and the lease was ratified by a statute which did not contain any express provision as to the lessor's liability, an **action of tort for personal injuries** received on the leased track is maintainable against the lessor company.

Braslin v. Summerville Horse R. R. Co. (Mass.) 888

N. E. R., V. IV.

5. A street-railway corporation cannot make a valid transfer of its franchise or **relieve itself from the burden** imposed upon it by law or by its charter without the consent of the State. Authorities cited. *Id.* 889

6. Prior to Stat. 1886, chap. 140, a street-railway company was not liable to an **action of tort for loss of life** of person, whether passenger or not.

Holland v. Lynn & B. R. R. Co. (Mass.) 820

Gunn v. Cambridge R. R. Co. (Mass.) 328

BRIEFS AND NOTES.

Liability to landowner for construction and operation, in street. (Me.) 546, 547

Right of action against, for damages for death. (Mass.) 821, 824

STREETS. See MUNICIPAL CORPORATIONS, V., VI.; ROADS AND HIGHWAYS.

SUBROGATION. See TRUSTS, 19, 21; DEVISE AND LEGACY, 23.

1. When a creditor who holds collateral security gets satisfaction from debtor's surety, the **surety takes** creditor's place as to the debts and as to the security.

Blake v. Traders Nat. Bank (Mass.) 624

2. Where one owner of property has claims for a loss against an insurer and a tortfeasor, the **insurer**, upon paying the loss, is subrogated to the rights of the owner to recover for the tort. Authorities cited. *Id.* 627

BRIEFS AND NOTES.

General right; laches in taking advantage of. (Mass.) 625, 626

SUICIDE. See WILL, 5.

SUBSCRIPTION.

1. A subscription contract to pay money in aid of a contemplated manufacturing business can **not be enlarged** or contradicted by a letter which was merely one of the preliminary negotiations to the subscription.

Smith v. Burton (Vt.) 900

2. The subscription contract contained several conditions, and the only one relating to the subscribers had been fulfilled, but some of the other conditions relating to other parties had not been fulfilled. *Held*, the subscription was enforceable. *Id.*

3. A subscription must be deemed **absolute unless** there is an express condition inserted in it. Authorities cited.

Eaton v. Pacific Nat. Bank (Mass.) 68

BRIEFS AND NOTES.

Letter written before subscription paper signed does not change the contract. (Vt.) 904

Performance of conditions. (Vt.) 905

SUNDAY.

1. An action may be maintained to **recover a sum agreed to be paid in an exchange of horses** made on the Lord's Day, the defendant not returning nor offering to return the horse which he received from the plaintiff.

Wentworth v. Woodside (Me.) 188

2. Where defendant in action upon a written contract dated on Monday sets up the defense that the contract was executed and delivered on Sunday, the burden is upon him to prove it.

Shaw v. Waterhouse (Me.) 155

3. One who has the management of business may be convicted of keeping a shop open on the Lord's Day, irrespective of ownership of property.

Commonwealth v. Dale (Mass.) 200

4. The fact that one is a Hebrew will not excuse desecration of the Lord's Day by keeping open shop.

Commonwealth v. Starr (Mass.) 204

BRIEFS AND NOTES.

Contract. (Me.) 188

Work of necessity or charity. (Mass.) 200, 204

Prohibition against opening of shops and doing business on. (Mass.) 200, 204

SUPERSEDEAS. See APPEAL, I.

SURETY. See PRINCIPAL AND SURETY.

SURFACE WATER. See WATERS AND WATERCOURSES, 28, 24.

TAXES.

I. PROPERTY TAXABLE; EXEMPTION.

II. WHERE TAXABLE.

III. ASSESSMENT, ETC.

a. *In General; Valuation.*

b. *Lists, etc.*

c. *Errors; Correction.*

IV. COLLECTION; INTEREST.

V. SALE.

VI. ILLEGAL.

BRIEFS AND NOTES.

See BANKRUPTCY, 5; DOMICILE, 1, 2; SCHOOLS AND SCHOOL DISTRICTS, 9-12, 15.

I. PROPERTY TAXABLE; EXEMPTION.

1. Property not expressly subjected by statute to taxation is exempt. Authorities cited. Dis. Op.

Boody v. Watson (N. H.) 571

2. Property actually devoted to pious or charitable uses is exempt, although the deed or record title does not show the use.

Willard v. Pike (Vt.) 608

3. An academy for general education owned certain buildings, a part of which was occupied by its students for a boarding-house, a part by one professor, and the remainder rented; tuition was charged only for the maintenance of the institution. *Held*, the buildings were exempt, under Rev. Laws, § 270.

Id.

4. The stock of a corporation cannot be assessed to stockholders when it does not exceed in value the value of property which it represents, and which is assessed to corporation.

Id.

N. E. R., V. IV.

5. Under a statute exempting land set apart for schoolhouses or colleges, with buildings thereon occupied for those purposes, a professor's house, erected on college grounds and occupied by one of faculty as a residence, is not exempt. Authorities cited. *Id.* 608

6. Under a statute exempting churches, etc., in actual use and occupation, the land on which a church is in process of erection is not exempt. Authorities cited. *Id.*

7. The excise imposed upon corporations by Pub. Stat. chap. 18, § 38, is a tax upon the franchise, and constitutional.

Boston Mfg. Co. v. Commonwealth (Mass.) 646

8. The excess only of the par value of national bank stock over amount of owner's interest-bearing indebtedness is liable to taxation.

Peasey v. Town of Greenfield (N. H.) 539

II. WHERE TAXABLE.

9. The personal property of a life insurance company was taxable by town in which it had its principal place of business, prior to Stat. 1885, chap. 829.

City of Portland v. Union Mut. Life Ins. Co. (Me.) 417

10. Such personal property is not an accumulating fund within Rev. Stat. chap. 6, § 14, cl. 7, providing that such property shall be assessed to person for whose benefit it is accumulating. *Id.*

11. Under Rev. Laws, § 270, exempting personal property taxed in another State, a debt evidenced by promissory note owned by inhabitant of this State is taxable here, although secured on lands in another State, where mortgagee's interest is taxed as real estate; and the note and mortgage are in their owner's agent's possession, living where land is situated.

Bullock v. Town of Guilford (Vt.) 363

12. A debt simply can have no locality separate from that of the party to whom it is due. Authorities cited. *Id.* 363

III. ASSESSMENT, ETC.

a. *In General; Valuation.*

13. A Special Act assessing a land tax is not limited by the general law providing that committee appointed to superintend expenditure of taxes should not be allowed their account for labor, unless it had been completed to amount of tax within two years from rising of Legislature.

Wells v. Austin (Vt.) 799

14. Under Rev. Stat. chap. 4, § 2, the majority of said committee could act in the premises. *Id.*

15. It is not necessary to verify the signature of one of committee signing by mark. *Id.*

16. An action is not maintainable to recover a tax assessed by three assessors, two of whom took oath of office before moderator of town meeting at which they were elected.

Inhabs. of Orneville v. Palmer (Me.) 771

17. An ordinary tax assessment of a town is **a judicial act** of the selectmen.
Boody v. Watson (N. H.) 553

18. It is essential to the validity of an assessment that every material **requisite of the statutes be complied with**. Authorities cited. *Dis. Op. Id.* 575

19. The **assessment of a tax larger, by the smallest sum, than is authorized by statute is fatal** to its validity. Authorities cited. *Dis. Op. Id.*

20. If **unauthorized persons unite with selectmen in making the appraisal, their assessment is void**. Authorities cited. *Dis. Op. Id.*

21. The **equalizing tax** required by Laws 1885, chap. 43, § 2, could be levied at annual assessment of 1886.

Perry v. Town of Fitzwilliam (N. H.) 526

22. An excise imposed by Pub. Stat. chap. 18, § 88, cannot be held to be assessed without authority of law in this case, even if the evidence before the board should seem to the supreme court to have been insufficient to justify the **valuation** which it saw fit to place upon the shares.

Boston Mfg. Co. v. Commonwealth (Mass.) 646

23. In providing for an assessment by the deputy tax commissioner, and for a board of appeal, all the provision was made which was deemed necessary, so far as **valuation** is concerned. *Id.*

24. The supreme court has not the jurisdiction to determine whether the **valuation** by board of appeal was **correct** in amount. *Id.*

25. **Value of property is question of fact**. Authorities cited.

Boody v. Watson (N. H.) 567

26. In cases of **overvaluation** by assessors, the **remedy** can only be by appeal from assessors to commissioners. Authorities cited.
City of Bath v. Whitmore (Me.) 154

b. Lists, etc.

27. Rev. Laws, § 881, requiring listers to lodge in town clerk's office an **abstract of the personal lists** of taxpayers, for their inspection, is mandatory.

Smith v. Hard (Vt.) 113

28. The Legislature may pass a retrospective Act **legalising a grand list**, invalid because the listers had not subscribed the preliminary statutory oath; and such list was admissible as evidence in an action to recover taxes assessed on that list, both before and after its legalization. *Id.*

29. But a list, **fatally defective** in matter of substance affecting taxpayer's rights, can not be so cured.

Bartlett v. Wilson (Vt.) 116

30. If the abstract is not signed, verified, and authenticated by the listers in such unmistakable manner as to carry on its face fair evidence of its character, the **grand list is invalid** and not admissible as evidence.

Smith v. Hard (Vt.) 113

31. Defendant's name and list were omitted in the abstract of personal lists, and the **abstract** was not signed, or certified, or authenticated by the listers, but merely indorsed

"Personal list, 1881." *Held*, the grand list was illegal, and was not cured by a later Act of the Legislature declaring it valid.

Bartlett v. Wilson (Vt.) 116

32. The **notice** required to be given to taxpayer, of time and place for hearing grievances, will not cure defects in abstract of personal lists. *Id.*

33. A list was seasonably returned, but the **certificate and oath** were not attached until several months after statutory time. The listers doubled their **appraisal** of the defendant's real estate. *Held*, the list was illegal as to defendant. *Id.*

34. That section of statute is constitutional which directs listers, in case taxpayer willfully omits to furnish required inventory of his property, to ascertain the amount thereof, and double it as a **basis of taxation**. *Id.*

35. It was not error to exclude inventories offered as bearing upon **good faith** of listers, without stating in what respect they bore upon it, although one on examination was found admissible.

Willard v. Pike (Vt.) 608

36. What purported to be a **certificate of the president of the county equalizing board**, required by Rev. Laws, § 808, and in proper form, was **admissible**. *Id.*

37. An **alteration of the list** by listers, after time for its completion, unauthorized by law, does not render the whole grand list void. *Id.*

38. The **check-list** used at annual town meeting, with proper alterations, may be used at a special meeting to elect listers to fill a vacancy, and need not be **posted longer than notice of meeting**. *Id.*

39. When the reasons specified as an **objection** to the admission of the grand list as evidence are **not sufficient**, the **exception** will not be **sustained**, although the list for other reasons is void. *Id.*

40. Statutory **regulations** relating to taxpayer's rights are conditions precedent to the legality of the tax; but those for the **information** of the lister, to promote method, are directory. *Id.*

41. A list was very defective in form, tested by Rev. Laws, § 848, but contained the necessary elements of a grand list; **what was wanting** could be **readily supplied** by computation. *Held*, valid in this respect. *Id.*

42. The **abstract of personal lists** must be **authenticated** by listers as such when list is filed. Authorities cited. *Id.* 606

43. The property of an **aqueduct company**, consisting of ponds, etc., and iron pipes by which water was brought into a village, was **properly set in the list** as real estate. *Id.* 608

44. An error of listers in **determining amount of taxable property** of one omitting to make his inventory, and who acted with good faith, and with common care and skill, does not **invalidate** the list.

Bullock v. Town of Guilford (Vt.) 863

c. Errors; Correction.

45. A validating Act can not cure the illegality of an assessment without notice to the persons interested. Authorities cited.

Barllett v. Wilson (Vt.) 119

46. A petition by taxpayers, alleging that school-district property was appraised, under Laws 1885, chap. 43, at more than double its value, does not state a case entitling them to relief.

Perry v. Town of Fittsfield (N. H.) 526

47. Unreasonable delay in filing a petition for relief from an excessive appraisal may be strong, if not conclusive, evidence that assessors' mistakes are waived. *Id.*

48. Selectmen are not liable for damages to one injured by their exemption of taxable property, in pursuance of an illegal vote of the town.

Boody v. Watson (N. H.) 553

49. The exemption is an erroneous judgment of a court of assessment, and is reversible by the common-law power of general superintendence for correcting errors of courts of inferior jurisdiction, where the laws have not expressly provided a remedy. Gen. Laws, chap. 208, § 1. *Id.*

50. The judicial ascertainment of a statutory share of public expense, and process for its collection, may be necessary for the exercise of the corrective power. *Id.*

51. Correctional authority to reverse an exemption that can be reversed only by an assessment is authority to make the assessment. *Id.*

52. In the correction of judicial errors, the common law preserves as far as possible what is right, and destroys only what is wrong. This rule is applicable to errors in the assessment of taxes. *Id.*

53. The power of assessors to correct their erroneous judgment of exemption is not a test of correctional power of supreme court. *Id.*

54. An action for a reversal of the judgment, brought at the earliest possible term, is seasonably commenced. *Id.*

55. In such action, plaintiff is entitled to ample remedy after the expiration of the tax year during which the error could be voluntarily corrected by lower court, under Gen. Laws, chap. 57, § 10. *Id.*

56. A continuance of case by supreme court for advisement is an act of law that works no wrong. *Id.*

57. The erroneous judgment, cannot be effectually reversed without an enforceable assessment of the wrongfully exempted property. *Id.*

58. One who can obtain a reversal of judgment in a direct proceeding can not impeach original assessment collaterally on account of error. *Id.*

59. In a legal process addressed to the board of selectmen and their successors, in their official capacity as a continuous court of assessment, they need not be personally named. *Id.*

N. E. R., V. IV.

IV. COLLECTION; INTEREST.

60. A taxable inhabitant assessed upon property for which he is not taxable must petition for abatement. He can not set that fact up in defense to a suit for taxes.

City of Bath v. Whitmore (Me.) 158

61. Nor can he defeat such suit by showing the recorded lists of assessments have not been signed by the assessors; or the assessors have not certified assessment as required by statute; or they inserted unauthorized mandate in the warrant to collect interest, there being no attempt to collect interest. *Id.*

62. It is the general rule that a separable illegal provision in a warrant will not vitiate the instrument. Authorities cited. *Id.* 155

63. A telegraph company is liable for interest on a tax finally levied upon it, from December 1 of the year in which it is assessed, although the amount of the original assessment has been reduced on appeal.

Western U. Tel. Co. v. State (N. H.) 302

V. SALE.

64. The collector can lawfully adjourn the sale.

Wells v. Austin (Vt.) 799

65. A tax sale of nonresident's land is invalid if the number of acres in the taxed parcel is not inserted in the collector's list, as required by Gen. Laws, chap. 59, §§ 1, 2. Authorities cited. Dis. Op.

Boody v. Watson (N. H.) 575

66. A sale is not invalidated by the fact that statute was not strictly complied with as to publication of notice of proposed application to the Legislature for assessment of tax.

Wells v. Austin (Vt.) 799

67. In a case involving the validity of a tax sale, it is immaterial whether rate-bill is issued to collector correctly contained name of original proprietor. *Id.*

VI. ILLEGAL.

68. In permitting a petition to the supreme court to recover back a tax which should not have been exacted, it was intended to bring before that court the inquiry whether there had been a wrongful assessment of a tax upon that which was not the proper subject of taxation.

Boston Mfg. Co. v. Commonwealth (Mass.) 646

BRIEFS AND NOTES.

Definition. (N. H.) 556

Power of taxation. (Vt.) 362; (N. H.) 556

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Collector is proper person to make demand of taxpayer. (Me.)	771
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TELEGRAPH COMPANIES.

1. When a company offers no explanation when an important word is dropped in transmission of message, it is *prima facie* evidence of negligence.

Hyer v. Western U. Tel. Co. (Me.) 784

2. Stipulation upon blank limiting company's liability for negligence in transmitting message, unless message is repeated at sender's expense, is void as against public policy. *Id.*

3. Sender of message must sustain loss by mistake in transmission, as between himself and receiver. *Id.*

4. Sender has remedy over against company when error is result of its negligence. *Id.*

BRIEFS AND NOTES.

Liable for negligence in transmission of message; stipulation limiting liability for negligence is void. (Me.) 785

TENANTS. See LANDLORD AND TENANT.

TENANTS IN COMMON. See JOINT TENANTS AND TENANTS IN COMMON.

TENDER. See TROVER AND CONVERSION, 2; MORTGAGE, 26, 27.

TOWNS. See MUNICIPAL CORPORATIONS.

TRADEMARK.

1. A manufacturer may use his own name as a mark upon his goods, although it be the same as that of another manufacturer of N. E. R., v. IV.

similar goods, if there is no false representation.

William Rogers Mfg. Co. v. Simpson, eto. Co. (Conn.) 75

2. But the second may not use his name in connection with like marks or words as those used by the first appropriator; nor with such as so closely resemble as that the association will probably mislead. *Id.*

3. Where a corporation had a right to the use of trademarks as follows: "Wm. Rogers Mfg. Co." "1865, Wm. Rogers Mfg. Co." "(Anchor) Wm. Rogers & Son," having secured such right by assignment from R., Sr., and by long-continued use, R., Jr., son of R., Sr., who from boyhood had had connection with the manufacture of ware by the various concerns with which his father was connected, and by reason thereof, since 1864, to this present, has had a valuable independent reputation in the market for skill and integrity in such manufacture, as a manufacturer of silver-plated ware, had the right to impress thereon the stamp "(Eagle) Wm. Rogers (Star)." — *Held*, R. Jr., had the right to contract with a manufacturing company that it would make the ware for him under his supervision, he to receive, sell, and stamp for himself; the corporation to receive a percentage for its labor and capital, he a percentage for his skill and reputation. *Id.*

4. The finding by the committee that a circular issued by the corporation defendant with which William Rogers, Jr., contracted, "is not misleading to a person familiar with the fact that R., Sr., died in 1878, but persons not so familiar might be misled," will not authorize an injunction restraining the defendant from the use of the circular. *Id.*

BRIEFS AND NOTES.

Title to. (Conn.) 75

TRESPASS. See INJUNCTION, 4; JOINT TENANTS AND TENANTS IN COMMON, 6; MORTGAGE, 17, 18; WATERS AND WATERCOURSES, 5.

1. In trespass on the freehold, the *ad damnum* in the writ determines the jurisdiction. *Smith v. Fitzgerald* (Vt.) 515

2. The mere entry of a complaint before a trial justice, and the issue thereon of a warrant of arrest, will not render the complaining party liable in trespass for the acts of the officer in serving the warrant.

Langford v. Boston & A. R. R. Co. (Mass.) 209

3. To sustain trespass to personal property, plaintiff must prove title or possession, or right to immediate possession.

Jones v. Smith (Me.) 689

4. Trespass cannot be supported against one coming into possession of goods lawfully for a subsequent unlawful conversion of them. Authorities cited. *Id.* 691

5. In trespass, declaring for taking and carrying away timber lying in a certain place, for the completion of a house "then lately built," is bad; for the timber cannot be for a house already built. Authorities cited.

State v. Haven (Vt.) 619

6. Acts of **occupancy**, that as well indicate a trespass by wrongdoer as possession by owner, are **prima facie trespasses**. Authorities cited.

Wells v. Austin (Vt.) 802

BRIEFS AND NOTES.

Liability of **officer** executing void process. (Me.) 277

Against sheriff for mere nonfeasance of deputy. (Vt.) 385

Joint tortfeasors *in pari delicto*. (Mass.) 839

To **personalty**; plaintiff must prove title or possession. (Me.) 689

TRIAL. See CONTINUANCE AND ADJOURNMENT; CRIMINAL LAW, IV.; JUDGMENT; NEW TRIAL; NONSUIT; PLEADING; WITNESS.

1. Where **evidence** is **admitted** subject to **condition** that another fact shall be proved, if that fact be not afterwards proved, objecting party should ask to have the evidence stricken out or jury instructed to disregard it.

Reese v. Dennett (Mass.) 428

2. It is in the discretion of trial court to admit **evidence** in **rebuttal** that should have been introduced in opening, if opposing party is not thereby injured.

Chamberlain v. Fuller (Vt.) 614

3. An error in **excluding evidence** rendered **harmless** by verdict is not vitiating.

Frary v. Gusha (Vt.) 359

4. Error cannot be predicated on **improper answer of a witness** when **attention of court** was not called to it. *Id.*

5. A **general objection to evidence** only **saves** the right to **specific rulings** on the defects that are called to the court's attention before the case is submitted to jury.

Willard v. Pike (Vt.) 608

6. It would be impracticable, in the hurry of a jury trial, for the presiding judge to examine and dissect a bundle of **papers** to see whether they have a **hearing on the issue**. Authorities cited. *Id.*

7. **Instructions.** It was not error for the judge to express to the jury the inclination of his **judgment upon the evidence**, where he did not make his opinion binding upon their consciences, but left them to decide the matter for themselves.

Comstock's Appeal (Conn.) 592

8. A court in instructing the jury is not limited by the **requests** made.

Hatt v. Nay (Mass.) 178

9. A judge is not bound to adopt the precise words of a party requesting instructions.

Khron v. Brock (Mass.) 424

10. When no exception is allowed, the question will not be considered whether there was error or not in **refusing a request** to charge, made out of time.

Chamberlain v. Fuller (Vt.) 614

11. An **exception** does not lie to an instruction where the **mistake** was obvious, N. E. R., V. IV.

and the judge's attention was not called to it before jury retired.

Dugan v. Thomas (Me.) 281

12. When there is no conflict in the evidence, and no dispute as to the facts, it is lawful to **direct a verdict**.

Village of St. Johnsbury v. Thompson (Vt.) 509

13. A **special verdict** containing inconsistent findings will be sustained, when they are made immaterial by other findings in the same verdict.

Baldwin v. Doubleday (Vt.) 124

14. A **verdict** for plaintiff on the general issue, which could not have been found if a special plea had been sustained, is in effect a verdict also for plaintiff on a **special plea**. Authorities cited.

Almy v. Daniels (R. I.) 917

BRIEFS AND NOTES.

By court; conclusiveness of findings of fact. (Mass.) 835

Misstatement of facts by judge. (Me.) 281

Failure of party to call attention of judge to mistake inadvertently made. (Me.) 281

Commenting on evidence. (Me.) 778, 779

Instructions; misleading jury. (Me.) 700

Requests must be wholly correct. (Me.) 700

Language of requests not necessarily adopted. (Mass.) 435

Directing verdict. (Me.) 502; (Mass.) 435, 443

Special verdict. (Me.) 143

TROVER AND CONVERSION. See JOINT TENANTS AND TENANTS IN COMMON, 6, 7; LIMITATION OF ACTIONS, 3; MORTGAGE, 61.

1. Where the only ground for keeping property demanded is a lien upon it, a claim to hold it, and a refusal to deliver it to the owner on demand, in assertion of a right other than the lien, are **evidence of a conversion**.

Hamilton v. McLaughlin (Mass.) 643

2. A **refusal to deliver** the property unless not only the amount of lien upon it, but also another debt, is paid, was a refusal to deliver it upon payment of amount of lien, and rendered a **tender of it unnecessary**. *Id.*

3. Something more than a **demand** of the husband, of personal property, and a **refusal** by him to deliver it, is necessary to prove a conversion by him, where he has no possession of the property, and has parted with whatever title he had to his wife.

Barrows v. Keene (R. I.) 271

4. A **purchaser** of property from one having it in possession, but who is not the **true owner**, with no right to sell, and using it as his own, is **guilty of actual conversion**. Authorities cited.

Merrill v. Bullard (Vt.) 111

5. The Statute of **Limitations** commences to run at time of sale. *Id.*

6. An **officer** taking property under **replevin** cannot justify thereunder unless he

return it to court to which it is made returnable.

Wright v. Marvin (Vt.) 885

7. Where plaintiff recovered a judgment against a constable for his wrongful act in allowing goods to be taken by agent of defendant, under replevin, the satisfaction of his judgment disentitled him to institute an action against defendant for same conversion.

Simpson v. Mercer (Mass.) 828

8. A constable who permitted goods to be wrongfully taken in replevin may recover from the person taking them on the ground that, although a codefendant, he is not *in pari delicto*. *Id.*

9. In trover for conversion of property secured by chattel mortgage, evidence is not admissible that mortgagee told the justice who administered the oath to the parties that there was no consideration for the mortgage.

Perry v. Dow (Vt.) 872

BRIEFS AND NOTES.

Demand and refusal. (Mass.) 644

There is no conversion until demand. (Vt.) 111

Ignorance of conversion does not change right. (Vt.) 111

One obtaining property tortiously cannot hold same by virtue of lien. (Mass.) 644

Justification of officer taking property under writ. (Vt.) 885

Measure of damages. (Mass.) 240

TRUSTS.

I. IN GENERAL; CREATION.

II. RESULTING.

III. TRUSTEE.

a. Appointment.

b. Liabilities; Sureties.

BRIEFS AND NOTES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; 1; CHARITIES AND CHARITABLE USES; DEVISE AND LEGACY, VII.; HUSBAND AND WIFE, 5; MORTGAGE, VII.

I. IN GENERAL; CREATION.

1. Trusts concerning land, except such as may arise or result by implication of law, shall not be created or declared unless by an instrument in writing signed by the party making or declaring the same, or by his attorney.

Moore v. Stinson (Mass.) 654

2. Wherever it is necessary for the accomplishment of any object of creator of trust that legal estate should remain in trustee, the trust is a special, active one. Authorities cited.

Barnes v. Dow (Vt.) 721

3. A son conveyed to his mother the estate inherited from father and received a written agreement to reconvey when he paid her an indebtedness. She kept a strict account of property and its income, and regularly paid him the net income. She spoke of

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it as his property in letters to him. At her death she devised it to another to hold in trust for him. There was no account of any indebtedness from her son to her, and no evidence of any save the paper she gave him when she received from him the conveyance. *Held*, the conveyance constituted a trust which terminated at her death.

Hinckley v. Hinckley (Me.) 535

4. An unrevoked trust is valid, even though there is an express power of revocation. Authorities cited.

Pingrey v. Nat. L. Ins. Co. (Mass.) 233

II. RESULTING.

5. Where money of one is wrongfully used by another, owner may pursue it and establish a resulting trust on the land bought with it.

Moore v. Stinson (Mass.) 654

6. Even when the money has paid for only a part of the land the land may still be compelled to be sold, that the money thus used may be realized. *Id.*

7. Where land is purchased and the conveyance of the legal estate is taken by one person, and the consideration is paid by another, there is a resulting trust in favor of the person who advanced the purchase money. *Id.*

8. This is also the case where it is shown that a part of the purchase money was paid by one, and the deed was given to another, if it were paid for some specific part or distinct interest in the land. *Id.*

9. In cases of this nature, oral or written testimony showing the circumstances of transaction and intention of the parties, are admissible to prove or disprove the implied trust. *Id.*

10. Where party seeking to establish a resulting trust is not a party to the deed he is not estopped by its recitals from proving the facts from which the trust may result. *Id.*

11. But the grantee in such a deed, which recites the consideration and declares the trusts upon which he shall hold the estate, can not be permitted, by parol proof, to change it. *Id.*

III. TRUSTEE.

a. Appointment.

12. A petition for the appointment of a trustee will not be dismissed for want of service because the original petition was left with defendant.

Adams v. Adams (N. H.) 168

13. The conduct of one appointed in a will to an active trust concerning property and incomes, may amount to a declination of the trust without words. In such case the probate court may fill the vacancy. *Id.*

14. In a petition for the appointment of some suitable person to a trust, one who has appeared in probate court to oppose need not have formal notice of a further application, in form of petition, which names trustees desired. *Id.*

15. An objection that **petitioners** are not jointly entitled to maintain the proceeding must be interposed at earliest opportunity. *Id.*

b. *Liabilities; Sureties.*

16. The probate court has **jurisdiction** in equity to hear and determine all matters relating to testamentary trusts. Authorities cited.

Swasey v. Jaques (Mass.)

44

17. If a trustee, through inadvertence, erred in admitting, in an account, that an amount therein stated was a part of income of trust fund, the court can grant leave to **reopen account and correct error.**

Dodd v. Winship (Mass.)

351

18. Where a trustee **pledged** certain **stocks** of trust estate to defendant to secure a debt, the certificate and assignment showing the stock was held in trust, and defendant sold the same,—*Held*, defendant was liable to the new trustee and *cestui que trust* for the avails.

Blake v. Traders Nat. Bank (Mass.)

624

19. A trustee's **sureties**, compelled to answer for his breach of trust, are subrogated to his *cestui que trust's* rights against those who have participated in his wrongful act.

Id.

20. The trustee and the *cestui que trust* both had an equitable remedy against defendant which would not be affected by **Statute of Limitations.**

Id.

21. This **right of action** is a right to which trustee's **surety**, compelled to make good the amount to the fund, would be subrogated.

Id.

22. The **surety** of the trustee was justified in the delay necessary to defend the suit against himself.

Id.

BRIEFS AND NOTES.

Mode of **creating** trusts concerning land. (Mass.)

452

Concerning personalty can be established by parol. (Me.)

585

Resulting. (Mass.)

451, 452

When arises. (Me.)

416

Parol evidence. (Mass.)

655

One receiving money to be paid to another is **trustee.** (Me.)

143

Duty of trustee to keep trust property invested. Mass.)

187

Power of sale. (Vt.)

712

Right of *cestui que trust* to follow trust funds. (Mass.)

625, 626

UNINCORPORATED ASSOCIATION. See CORPORATIONS, 11-13.

USE AND OCCUPATION.

Assumpsit for use and occupation cannot be maintained when there is no contract or promise to pay for the occupation.

Durrell v. Emery N. H.)

164

BRIEFS AND NOTES.

Contract to pay for occupation. (N. H.)

164

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USER. See ROADS AND HIGHWAYS, I., IV

USES. See CHARITIES AND CHARITABLE USES.

USURY.

1. Money paid above the legal rate for forbearance of an existing debt is usury. *Hathaway v. Hagan* (Vt.)

128

2. Usury cannot be covered by subterfuge. *Id.*

3. Where one, financially embarrassed, employed another to assist him, and the value of services was afterwards agreed upon and included in amount of promissory note,—*Held*, it was not usury.

Noyes v. Landon (Vt.)

724

BRIEFS AND NOTES.

Application of excessive usurious premiums in payment of debt. (Me.)

497

VENDOR AND PURCHASER. See SALE; COVENANT, 1; FRAUD AND FRAUDULENT CONVEYANCE, 3.

1. It would be a fraud in equity to convert into an absolute sale that which was intended for a different purpose.

Hinckley v. Hinckley (Me.)

535

2. An instrument under seal, conveying maker's estate, etc., in trust so as to raise a certain sum therein mentioned as owing from maker to grantee, the amount of such debt and interest to be retained by grantee, and residue of transferred property to be returned by him to maker,—*Held*, intended only as a bill of sale, and not an obligation to pay debt mentioned therein; and that, if regarded as an acknowledgment of a pre-existing indebtedness, the fact that it is under seal gives it no additional effect for saving it from Statute of Limitations.

Tolle's Appeal (Conn.)

463

3. The obligee in a real-estate bond can not recover what he has voluntarily paid under the terms of the bond, upon his failure to complete the required payments.

Grimes v. Goud (Me.)

671

4. Defendant's grantor was out of possession at conveyance; defendant knew others controlled property for many years; he examined the registry and gave an insignificant price and took a quitclaim deed; he made no inquiries of grantor as to the circumstances of his title; he contended grantor had no valuable title. *Held*, that these facts amounted to proof of actual notice.

Knapp v. Bailey (Me.)

147

5. Actual notice, as applicable to conveyances, does not necessarily mean actual knowledge. *Id.*

6. Actual notice may be proved by direct evidence, or it may be inferred or implied (that is, proved) as a fact from indirect evidence. Authorities cited. *Id.*

151

7. Grantee of a quitclaim deed is not a bona fide purchaser without notice. Authorities cited. *Id.*

128

BRIEFS AND NOTES.

- Bona fide purchaser; notice. (Me.)* 149
Constructive notice. (Me.) 150

VERDICT. See TRIAL, 12-14.

VILLAGES. See MUNICIPAL CORPORATIONS.

VOTERS AND ELECTIONS.

1. Acts 1885, chap. 845, § 7, that no person shall be entitled to be registered as a voter within thirty days of naturalization is unconstitutional.

Kinneen v. Wells (Mass.) 457

2. An action against registrars of voters to recover damages for wrongfully refusing to register plaintiff as a voter can be maintained. *Id.*

3. A plurality of electors may elect a member of Congress, or a presidential elector.

Re Plurality Elections (R. I.) 108

4. State Constitution, art. 8, § 10, is in conflict with § 4 of art. 1 of Federal Constitution, if it be construed to extend to elections of representatives to Congress. *Id.*

5. R. I. Pub. Stat. chap. 11, §§ 6, 7, which provide that a plurality shall elect in the special congressional elections there designated, are constitutional. *Id.*

6. The manner of appointment of presidential electors is left entirely to State Legislatures. *Id.*

7. A plurality of electors may elect constitutionally a member of the city council of Providence, or any civil officer in an election held by the people. *Id.*

8. The State Constitution, art. 8, § 10, making a majority necessary in all elections held under such Constitution, refers to the annual election of governor and other State officers. *Id.*

9. The provision of R. I. Pub. Stat. chap. 11, § 6, that if no person have a majority of legal votes for representative in Congress, the General Assembly shall order a new election, applies only upon failure to elect.

Re Representative Vacancy (R. I.) 274

10. One elected by General Assembly was declared by United States House of Representatives not to have been elected, and the seat was declared vacant. *Held*, the governor has power to issue a writ of election to fill the vacancy. *Id.*

11. Where there is a failure to elect a representative to Congress, the General Assembly must order a new election.

Re Special Elections for Representatives to Congress (R. I.) 275

BRIEFS AND NOTES.

Qualifications of voters. (Mass.) 457

The Legislature can regulate, but not destroy or suspend, the right to vote. (Mass.) 458

Restrictions upon Legislature in regulating suffrage; defined. (Mass.) 458

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Time of registration of naturalized person. (Mass.) 458, 459

WAGES. See MASTER AND SERVANT, 1.

WARD. See GUARDIAN AND WARD.

WATER COMPANIES. See MUNICIPAL CORPORATIONS, IV.

WATERS AND WATERCOURSES.

See FISH AND FISHERIES; MILLS AND DAMS; WHARVES.

1. To make a stream navigable, there must be some commerce and navigation upon it which is essentially valuable. Authorities cited.

Woodman v. Pitman (Me.) 702

2. The Act of May 20, 1707 (4 R. I. Col. Rec. 24), only authorized the town of Providence to appropriate the waters and banks within its borders, by improvements.

Bassett v. Franklin (R. I.) 762

3. Where no such appropriation has occurred, the present city of Providence, or those holding under it, have no such title to such waters, etc., as will support ejectment. *Id.*

4. The right of parties to use water of a stream is not determinable in a real action, though parties desire it.

Hobbs v. Gould (Me.) 775

5. For wrongful diversion of water, action on the case for damages is the appropriate remedy. *Id.*

6. The law of accretion and reliction is the same in the case of both navigable and non-navigable rivers.

Welles v. Bailey (Conn.) 841

7. If a particular tract of land was originally cut off from a river by an intervening tract, and the intervening tract is gradually washed away until the remoter tract is reached by the water, the latter tract becomes riparian. *Id.*

8. The principle by which a riparian owner takes accretions is applicable to such tract. *Id.*

9. The title of a riparian owner, on a non-navigable stream, to accretions, is not limited by the middle line of the stream. *Id.*

10. Whenever a portion of a riparian lot is washed away by the river, the riparian owner takes whatever front upon the river its change of bed gives him, and by lines that run from the termini of his upland lines at right angles to the centre line of the stream. *Id.*

11. The rights of traveling upon ice of a river, and of cutting and taking the ice, are natural and common rights.

Woodman v. Pitman (Me.) 699

12. The right of way over ice in a river, where large quantities of ice are annually taken for commercial purposes, and where good roads upon either bank of the river are provided, and at established ferries across the river, is not a paramount right. *Id.*

13. The Legislature may regulate conflicting public interests in the ice upon a tidal river.

and in the absence of legislative regulation such matters necessarily become the subjects of judicial interpretation. *Id.*

14. Ice-cutters should mark their fields, and warn travelers of dangerous places. But when that is not done, and a traveler carelessly drives upon thin ice, caused by ice operations, and is damaged, he cannot recover from the ice-cutters. *Id.*

15. An unlawful obstruction to navigation is remedial by indictment or by abatement, or equity may take jurisdiction upon information filed by attorney-general. Authorities cited. *Id.* 703

16. To constitute nuisance, obstructions must materially interrupt general navigation. Authorities cited. *Id.*

17. The right to pollute a stream may be acquired by prescription.

Masonic Temple Assn. v. Harris (Me.) 407

18. An acquired right to use a natural stream as a covered drain is not taken away, though it may be curtailed by the diversion of the drain by municipal authorities. *Id.*

19. The burdens of owner through whose land drain runs can not be increased by any diversion. *Id.*

20. The exercise of the prescriptive right must not affect more injuriously the servient estate. *Id.*

21. A person aggrieved by abuse of the prescriptive right may sue for damages, or proceed by indictment, or move for injunction. *Id.*

22. Aggrieved persons cutting off the drain will be restrained by injunction. *Id.*

23. Section 82 of charter of Wallingford (Special Laws 1881, p. 117) authorizes the borough to construct sewers and provide for outflow of waste water and sewage, and providing a method of compensation for damages to private property, has no reference to surface waters.

Bronson v. Borough of Wallingford (Conn.) 467

24. A complaint against a municipal corporation for damages to private property from disposition of surface water from a highway, is not sufficient where it fails to allege the act was wanton or unnecessary. *Id.*

25. The reasonableness of a use of land which obstructs flow of surface water over it, is determined by its operation upon interests of all parties affected by it.

Town of Rindge v. Sargent (N. H.) 528

26. Evidence to prove a license, as a defense to an action for overflowing land is not competent where the license is not set up in the answer.

Warren v. Carey (Mass.) 867

27. Evidence that a former owner of land, while in occupation, told the adjoining owner that he might put a pipe in a natural stream, and that such former owner paid part of the expense for so doing, is not, as against a subsequent grantee, competent evidence of a grant or prescription to overflow the land. *Id.*

28. An island consisting of about 2 acres
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of rocks and ledges, and unfit for habitation, is of extent and importance enough to admit of title by adverse possession.

Babson v. Tainter (Me.) 661

29. The title to an island within 100 rods from upland does not extend to flats between the island and mainland when the channel is dry at low water, unless by special grant. It is otherwise as to the flats between the island and receded sea. *Id.*

30. The rule is not varied by proof that there had been anciently a channel at low water between mainland and island, which had become filled up by the slow process of accretion. *Id.*

31. Sand heaps and bars may not be islands;—but it may be a question of fact whether they are not when separated from the mainland only by narrow channels or sloughs. Authorities cited. *Id.* 663

32. Elevations of mussel bed have been declared not to be islands. Authorities cited. *Id.*

BRIEFS AND NOTES.

Watercourses defined. (Me.) 407

Ejectment lies for land covered with water. (Conn.) 843

Accretion. (Me.) 661

Accretion and reliction. (Conn.) 842, 848

Rights of riparian owners to. (Conn.) 842, 848

Surface water; liability. (Conn.) 468

Intermittent. (N. H.) 523

Reasonableness of use of land obstructing flow of. (N. H.) 523

Action on case is remedy for wrongful diversion. (Me.) 775

Riparian owner is protected by injunction from violation of rights. (Me.) 407

Right of riparian owners upon natural stream to use water for draining. (Me.) 407

Ice; right of traveling on, and right of cutting. (Me.) 700

Riparian rights not changed when surface of river covered with ice. (Me.) 700

Islands. (Me.) 601

WHARVES.

Where owner of wharf leases it in defective condition, an action for damages is maintainable against him and lessee jointly for injury through such defect.

Joyce v. Martin (R. I.) 796

BRIEFS AND NOTES.

Liability of lessor and lessee for injuries caused by defect. (R. I.) 796

WIDOW. See DEVISE AND LEGACY, IX.

WIFE. See HUSBAND AND WIFE.

WILL. See CONFLICT OF LAWS, 3; DESCENT AND DISTRIBUTION; DEVISE AND LEGACY.

1. The probate establishes testator's ca-

capacity; and evidence is not admissible, on appeal from a decree of distribution, to prove his incapacity.

Vermont Baptist State Conv. v. Ladd's Est. (Vt.) 874

2. In the **probate** of a will, **evidence** is not admissible that contestant did not deny collateral statements by testator at a hearing for appointment of guardian over him.

Frary v. Gusha (Vt.) 359

3. Where defense was **insanity** of testator and **undue influence**, after evidence had been introduced by proponent, tending to prove that testator held his son, contestant, in disesteem, **evidence** was properly allowed to show the son had **no vicious habits**, as proving that if his father did disesteem him, it was due to some unnatural influence. *Id.*

4. **Evidence** was admissible to show business character and financial condition of one to whom testator gave a power of attorney to do his business, as bearing on his capacity to make the will. *Id.*

5. **Suicide** is evidence tending to prove **insanity**. *Id.*

6. There is an inherent power in probate courts, in cases where justice clearly requires it, to **revise a decree** allowing a will.

Gale v. Nickerson (Mass.) 838

7. If, after a will is proved, a later will or codicil is discovered, or if there is newly-discovered evidence proving that the will is forged, the court may reopen the case and **reverse the decree**. *Id.*

8. **Decrees** allowing wills and appointing executors are in nature of **judgments in rem**. *Id.*

9. Applications for **new trial** cannot be entertained unless the applicant makes a strong case, both of error and injustice in the decree, and of diligence on his part. *Id.*

10. Where a will was duly presented for probate and allowed, and sixteen years later a **petition** was filed to **revise and reverse** the decree allowing the will, on the ground that the will was forged, and which petition nowhere specifies any fraud practiced upon the court or the parties interested, or alleges that there is any newly-discovered evidence on the issues which it seeks to retry, is **insufficient** and properly dismissed. *Id.*

11. In the absence of a statute, **marriage alone**, without birth of child, will **not revoke** will.

Goodsell's Appeal (Conn.) 831

12. **Laws** 1885, chap. 110, § 135, providing for **revocation** of will by subsequent marriage or birth, is **not retrospective**. *Id.*

13. **Statute of 1821**, providing that no devise of real estate should be revoked except by cancellation or later will or codicil, **applied** to every will containing both **devises of real estate** and bequests of **personalty**, as well as to wills containing devises of real estate only. *Id.*

14. A **valid oral agreement** may be made to **leave a sum of money** by will to a particular person in consideration of services
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thereafter to be rendered by the promisee to the promisor.

Wellington v. Aphorp (Mass.) 883

15. The **performance** of the consideration renders the contract binding, and gives a right of action. *Id.*

BRIEFS AND NOTES.

Testamentary capacity; suicide as an indication of insanity. (Vt.) 359

Admissibility of evidence to prove incapacity of testator after probate. (Vt.) 374

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Revocation. (Mass.) 885

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WITNESS. See EXECUTORS AND ADMINISTRATORS, 15; HUSBAND AND WIFE, 15; INTOXICATING LIQUORS, 18.

1. Testimony of witnesses **interested and biased**, and who differ from each other and are uncorroborated, cannot be relied upon.

Walker v. Welch (Mass.) 354

2. The words "the other party" refer only to the other party to the original contract or cause of action, and not necessarily to the party to the record. Authorities cited.

Barnes v. Dow (Vt.) 722

3. **Transactions with decedents.** In a case involving allowance of the account of deceased trustee, whose administrator was orator in a cross-bill in which succeeding trustee and two legatees,—one a beneficiary having a life support and the other a remainderman,—were defendants, the remainderman was incompetent, under Rev. Stat. §§ 1001-1003, as a witness, in his own behalf, to disprove such account. *Id.*

4. The maker of a note cannot testify to a payment to payee while he was alive, though the latter had transferred the note before his decease to plaintiff. Authorities cited. *Id.* 722

5. Although one party be a representative of a deceased person, the other party may testify as to matters happening after death of such deceased person.

Swasey v. Ames (Me.) 789

6. Plaintiff cannot be a witness when defendants have been made parties as heirs of a deceased party.

Hinckley v. Hinckley (Me.) 535

7. **Limits of cross-examination**, even in collateral matters, are within discretion of court, and not subject to exception. Authorities cited.

Thompson v. Thompson (Me.) 488

8. Defendant made plaintiff's witness his own by asking him, on **cross-examination**, if his attention had been called by anyone to the debtor's condition,—a matter he had not testified to. It was not error to allow plaintiff, on **re-examination**, to inquire the name of the person.

Chamberlain v. Fuller (Vt.) 614

9. A party cannot, by drawing out on **cross-examination** the opinion of a witness as to ownership of real estate, gain the right to **contradict** the witness by showing that, at another time, the witness had stated that the deed under which the person he had designated as the owner of the realty claimed title was fraudulent.

Jordan v. McKinney (Mass.) 426

10. A party may **impeach** the credit and contradict an adverse witness by showing **inconsistent statements** upon some relevant and material matter, at other times. Authorities cited. *Id.* 427

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WORDS AND PHRASES. See DEFINITIONS.

WRIT AND PROCESS.

1. The **date of writ** is presumed to be time when action is brought. Authorities cited.

Biddeford Sav. Bank v. Mosher (Me.) 403

2. And an **action** is brought when writ is sued out with an intention of service. *Id.*

3. The statutory **authorization of certain writs**, "and all other writs and processes," is a **confirmation of common-law power of issuing process** that is necessary "for the furtherance of justice, and the due administration of the laws."

Boody v. Watson (N. H.) 553

4. A petition for the appointment of a trustee will not be dismissed for want of service because the **original petition** was left with defendant.

Adams v. Adams (N. H.) 163

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Ex. J. M.

